CASES ON CONSTITUTIONAL LAW.

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CONSTITUTIONAL LAW.

WITH NOTES.

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TAXATION.

"The power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading, and at no point does the power of the government affect more constantly and intimately all the relations of life than through the exactions made under it.

"Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes. The power to tax rests upon necessity, and is inherent in every sovereignty. The legislature of every free State will possess it under the general grant of legislative power, whether particularly specified in the Constitution among the powers to be exercised by it or not. . . .

"Having thus indicated the extent of the taxing power, it is necessary to add that certain elements are essential in all taxation, and that it will not follow as of course, because the power is so vast, that everything which may be done under pretence of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government." — Cooley, *Const. Lim.* 6 ed. 587 (1890).[1]

In *People* v. *Com'rs*, 4 Wall. 244, 256 (1866), Nelson, J., for the court, said: "It is known as sound policy that, in every well-regulated

[1] "Primarily, the determination of what is a public purpose belongs to the legislature, and its action is subject to no review or restraint so long as it is not manifestly colorable. All cases of doubt must be solved in favor of the validity of legislative actions, for the obvious reason that the question is legislative, and only becomes judicial when there is a plain excess of legislative authority. A court can only arrest the proceedings, and declare a levy void, when the absence of public interest in the purpose for which the funds are to be raised is so clear and palpable as to be perceptible to any mind at first blush." — Cooley, *Princ. Const. Law*, 2d ed. 57 (1891). — Ed.

and enlightened State or government, certain descriptions of property, and also certain institutions — such as churches, hospitals, academies, cemeteries, and the like — are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordained that it should be uniform." [1]

WELLS v. HYATTSVILLE.

MARYLAND COURT OF APPEALS. 1893.

[77 *Md.* 125.[2]]

R. Ford Combs, *R. W. Habercorn*, and *Marion Duckett*, for the appellants. *Oscar Wolff*, and *A. S. Niles* (with whom was *M. R. Leverson*, on the brief), for the appellee.

McSHERRY, J., delivered the opinion of the court. . . . The adoption by the Board of Commissioners of Hyattsville of what is called the single tax system — that is, a system under which the whole burden of taxation is imposed upon the land, to the total exclusion of buildings, improvements, and personal property — is the proceeding which caused the petitioning tax-payers to make this application to the courts. It is obvious that the questions now brought before us are of more than ordinary interest, and are far from being of mere local importance. Apart from the preliminary inquiry as to whether a correct interpretation of the Act of 1892, ch. 285, warrants the exemption of all buildings and improvements in Hyattsville from municipal taxation; the broader one, involving the power of the legislature under the Declaration of Rights, to impose the whole burden of taxation on one single class of property, to the exclusion of all others, is distinctly presented. . . . The Declaration of Rights, Article fifteen, provides that, "every person in the State, or person holding property therein, ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property; yet fines, duties, or taxes may properly or justly be imposed or laid, with a political view for the good government and benefit of the community." This provision has, with a slight but not material change of phraseology, been a part of the organic law of Maryland for considerably more than a century. Its predominant object is to provide by a fixed enactment equality in taxation, and to prevent, as far as possible, the burden of supporting the government from falling upon some individuals to the exclusion or exemption of others. It prohibits unjust discriminations,

[1] As to the effect of legislative provisions or contracts for future exemption, see *infra*, *Laws Impairing the Obligation of Contracts*. See also 1 Hare, Am. Const. Law, 604, 605; *Picard* v. *East Tenn., &c., R. R. Co.*, 130 U. S. 637. — ED.

[2] The statement of facts is omitted. — ED.

and whilst it remains in force the land-owner, be his possessions large or small, will have an absolute and complete guarantee that public taxes cannot be imposed upon the soil alone. Buildings, improvements, and personal property are, under its terms, as liable to assessment for taxation as land. Its theory is that the distribution of the burden over every class of property alike will lessen the proportion of each individual's contribution, whereby oppressive exactions from the owners of any particular class of property will be impossible. As those who own buildings, improvements, and personal property in any of its various forms — as well intangible as tangible — are equally protected in their possessions and in their natural rights, by the State and local governments, with those who own the land, the support of those governments should place no heavier charge upon the one than on the other class of individuals. This has been the uniform and consistent principle always followed in Maryland. Eminently just in itself as a sound and long-accepted axiom of political economy, it has been incorporated in her organic law since November the third, 1776; it has been upheld by her courts, and steadily and tenaciously adhered to by her conservative people.

But the Act of 1892, not only under the construction placed upon it by the appellee, but palpably by reason of its exemption of all personal property, attempted to overthrow this salutary principle and to disregard the fifteenth article of the Declaration of Rights, and to substitute an experimental, if not a visionary scheme, which if suffered to obtain a foothold will inevitably lead to ruinous consequences. By making no provision for the assessment of personal property in the village of Hyattsville, and by confining the assessment to lands and improvements only, the Act of 1892 undertook to exempt all personal property from municipal taxation; and if the appellee's interpretation of the Act be conceded to be correct, it in like manner authorized the exemption of buildings and improvements. Thus the whole cost of conducting the municipal government in all its departments was attempted to be thrown exclusively upon the land. If the legislature may lawfully do this in the particular instance of Hyattsville, it may do the same thing in the case of a larger and more populous municipality, and likewise with reference to a county; and if as to one county, then, too, as to every county in the State. If the assessed valuations upon buildings and improvements and upon personal property be stricken from the assessment books of the several counties, and the taxes be levied only upon the owners of the land, the burden would speedily become insufferable, and the land would cease to be worth owning. Such a system would eventually destroy individual ownership in the soil, and under the guise of taxation would result in ultimate confiscation.

The wisdom of providing in the organic law against such abuses is obvious, and the provision by which the people of the State are protected against them, embodies a fundamental principle which underlies the American system of taxation.

The attempt made by the Act of 1892 to disregard the fifteenth article of the Declaration of Rights by exempting all personal property from assessment must prove abortive, and as the Act undertakes to establish a scheme of taxation not warranted by the organic law, it must be stricken down as null and inoperative.

We are not to be understood as denying to the legislature the power, when State policy and considerations beneficial to the public justify it, to exempt, within reasonable limits, some species of property from taxation. A long-continued practice, nearly contemporaneous in its origin with the adoption of the Constitution itself, and many adjudged and carefully considered cases decided by this court, abundantly support that power. But a power to exempt for reasons and upon considerations which are sufficient to uphold the exemption, is not a power to nullify the Constitution of the State. Under the pretext of granting exemptions, different classes of property cannot be successively stricken from the tax lists, so as to destroy the equality prescribed by the fundamental law, and eventually to reduce the taxable basis to one kind of property alone. Reducing the taxable basis to land by first excluding personal property altogether, and then excepting buildings and improvements, is a perversion and not a legitimate exercise of the conceded authority to make valid exemptions. If this be not so, then the very power to exempt might be carried to the length contended for, and, if carried that far, it would effectually abrogate the fifteenth article of the Declaration of Rights. It is not necessary for the decision of this case, nor would it be appropriate in this proceeding, to determine how far the legislature may lawfully go in granting exemptions from taxation; it is sufficient to observe, that the most latitudinarian construction ever heretofore contended for did not pretend to advance the position assumed by the appellee.

Nor can the Act of 1892 be upheld as one imposing a tax "with a political view," in contradistinction to one levying a tax for the support of the government. Whilst the Declaration of Rights prescribes the rule of equality in levying taxes for the support of the government, it is careful to provide that the legislature shall not be confined to the laying of such taxes alone. Hence it declares: "Yet fines, duties, or taxes may properly and justly be imposed or laid with a political view for the good government and benefit of the community." In other words, notwithstanding every person ought to contribute his just proportion of the public taxes for the support of the government according to his actual worth in real or personal property, still, other duties or taxes of a different kind may be imposed "with a political view" for the good government of the community. *Tyson et al.* v. *State*, 28 Md. 577.[1]

This is not a qualification of the antecedent clause of the fifteenth article. It is an enlargement of the power to tax. The two clauses of the fifteenth article are not alternative, but are cumulative provisions,

[1] This case, in 1868, sustains the validity of statutes, running back to 1844, which tax "collateral inheritances, distributive shares, and legacies." — Ed.

and consequently when public taxes are required to be raised for the support of the government, upon a taxable basis fixed by an ascertainment of property valuations, they are imposed according to the standard of equality fixed in the first clause of the article; and this standard cannot be evaded by a mere declaration that the taxes are levied "with a political view," when it is perfectly manifest that they are designed to be levied in the usual way for the support of a municipal government. The assertion that they are taxes of the one sort, when they are palpably taxes of the other class, cannot make them what they are not, nor cause them not to be what they essentially are. Taxes collected for municipal purposes are taxes imposed for the support of government, and are subject to the constitutional prohibition against inequality. *Daly* v. *Morgan et al.*, 69 Md. 460. But the right to lay other taxes "with a political view" is not identical with a power to exempt all personal property from taxation. The right to impose other taxes is in no sense a power to exempt at all; and this broad exemption is not an exercise of the authority to levy a tax with a political view. The power to exempt is not derived from the second clause of the fifteenth article, relating to the laying of taxes with a political view; and the latter power can never be appealed to as a justification for the use of the former.

In our opinion, then, the Act of 1892, ch. 285, is null and void, because plainly unconstitutional in its unrestricted exemption of personal property from assessment and taxation.

In *Norwich* v. *Co. Com'rs of Hampshire*, 13 Pick. 60 (1832), there was a petition for a writ of *mandamus* requiring the defendants to rebuild a bridge, according to the requirements of a statute: Shaw, C. J., drew up the opinion of the court. The ground of objection on the part of the commissioners is, that an Act of legislation, providing that the expense of erecting a particular bridge shall be borne by a county, in whole or in part, when by the operation of the general laws of the Commonwealth, without such legal provision, the expense would be borne wholly by a town, is beyond the just scope of legislative power, and so is unconstitutional and void.

If an Act, purporting to be a statute passed by the legislature, is not warranted by the powers vested in the legislature, it is clear that such Act cannot have the force of law; and that it is the duty of the court so to declare it, whenever it is claimed to be enforced as such. But this is a high and important judicial power, not to be exercised lightly, nor in any case where it cannot be made to appear plainly that the legislature have exceeded their powers. It is always to be presumed, that any Act passed by the legislature is conformable to the Constitution and has the force of law, until the contrary is clearly shown.

In the case before us this is the only question. The provisions of the Act are clear and explicit. It in terms makes it the duty of the county commissioners to cause the bridge in question to be built, provided the

expense does not exceed the sum of six hundred dollars, and to charge one-half of the expense thereof upon the county.

Upon consideration, the court are all of opinion that the Act was not unconstitutional. We think it was competent for the legislature, having regard to the singular and peculiar circumstances of a particular town, to provide that a particular bridge should be built partly at the expense of the town, and partly at the expense of the county, within which it is situated. It may happen that a wild, rapid stream, subject to great floods and torrents, passing through a poor, thinly settled town, may require for the public exigency several expensive bridges. It is not contended that the legislature might not, by a general law, provide for charging the expense of such bridges upon counties, or upon the whole State. But suppose there were only one county, or even town, to which such Act of legislation could in its terms apply; it seems difficult to find a valid distinction, that would warrant the legislature to pass an Act, which, though in terms general, could apply to one town or one bridge, and yet that should restrain them from doing the same thing, by naming the particular town or describing the particular bridge. In a question of this description, we must look at the substance of legislative power, not at the mere forms in which it is exercised.

If in any case the legislature can exercise such a power, within the limits prescribed to them by the Constitution, it is to be presumed, in just deference to the authority of a co-ordinate branch of the government, that in any particular case it was done discreetly, and with a just regard to the relative rights and interests of different portions of the community.

It will not throw much light on a question like this, to put extreme cases of the abuse of such a power, to test the existence of the power itself. It is said that the expense of erecting bridges in one section of the Commonwealth, may be charged upon the inhabitants of another; that the inhabitants of Suffolk may be taxed for a bridge in Berkshire. But we think the decision in this case will warrant no such extravagant conclusion. Bridges, though they are designed for public convenience, and for all the citizens of the Commonwealth, yet are more immediately beneficial to those whose local situation is such as to require the more frequent use of them. The people of a town and county where a bridge is situated, have an interest in it, and derive a benefit from it, greater in degree, than the rest of the community, according to their local position, and may therefore, on general principles of justice, be required to contribute a larger share towards its erection and support. The possibility that such a power may be abused, has but a slight tendency to prove that it does not exist. There are a variety of other cases, in which it would be easy to suggest a possible gross abuse of legislative powers, but in which there can be no possible question of the existence of the power itself, under the express provisions of the Constitution. . . .

And there is another circumstance which, we think, rescues this Act from the charge of violent innovation; it is, that it has been the prac-

tice, from the earliest times, to charge the cost of certain large and expensive bridges, in whole or in part, upon counties; and it is impossible to deny the equity of these provisions.

The court are of opinion, that the Act in question was not unconstitutional; that it is a valid and binding law, which the commissioners are bound to carry into effect, according to its terms.

A writ of mandamus in the alternative ordered.

In *People* v. *Flagg*, 46 N. Y. 401, 404 (1871), in sustaining a law which authorized the building of certain roads by two towns, and required the issuing and sale of town bonds to pay therefor, Church, C. J., for the court, said: "The legislation involved in this case is challenged upon the ground that it is not competent for the legislature to compel the town of Yonkers to incur a debt for the improvements authorized to be made. It is conceded that the legislature could direct the improvements to be made, and could lawfully impose a tax upon the property of the citizens of the town to pay the necessary expenses, or that it might authorize a town debt to be created, with the consent of the people of the town, or some officer or officers representing the municipality; but that it cannot directly compel the creation of the debt, without the consent of the citizens or town authorities.

"All legislative power is conferred upon the Senate and Assembly; and if an Act is within the legitimate exercise of that power, it is valid, unless some restriction or limitation can be found in the Constitution itself. The distinction between the United States Constitution, and our State Constitution is, that the former confers upon Congress certain specified powers only, while the latter confers upon the legislature all legislative power. In the one case the powers specifically granted can only be exercised. In the other, all legislative powers not prohibited may be exercised. It cannot be denied, that the subject of the laws in question is within legislative powers. The making and improvement of public highways, and the imposition and collection of taxes, are among the ordinary subjects of legislation. The towns of the State possess such powers as the legislature confers upon them. They are a part of the machinery of the State government, and perform important municipal functions, which are regulated and controlled by the legislature. Private property cannot be taken for public use without compensation. But this principle does not interfere with the right of taxation for proper purposes. The legislature, in substance, directed certain highways to be made and constructed in the town of Yonkers, and imposed a tax upon the town to pay the expenses of the work, but to prevent too large a tax at one time, it directed bonds to be given, payable at different periods, so that no more than a limited sum should become due at one time.

"The bonds to be given are town bonds; they are to be issued by town officers, and the tax to pay them is imposed upon the property of the town. If the legislature may authorize the town to incur this debt,

why may it not direct it to be done? As a question of power, I am unable to find any restriction in the Constitution. It is not within the judicial province to correct all legislative abuses.

"That local expenditures and improvements should, in general, be left to the discretion of those immediately interested, is manifestly just, and is in accordance with the theory of our government. But when power is conceded, we have no right to inquire into the motives or reasons for doing the particular act.

"The legislation in question is open to serious criticism. It compels a large, if not extravagant expenditure of money, and imposes onerous burdens upon the people without their consent. If the object of the expenditure was private, or if the money to be raised was directed to be paid to a private corporation, who were authorized to use the improvements for private gain, the question, in my judgment, would be quite different; and in this respect there is a limit, beyond which legislative power cannot legitimately be exercised. But the defendants cannot avail themselves of this principle. Here the purpose is confessedly public, and the taxing power for such purposes is restrained only by restrictive provisions, and whether a tax shall be imposed for the whole expenditure in one year, or spread over a series of years; and in the mean time the obligations of the town, given on matters of detail and discretion, which do not affect the power, and with which courts cannot interfere."

KELLY *v.* PITTSBURGH.

SUPREME COURT OF THE UNITED STATES. 1881.

[104 *U. S.* 78.]

ERROR to the Supreme Court of the State of Pennsylvania.

The facts are stated in the opinion of the court.

Mr. Daniel Agnew and *Mr. Albert N. Sutton*, for the plaintiff in error. *Mr. George Shiras, Jr.*, *contra.*

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 pur-

poses 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 choose, 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 specific 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 tax-payer without due process of law.

These views have heretofore been announced by this court in the cases which we have cited, and in *McMillen* v. *Anderson*, 95 U. S. 37.

In *Davidson* v. *New Orleans*, *supra*, the whole of this subject was very fully considered, and we think it is decisive of the one before us.

Judgment affirmed.[1]

[1] Compare *Erie* v. *Reed's Ex'rs*, 113 Pa 468. As to the summary procedure that is valid in taxation, see *Murray* v. *Hoboken Land Co.*, 18 How. 272; s. c. *supra*, p. 600; and compare *Davidson* v. *N. O.*, 96 U. S. 97; s. c. *supra*, p. 610; *Auffmordt* v. *Hedden*, 137 U. S. 310, 323; *State Railroad Tax Cases*, 92 U. S. 575.

Compare, on a like question, *Morford* v. *Unger*, 8 Iowa, 82 (1859). STOCKTON, J., for the court: "The only question to be considered in this case is, whether the Act of the Legislature of Iowa, approved July 14, 1856, entitled 'An Act to amend the Act to incorporate the city of Muscatine' is constitutional. By this Act, it is conceded the limits of the city of Muscatine were extended about one mile on the east, and about two miles on the north and west, beyond its former boundary. The plaintiff lived upon the territory brought into the city by the Act aforesaid, upon land used exclusively for farming purposes, about one mile from the old city limits, and about the same distance from any lands laid out into city or town lots, or used as city property. His land, so used, was taxed by the city at the sum of one dollar per acre. This tax he refused to pay; and his property being distrained for the payment thereof, he brought this action of replevin, to test the constitutionality of the Act extending the limits of the city. . . .

"The question where the proper line is to be drawn between the legitimate exercise of the taxing power and an arbitrary appropriation of the property of an individual under the mask of this power, is discussed at length by Marshall, C. J., in *Cheaney* v. *Hooser*, 9 B. Monroe, 330; and it is held by the court, that where there is no other constitutional restriction upon the power of taxation, securing equality and uniformity in the distribution of taxation, either general or local, the provision of the Constitution which prohibits the taking of private property for public use without just compensation, furnishes the only available safeguard against legislation, which, in its operation, may result in the appropriation of the property of one for the benefit of many.

"Conceding to the General Assembly a wide range of discretion as to the objects of taxation, the kind of property to be made liable, and the extent of territory within which the local tax may operate, it is argued, in the opinion referred to, that there must be some limit to this legislative discretion; which, in the absence of any other criterion, is held to consist in the discrimination to be made, between what may reasonably be deemed a tax, for which a just compensation is provided in the objects to which it is to be devoted, and that which is palpably not a tax, but which, under the form of a tax, is the taking of private property for public use, without just compensation. If there be such a flagrant and palpable departure from equity, in the burden imposed; if it be imposed for the benefit of others, or for purposes in which those objecting have no interest, and are, therefore, not bound to contribute, it is no matter in what form the power is exercised — whether in the unequal levy of the tax, or in the regulation of the boundaries of the local government, which results in subjecting the party unjustly to local taxes, it must be regarded as coming within the prohibition of the Constitution designed to protect private rights against aggression, however made, and whether under the color of recognized power or not.

"It is urged by the plaintiff, that his farm, which is sought to be brought within

the jurisdiction of the city, is agricultural land; that it is one mile from the old boundary of the city, and the same distance from any lands laid out into city lots, or used or needed for city purposes; that he can derive no benefit from the extension of the municipal government over him and his property; and that the Act subjecting him to taxation at the will of the city council, and for its benefit, is an appropriation of his private property for the use of the city, without any compensation or benefit accruing to him in return.

"We have no doubt, as is held in *Cheaney* v. *Hooser, supra*, that if the owner of land adjoining a city or town should lay the same off into lots, and invite purchasers and settlers to occupy it with dwellings or otherwise, he could not object to a law extending the authority of the local government over him and his land so laid out and occupied. But if the case is that of vacant land, or a cultivated farm, occupied by the owner for agricultural purposes, and not required for either streets or houses, or other purposes of a town, and solely for the purpose of increasing its revenue, it is brought within the taxing power, by an enlargement of the city limits, such an Act, though on its face providing only for such extension of the city limits, is in reality nothing more than authority to the city to tax the land to a certain distance outside of its limits; and is, in effect, the taking of private property without compensation. The force and effect and obvious intent of the Act is, to subject such outside lands to city taxation, without the pretext of extending the protection of the city over them, and when the power of the legislature over local regulations and government furnishes no legitimate basis for the Act.

"In *Wells* v. *City of Weston*, 22 Missouri, 385, the Supreme Court of Missouri, while conceding to the legislature the uncontrolled power of taxation, subject only to the constitutional restriction, that 'all property subject to taxation shall be taxed in proportion to its value;' and conceding, also, the right to delegate to subordinate agencies, such as municipal corporations, the power of taxation, have denied to it the power to tax arbitrarily the property of one citizen and give it to another; and on this ground have held, that the legislature cannot authorize a municipal corporation to tax, for its own local purposes, land lying beyond the corporation limits.

"And so it is held by the Court of Appeals of Kentucky, in conformity with the principles laid down in *Cheaney* v. *Hooser, supra*, that although the legislature has power to extend the limits of cities and towns, and include adjacent agricultural lands, without the consent of the owner, yet the corporation authorities cannot tax such property as town property, and subject it to the city burdens, without the consent of the owner, until it shall be laid off into lots and used as town property. The decision is made distinctly on the ground that the Act of the Legislature was an invasion of private property, contrary to the principles of our constitutional law, under color of the power of taxation. *City of Covington* v. *Southgate*, 15 B. Monroe, 491. . . .

"The extension of the limits of a city or town, so as to include its actual enlargement, as manifested by houses and population, is to be deemed a legitimate exercise of legislative power. An indefinite or unreasonable extension, so as to embrace lands and farms at a distance from the local government, does not rest upon the same authority. And although it may be a delicate, as well as a difficult, duty for the judiciary to interpose, we have no doubt but strictly there are limits beyond which the legislative discretion cannot go. It is not every case of injustice or oppression which may be reached; and it is not every case which will authorize a judicial tribunal to inquire into the minute operation of laws imposing taxes, or defining the boundaries of local jurisdictions The extension of the limits of the local authority may in some cases be greater than is necessary to include the adjacent population, or territory laid out into city lots, without a case being presented, in which the courts would be called upon to apply a nice or exact scrutiny as to its practical operation. It must be a case of flagrant injustice and palpable wrong, amounting to the taking of private property, without such compensation in return as the tax-payer is at liberty to consider a fair equivalent for the tax.

"In the case of *City of Covington* v. *Southgate*, 15 B. Monroe, 498, it was held by the court, that as Southgate had made no town upon his land, and desired none; and

WEIMER *v.* BUNBURY.[1]

SUPREME COURT OF MICHIGAN. 1874.

[30 *Mich.* 201.]

[BUNBURY brought trespass for taking and carrying away his goods. Plea, the general issue; giving notice of certain facts in justification, to the effect that the said plaintiff, being treasurer of a city, made default in collecting and paying over taxes to Hess, the county treasurer; that Hess, under color of a statute, issued a warrant to the defendant Weimer, reciting this default and the amount thereof, and directing him to collect the said sum from the estate of the plaintiff; and that Weimer acted by virtue of this warrant. At the trial the plaintiff objected to the defendant's offer of proof, on the ground, among others, that the statute alleged as authorizing the warrant was unconstitu-

as there appeared no legitimate necessity to justify the extension of the city boundary, without his consent, it presented a case of taxation for the benefit of others, and was under the color of taxation, an appropriation of private property without compensation. We think the case made by the present plaintiff is quite as strong as the one cited. His land is situated too far from the city of Muscatine to be deemed, in any just sense, a part of it. He does not desire to lay it off into city lots, but desires to use it as farming land. It is idle to say that the protection afforded by the city authority, or the privilege of voting at the city elections, furnishes a just equivalent for the burdens imposed upon him in the shape of taxes, by the city; and the attempt to extend its jurisdiction over him and his property must be regarded as an attempt to take private property for public use, and within the prohibitory clause of the Constitution.

"The restriction in the fifth section of the Act, 'that the lands lying within the territory brought into the city, not laid out into lots and out-lots, shall not be assessed or taxed otherwise than by the acre, according to its value for agricultural, horticultural, mining, and other purposes,' does not relieve the Act of its objectionable features, or strengthen, in any degree, the case of the defendant. It would seem to indicate, on the other hand, that the city was seeking to bring within its power, for the purpose of taxation, land used for farming purposes, and not needed for city lots, without any expectation of rendering a just equivalent for the burdens it designed to impose. The difficulty is in no manner obviated by the suggestion, that the city only proposes to tax the land of the plaintiff by the acre, as agricultural lands, and not as city lots. It can make little difference to the plaintiff in what manner his property is taxed. Whether as city lots, or by the acre, as agricultural land. It is the power to tax in any shape to which he objects. It might as well be attempted to call the tax itself by some less objectionable name. *Judgment reversed.*"

In *Fulton* v. *Davenport*, 17 Iowa, 404 (1864), the court (LOWE, J.), upon a referee's detailed report as to the situation of the lot in question, and its relation to the city proper, undertakes to lay down a working rule. Compare *Bradshaw* v. *Omaha*, 1 Neb. 16, a case of the same sort, where the court make a similar attempt to lay down a rule.

See Cooley, Const. Lim. 6th ed. 616, n. 3: "It would seem as if there must be great practical difficulties — if not some of principle — in making this disposition of such a case." — ED.

[1] *Spencer* v. *Merchant*, *supra*, p. 647, may well be examined at this point. — ED.

tional, as depriving the defendant of his property without due process of law. Verdict and judgment for the defendants.]

Error to Berrien Circuit. *Edward Bacon* and *C. I. Walker*, for plaintiff in error. *E. M. Plimpton* and *D. Darwin Hughes*, for defendant in error.

Cooley, J.[1] . . . The position taken by the defendant in error is, that the words "due process of law," made use of in the section of the constitution last referred to, imply, in the words of Judge Bronson, "a prosecution or suit, instituted and conducted according to the pre-

[1] The following passage of the opinion, from what is here omitted, may be inserted as a note: —

"Under our revenue system, the supervisors of townships and cities make an annual assessment of persons and property for the purposes of taxation. The auditor-general apportions the State tax among the counties, and transmits notice of the apportionment to the clerks of the boards of supervisors respectively. Comp. L., § 996. The supervisors determine the amount of county taxes, and apportion State and county taxes among the townships. Ib., § 997. The clerk of the board makes two certificates of the amount apportioned to each township and ward, one of which he delivers to the county treasurer, and the other to the proper supervisor. Ib., § 998. The supervisor proceeds to levy the taxes specified in the certificate, Ib, § 999; and on or before November 15, notifies the township or ward treasurer of the amount, who must, on or before the 25th of November, give bond to the county treasurer, and his successors in office, with sureties, conditioned that he shall duly and faithfully perform the duties of his office. Ib., § 1000. For this bond the county treasurer gives a receipt, Ib., § 1001; which is presented to the supervisor, who thereupon delivers to the township treasurer a copy of the assessment roll, with the taxes all extended thereon, including not only the State and county, but also all township, school, highway and special taxes, and with a warrant attached, which shall specify particularly the several amounts and purposes for which said taxes are to be paid into the county and township treasuries, respectively. Ib., § 1002. This warrant is to be under the hand of the supervisor, commanding the treasurer to collect from the several persons named in the roll the sums assessed against them, and to retain in his hands the amount receivable by law into the township treasury for the purposes therein specified, and to account for and pay over to the county treasurer the amounts therein specified for State and county purposes, on or before the first day of February then next; and it is to authorize the treasurer, in case any person named in the assessment roll shall neglect or refuse to pay his tax, to levy the same by distress and sale of his goods and chattels. Ib., § 1003. The township treasurer must, 'within one week after the time specified in his warrant for paying the money directed to be paid to the county treasurer, pay to such county treasurer the sum required in his warrant, either in delinquent taxes or in funds then receivable by law.' Ib., § 1018. The provision under which the county treasurer issued the process now in question, is as follows. 'If any township treasurer, ward collector, or other collecting officer shall neglect or refuse to pay to the county treasurer the sums required by his warrant, or to account for the same as unpaid, as required by law, the county treasurer shall, within ten days after the time when such payment ought to have been made, issue a warrant under his hand, directed to the sheriff of the county, commanding him to levy such sum as shall remain unpaid and unaccounted for, together with his fees for collecting the same, of the goods and chattels, lands and tenements of such township treasurer, ward collector, or other collecting officer, and their sureties, and to pay the said sums to such county treasurer, and return such warrant within forty days from the date thereof.' Ib., § 1029.

"It is, perhaps, not necessary to notice statutes further, except to say that under the charter of the city of Niles there are no ward collectors or treasurers, but the duty of collecting for the whole city is devolved upon the treasurer of the city." — Ed.

scribed forms and solemnities for ascertaining guilt or determining the title of property." *Taylor* v. *Porter*, 4 Hill, 147. In this case there has been no prosecution or suit; the county treasurer has adjudged the case without a hearing, and issued final process to seize property in enforcement of his conclusion. Such summary process, it is said, which gives the party whose property is seized no opportunity to contest the claim set up against him, cannot be due process of law.

There is nothing in these words, however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress. One in whose presence a felony is committed is in duty bound to restrain the offender of his liberty without waiting for the issue of a magistrate's warrant, — 4 Bl. Com. 292–3; and the traveller who finds the public way founderous crosses the adjacent field without fear of legal consequences. *Holmes* v. *Seeley*, 19 Wend. 507; *Campbell* v. *Race*, 7 Cush. 408. Our laws for the exercise of the right of eminent domain protect parties in going upon private grounds for the preliminary examinations and surveys. It may be said that in none of these cases is the deprivation final or permanent, but that is immaterial. The constitution is as clearly violated when the citizen is unlawfully deprived of his liberty or property for a single hour, as when it is taken away altogether. Estrays were at the common law taken up and disposed of without judicial proceedings, — 1 Bl. Com. 297; and our statutes have always made provisions under which, if they were complied with, the owner of stray beasts might be deprived of his ownership by *ex parte* proceedings not of a judicial character. Where an individual creates with his property a public or private nuisance, the common law permits the citizen who suffers from it to become "his own avenger, or to minister redress to himself," — 3 Bl. Com. 5, 6; and he may even destroy the property if necessary to the removal of the nuisance. *Rung* v. *Shoneberger*, 2 Watts, 23; *Inhabitants of Arundel* v. *McCulloch*, 10 Mass. 70; *Wetmore* v. *Tracy*, 14 Wend., 250. The destruction by the act of the party is as lawful as if it had been preceded by a judgment of a competent court, the only difference being that the party when called upon to justify the act must in the one case prove the facts warranting it, while in the other he would be protected by the judgment. No one probably would dispute the levy of distress by a private individual being due process of law in the cases in which the law permits it. 3 Bl. Com. 6. It is true that the party whose property has been distrained may contest the proceedings by suit in the common-law courts, but he fails if they prove to have been regular. The military law affords abundant illustration on this point. The principles on which it is administered have but little in common with those which control

judicial investigations, and the process under which men are restrained of their liberty under it is sometimes very summary and even arbitrary. But this law is just as much subject to the constitutional inhibitions as is the code of civil remedies. See *Ex parte Milligan*, 4 Wall. 2. But the proceedings for the levy and collection of the public revenue afford still better illustration. Almost universally these are conducted without judicial forms, and without the intervention of the judicial authority; the few cases in which statutes have required the action of courts being exceptional. Where such action is not required, the proceedings are regarded as purely administrative, and any hearing allowed to parties in their progress has not been in the nature of a trial, but as a means of enlightening the revenue officers upon the facts which should govern their action. This has been so from time immemorial, and it has never been supposed that the taxpayer had a constitutional right to resist the tax because he had never had any judgment against him on a judicial hearing to fix its amount.

There are, unquestionably, cases in which expressions have been used implying the necessity for a common-law trial before, in any instance, a man can be deprived of his property; but they will be found on investigation to be cases calling for no such sweeping statement. If any court has ever decided that judicial proceedings are of constitutional necessity in appropriating property under the power of taxation, the case has not been brought to our attention, and has been overlooked in our investigations. This would be most extraordinary if the necessity existed, for tax systems similar to our own have prevailed ever since our government was founded, and it cannot be said that tax laws are usually so popular as to disarm every person of any legal objections which he might suppose available to relieve him of their burdens. On the contrary, no laws are contested more vigorously, and with none are people more critical in looking after defects and infirmities. It may be safely asserted, without fear of contradiction, that if the collection of the revenue could only be made through legal proceedings, the true principle would not have been left to so late a discovery, but the wheels of government would long ago have been blocked by litigious parties until an entirely new system could be substituted. And it need hardly be said that any new system in which courts should be made the administrators of the revenue would necessarily be so cumbrous, and so subject to impediments and delays, as to make a constitutional provision requiring it a great public inconvenience.

There is nothing technical, or, we think, obscure, in the requirement that process which divests property shall be due process of law. The constitution makes no attempt to define such process, but assumes that custom and law have already settled what it is. Even in judicial proceedings we do not ascertain from the constitution what is lawful process, but we test their action by principles which were before the constitution, and the benefit of which we assume that the constitution was intended to perpetuate. If there existed, before that instrument

was adopted, well-known administrative proceedings which, having their origin in a legislative conviction of their necessity, had been sanctioned by long and general acceptance, we are no more at liberty to infer an intent in the people to prohibit them by implication from any general language, than we should be to infer an intent to abridge the judicial authority by the use of similar words. The truth is, the bills of rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation.

We are, therefore, of necessity, driven to an examination of the previous condition of things, if we would understand the meaning of due process of law, as the constitution employs the term. Nothing previously in use, regarded as necessary in government and sanctioned by usage, can be looked upon as condemned by it. Administrative process of the customary sort is as much due process of law as judicial process. We should meet a great many unexpected and very serious embarrassments in government if this were otherwise. The words, it has very justly been said, "were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." Per Johnson, J., in *Bank of Columbia* v. *Okely*, 4 Wheat. 235. It has been said, with special reference to process for the collection of taxes, that "any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, must be considered an exception to the right of trial by jury, and is embraced in the alternative 'law of the land.'" *State* v. *Allen*, 2 McCord, 56. In *High* v. *Shoemaker*, 22 Cal. 363, the same doctrine was held in a revenue case. In *Rockwell* v. *Nearing*, 35 N. Y. 308, which is quoted for defendant in error as sustaining his position, the opposite view is very distinctly taken. "There are," says Porter, J., "many examples of summary proceedings which were recognized as due process of law at the date of the constitution, *and to these the prohibition has no application.*" Yet the same judge, in a previous portion of his opinion, had quoted with approval the general language of other cases, which might be understood as implying the necessity of a judicial hearing to due process of law; and the case is an illustration of the danger of deducing general principles to govern one class of cases, from isolated expressions made use of in deciding another class. A day in court is a matter of right in judicial proceedings, but administrative proceedings rest upon different principles. The party affected by them may always test their validity by a suit instituted for the purpose, and this is supposed to give him ample protection. To require that the action of the government, in every instance where it touches the right of the individual citizen, shall be preceded by a

judicial order or sentence after a hearing, would be to give to the judiciary a supremacy in the State, and seriously to impair and impede the efficiency of executive action.

But it may be argued that the warrant in question is not a necessary or usual process under revenue laws. It cannot be said, however, that summary process to enforce payment by a defaulting collector is very unusual. The Territorial Act of 1833 required the auditor to report such a defaulter to the governor, and unless he settled up and paid all arrearages within thirty days after the report, he was to be removed from office. Code of 1833, p. 169. In the Revised Statutes of 1838, p. 87, § 12, the provision was introduced for the issue, by the county treasurer, of a warrant to the sheriff in the nature of an execution against the collector. This provision had been in force for twelve years before the present constitution was proposed, and we are not informed that its validity had ever been questioned. Similar statutes had existed in other States. In Massachusetts and New York, from which we derived the larger portion of our statutes, they had been in force for a period dating back of the organization of our State government; and in neither State does it seem to have been disputed, that such summary process was "due process of law." The legislature of this State, by providing for it in repeated enactments, have shown their conviction of its necessity; and the constitutional convention, though they made several express provisions to insure justice and equality in matters of taxation, passed this legislation by in silence. We think, therefore, that summary process to enforce payment by a delinquent collector cannot be held forbidden. . . .

The circuit judge held the statute constitutional, but that plaintiff in error was not justified by its provisions. If he was right in this, any consideration of the constitutional question might have been waived, upon the ground that a legislative act should not be declared unconstitutional unless the point is presented in such form as to render its decision imperative. *Ex parte Randolph*, 2 Brock. 447; *Frees* v. *Ford*, 6 N. Y. 177; *Hoover* v. *Wood*, 9 Ind. 287; *Mobile & Ohio R. R. Co.* v. *State*, 29 Ala. 573. It is not imperative, so long as it appears that the case can be disposed of in only one way, whether the law is held valid or not. But as the general principle of this statute has always been deemed important in this State, we have thought it proper to express our opinion of its constitutional validity, pausing only when we reach a provision which seems defective in its protection of individual rights, and which, whether constitutional or not, it may fairly be presumed the legislature might be inclined to modify on their attention being called to it. Waiving, therefore, the question of the validity of this provision, we proceed to show why, in our opinion, the county treasurer's warrant was not justified by its terms. . . .

The judgment must be affirmed, with costs.

The other Justices concurred.

HOOPER *v.* EMERY ET AL.

SUPREME JUDICIAL COURT OF MAINE. 1837.

[14 *Me.* 375.]

THE case came before the court on a statement of facts, which sufficiently appear in the opinion of the court. There was a brief argument by *Fairfield* and *Haines*, for the plaintiff, and by *A. G. Goodwin*, for the defendants.

The opinion of the court was drawn up, and delivered the week following, at the adjourned term in Cumberland, by

SHEPLEY, J. This is an action of *assumpsit*, brought to recover a sum of money alleged to be due from the defendants to the plaintiff. The facts are agreed; and from the agreement of the parties it appears, that at a legal meeting of the inhabitants of the town of Biddeford, qualified to vote in town affairs, on the fourth day of April, 1837, a vote was passed to receive the money apportioned to the town under the Act of the eighth of March, 1837, c. 265, entitled "An Act providing for the Disposition and Repayment of the Public Money, apportioned to the State of Maine, on Deposit, by the Government of the United States." And the defendants were chosen trustees to receive and "appropriate it." At the same meeting, a vote was passed, that the money so received should "be divided among the inhabitants of the town according to families." The defendants, before the commencement of this suit, received the money apportioned to the town of Biddeford; and on demand being made by the plaintiff, an inhabitant of said town and having a family, they refused to pay to him any portion thereof, assigning as a reason, "that the town could not legally make such a disposition of it."

If the plaintiff is entitled to recover anything, the amount to be recovered is agreed. The parties agree, also, to waive all objections to the form of the process and mode of proceeding; and judgment is to be rendered according to the rights of the parties. . . .

This State had the right to prescribe the conditions upon which the municipal corporations should receive the money, and to define and limit their powers in relation to the use and employment of it. This has been done by the enactments before recited; and these corporations have no power over it, not derived from the provisions of the Act of the eighth of March.

"The inhabitants of every town in this State are declared to be a body politic and corporate" by the statute; but these corporations derive none of their powers from, nor are any duties imposed upon them by, the common law. They have been denominated *quasi* corporations, and their whole capacities, powers, and duties are derived from legislative enactments. They cannot therefore appropriate this money in any other manner than is provided in the Act of the 8th of March.

The manner in which it can be appropriated is clearly pointed out in the clause "that any city, town, or organized plantation is hereby authorized to appropriate its portion of the surplus revenue, or any part thereof, for the same purposes, that they have a right to any moneys accruing from taxation; also, to loan the same in such manner as they deem expedient, on receiving safe and ample security therefor." . . .

Whether the town could legally divide it among the inhabitants "according to families," is the direct question for consideration. And it is to be determined by ascertaining, whether they can so appropriate "moneys accruing in the treasury from taxation;" because it can only be appropriated according to the express terms of the Act "for the same purposes."

Towns can appropriate moneys derived from taxation only to the purposes for which they are authorized by law to assess and collect them. The legislature has determined the purposes or uses for which money may be granted, assessed, and collected; and if it can be appropriated to different purposes after it has been collected, then the limitation upon the assessment and collection of it becomes ineffectual and void; because the town has only to express one object in the grant of the money, assess and collect it for that, and then expend it upon objects wholly different. The intention of the limitation was to prevent money from being assessed and collected for other objects than those named in the laws; and this intention cannot be defeated by a misapplication of the money by way of appropriation. The limitations upon the appropriation, and upon the collection, being the same, when the money is derived from taxation, it becomes necessary to examine the statute provisions respecting the grant, assessment, and collection of money. In the sixth section of the Act of the 19th of June, 1821, Rev. Stat. c. 114, the purposes for which money may be granted are thus expressed: "the citizens of any town," "legally qualified to vote," "may grant and vote such sum or sums of money as they shall judge necessary for the settlement, maintenance, and support of the ministry, schools, the poor, and other necessary charges arising within the same town, to be assessed upon the polls and property within the same as by law provided." Towns have also the power to grant and assess money for making and repairing highways; and they have been occasionally authorized to grant money for other purposes, by special enactments; but those purposes have been defined in the Acts giving the power, and no authority can be derived from them to authorize any appropriation of the money referred to in this case. It cannot be contended, that the town of Biddeford, by the vote recited, has applied the money to the support of the ministry, schools, or the poor. Nor is there any good reason for asserting, that it has been applied to any "necessary charges arising within the same town;" because no intimation is afforded by the vote, or by the facts agreed, that the "families" had charges or claims of any kind against

the town; and such an extraordinary state of the affairs of any town cannot be presumed.

The case presented by the vote can be regarded only as a donation of the money to the "inhabitants of the town according to families." By a division according to "families" must be understood a division *per capita*, or by numbers; the word "families" being used in such a manner as to indicate clearly, that the term is derived from those parts of the same Act which provide for "ascertaining the population of the several cities, towns, and plantations" by taking the number "of the persons belonging to such family." If towns cannot legally grant, assess, and collect money, and when it has been received, divide it by donation among the families according to numbers; then the money received under the Act of the 8th of March cannot be so divided; because the appropriation of it is restricted by the Act to "the same purposes that they have a right to any money accruing in the treasury from taxation." To contend, that towns have the power to assess and collect money for the purpose of distributing it again according to numbers, is to ask for a construction, not only entirely unauthorized by the language of any statute, but in direct opposition to the language of limitation employed in giving power to the towns to grant money. It not only does this, but it asks the court to give a construction to the statutes, which would authorize towns, if so disposed, to violate "the principles of moral justice." For if the right to assess and collect money is without limit, it would not be difficult to continue the process of collection and division until the whole property held by the citizens of the town, had passed into and out of the treasury; and until an equalization of property had been effected, as nearly as it could be expected to be accomplished, by placing it all in one common fund, and then dividing it by numbers or *per capita*, without distinction of sex or age. Such a construction would be destructive of the security and safety of individual property, and subversive of individual industry and exertion. It would authorize a violation of what is asserted in our "Declaration of Rights" to be one of the natural rights of men, that of "acquiring, possessing, and protecting property." Such a construction would authorize a violation also of that clause in the Constitution of this State which provides that "private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." No public exigency can require, that one citizen should place his estates in the public treasury for no purpose, but to be distributed to those who have not contributed to accumulate them, and who are not dependent upon the public charity. . . .

The plaintiff, having no legal right to the money claimed, cannot maintain this action; and there must be judgment for the defendants according to the agreement of the parties.[1]

[1] By the statute of 1838, c. 311, towns were authorized to distribute the money received under the Act of 1837, c. 265, "*per capita*, among the inhabitants thereof."

ALLEN ET AL. *v.* INHABITANTS OF JAY.

SUPREME JUDICIAL COURT OF MAINE. 1872.

[60 *Me.* 124.[1]]

Robert Goodenow, for the petitioners. *S. Belcher*, for the respondents.

APPLETON, C. J. A town meeting of the inhabitants of Jay was duly called to see if the town would loan its credit to Hutchins & Lane, on certain terms, provided "said Hutchins & Lane shall move their new saw-mill and box factory from Livermore Falls to Jay Bridge, and also put in operation one run of stones for grinding meal, and establish their manufacturing business as soon as the month of September, A. D. 1870, at or near Jay Bridge."

At a legal meeting held upon this call on April 19, and by adjournment on April 21, 1870, the town "voted to loan their credit to the amount of ten thousand dollars, at six per cent annually, to H. W. Hutchins and B. R. Lane, provided said Hutchins & Lane will invest the amount of from twelve to thirteen thousand dollars in building a steam saw-mill, box factory machinery and land; also to put in one run of stones for grinding meal, to be located at or near Jay Bridge, and to keep the above-named property in good repair, and also keep it amply insured, and to cause said manufacturing business to be carried on for a term not less than ten years, said Hutchins & Lane to pay all the interest, and ten per cent of the principal annually, after three years," the town to be secured by a mortgage of the mill, machinery, and land, "at the rate of one dollar for every seventy-five cents thus loaned by said town, and the selectmen are hereby authorized to issue town bonds for the above amount, payable in yearly instalments after three years, at six per cent interest annually, *viz.*: one thousand dollars the first year, and nine hundred dollars each year for the ten succeeding years, providing the whole amount shall be necessary to establish said manufacturing business."

The legislature passed an Act, c. 716, approved Feb. 25, 1871, in the following terms:

"Whereas, upon due investigation and consideration, we deem it for the benefit of the town of Jay, and of the people of this State, said town is hereby authorized to loan the sum of ten thousand dollars to Hutchins & Lane, in accordance with a vote taken by said town on the 21st day of April, eighteen hundred and seventy, for the encouragement of manufacturing in said town."

The complainants, ten taxable inhabitants of Jay, under R. S. c. 77, § 5, by which this court has equity jurisdiction, "when counties, cities, towns, or school districts, for a purpose not authorized by law, vote to

[1] The statement of facts is omitted. — ED.

pledge their credit or to raise money by taxation, or to pay money from their treasury," have filed a bill in equity, praying that the defendants and all their officers may be enjoined from issuing certain bonds, duly described in the bill, the issue thereof being for a purpose not authorized by law.

The purpose is obvious, and the inquiry is, whether the purpose is one authorized by law?

Whether the loan be of town bonds or of money, as, if the loan be of bonds, the town must ultimately be liable for their payment, and as the payment is to be raised by taxation, matters not. The question proposed is whether the legislature can authorize towns to raise money by taxation, for the purpose of loaning the money so raised to such borrowers as may promise to engage in manufacturing or any other business the town may prefer, for their private gain and emolument. Is the raising of money to loan to such persons as the town may determine upon as borrowers, a legal exercise of the power of taxation? Ultimately, it will be found that the question resolves itself into an inquiry, whether the legislature can constitutionally authorize the majority of a town to loan their own and the money of a minority raised by taxation and against the will of such minority, as such majority may determine.

A tax is a sum of money assessed under the authority of the State, on the person or property of an individual for the use of the State. Taxation, by the very meaning of the term, implies the raising of money for public uses, and excludes the raising if for private objects and purposes. "I concede," says Black, C. J., in *Sharpless* v. *Mayor*, 21 Penn. 167, "that a law authorizing taxation for any other than public purposes, is void." "A tax," remarks Green, C. J., in *Camden* v. *Allen*, 2 Dutch. 839, "is an impost levied by authority of government, upon its citizens or subjects for the support of the State."

"No authority, or even *dictum*, can be found," observes Dillon, C. J., in *Hanson* v. *Vernon*, 27 Iowa, 28, "which asserts that there can be any legitimate taxation when the money to be raised does not go into the public treasury, or is not destined for the use of the government or some of the governmental divisions of the State." . . .

Capital naturally seeks the best investment, or its owners do. Those who by industry and economy have become capitalists are more likely to invest it well than those who, having gained none, have none to lose. The sagacity shown in the acquisition of capital is best fitted to control its use and disposition.

It is obvious, that, if the removal from Livermore Falls would be made without special inducement, in other words, if the prospect of profit at Jay Bridge were sufficient to induce Messrs. Hutchins & Lane to move their saw-mill, etc., without any special offer of the defendant town, there would be no necessity for making such offer. It is not readily perceived that raising money under such circumstances would be of public benefit. If they should not so deem it, and it is not ad-

vantageous on the whole for them to make the removal, then it is a premium offered for them to make a removal injurious to their interest, and which they would not otherwise make, and of sufficient magnitude to induce them to meet the probable loss. Still less can it be conceived to be of "benefit" in such case to raise money to promote losing enterprises.

It is said that it induces enterprises which would not otherwise be undertaken. But why not undertaken? Every man is the best judge of his interest. There may be exceptions, but such is the general rule. Now why is not capital invested at Jay Bridge? The answer is obvious. No one having capital to invest or loan, is willing, for any existing prospect of gain, to invest or to loan money to be thus invested. The want of existent capital or sufficient probability of profit, is the reason why the proposed undertaking has not been carried into operation.

The idea seems to be that thereby capital would be created. But such is not the case. Capital is the saving of past earnings ready for productive employment. The bonds of a town may enable the holder to obtain money by their transfer as he might do by that of any good note. But no capital is thereby created. It is only a transfer of capital from one kind of business to another.

Nor is capital created by the raising of money by taxation. If the wealth of the country were increased by taxation, the result would be, the higher the taxes the more rapid the increase of its wealth. But the reverse is the case. The wealth of the country is lessened by the time spent in assessing and collecting taxes, and by the taxes collected, if unproductively expended.

Is the removal of the new saw-mill, etc., by Messrs. Hutchins & Lane, a public or private enterprise? Hutchins & Lane are now at Livermore. They propose to remove to Jay Bridge. It is their interest alone which they will consider. But why remove? It is no more a public purpose than any other removal of manufacture from one town to another. The town of Jay is to have no share in the anticipated profits of Messrs. Hutchins & Lane. The State is not to be a partaker of their gains. The new mill, etc., being removed, the town of Jay stands in precisely the same relation to it as other towns to new or old mills within their limits, so far as regards any public benefit to be derived therefrom. The timber of the inhabitants is sawed at the usual compensation. Their grists are ground for the same customary toll as those of others.

The industry of each man and woman engaged in productive employment is of "benefit" to the town in which such industry is employed. This can be predicated of all useful labor — of all productive industry. But because all useful labor, all productive industry, conduces to the public benefit, does it follow that the people are to be taxed for the benefit of one man or of one special kind of manufacturing? If so, then there is no kind of labor, no manufacturing for which the minority of a town may not be assessed for the benefit of an individual. There

is nothing of a public nature in the new saw-mill of Hutchins & Lane, any more entitling them to special aid than the owners of any other saw-mill. The sailor, the farmer, the mechanic, the lumberman, are equally entitled to the aid of coerced loans to enable them to carry on their business with Messrs. Hutchins & Lane. Our government is based on equality of right. The State cannot discriminate among occupations, for a discrimination in favor of one is a discrimination adverse to all others. While the State is bound to protect all, it ceases to give that just protection when it affords undue advantages, or gives special and exclusive preferences to particular individuals and particular and special industries at the cost and charge of the rest of the community.

Unless there is something peculiar and transcendental in the new saw-mill to be removed, and in the grist-mill to be erected, and in the labor of Messrs. Hutchins & Lane, it must stand in the same category with other saw-mills and grist-mills, which are and have been, and will be built, and other laborious industries, which are pursued for private gain and emolument.

The alleged justification for raising money to be loaned to private individuals for their own profit, arises from the supposed public benefit to be made of the money so loaned. But the moment the loan is effected, the bonds and money raised from their sale become the bonds and money of the person borrowing, and subject to his control. The town has lost all power over the use and disposition of their loan. True, it may sue for any violation of the contract, if any is made, in reference to the manner of using the bonds or money loaned. The loan, when once made, becomes like all loans. The other borrower has it. It is his. The loan effected, there is the end of the matter.

The question recurs, can the town raise money by taxation merely to loan again to individuals for their own purposes; for it has been seen that the loan effected, the town loaning cannot control the use of the loan, and the loan is merely for the benefit of the individual borrowing. The bonds to be loaned, or the money to be loaned are in the hands of the loaning committee. It is to be loaned for a longer or shorter time, upon security good, bad, indifferent; fortunate, if only the latter. Is the loaning of bonds or money by the town in any respect different from the loaning of money by individuals? Does the mere fact that the town makes the loan irrespective of any other consideration make the loan a public "benefit" more than, or different from, any other loan by an individual or banking corporation having, funds to loan? . . . [Here the case of *Hooper* v. *Emery*, 14 Me. 379, is stated.]

But whether the money raised is to be distributed *per capita* or loaned, can make no difference in principle. If towns can assess and collect money to be again loaned to such persons as the majority may select for such purposes as it may favor, with such security or without security, as it may elect, property ceases to be protected in its acquisition or enjoyment. Whether the estates of citizens are to be placed in the public treasury for the purpose of dividing them, or of loaning

them to those who have not accumulated them, matters not. In either case, the owner is despoiled of his estate, and his savings are confiscated.

If the loan be made to one or more for a particular object, it is favoritism. It is a discrimination in favor of the particular individual and a particular industry, thereby aided, and is one adverse to and against all individuals, all industries, not thus aided.

If it is to be loaned to all, then it is practically a division of property under the name of a loan. It is communism incipient, if not perfected.

If it were proposed to pass an Act enabling the inhabitants of the several towns by vote to loan horses or oxen, or to lease houses to any individual for his private gain, whom the majority may select, the monstrous absurdity of such legislation would be transparent. But the mode by which property would be taken from one or more and loaned to others can make no difference. It is the taking to loan, or otherwise disposing of property for private purposes, against the consent of the owner, that constitutes the wrong, no matter how taken. Whether the horse be taken from the reluctant owner to be loaned to some favored livery-stable keeper, or the loan be of money raised by the collector on its sale or by the payment of the tax to avoid such sale, does not change the result. In either case the horse or the value thereof is loaned by others, without the owner's consent. If a part of one's estate may be taken from him and loaned to others, another and another portion may be taken and loaned until all is gone.

By the Constitution of this State, "certain natural inherent and unalienable rights" are guaranteed to the citizens of this State, "among which are those of . . . acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." What motive is there for the acquisition of property, if the tenure of the acquisition is the will of others? How can our property be protected, if the legislature can enable a majority to transfer by gift or loan, to certain favored and selected individuals through the medium of direct taxation, such portions of one's estate as they may deem expedient. Men only earn when they are protected in the acquisition, possession, and enjoyment of their property. The barbarous nations of Asia have neither industry nor capital, the result of saving, for the reason that property is without protection. Where is the protection of property if one's money or his goods can be wrested from him and loaned to others? Where is the difference between the coerced contribution of the tax-gatherer to be loaned to individuals for their benefit, and those of the conqueror from the inhabitants of the conquered territory? If one's money may be taken from him without and against his consent, to be loaned to an individual whom he would not trust, for a time which might be inconvenient, for a purpose which he might deem injudicious, what protection is afforded him? What would be thought of a statute requiring individuals to give their notes to others to be discounted for their special benefit, or to raise money to be thus loaned? What differs

it whether individuals are compulsorily required to loan their notes on time to others, to be discounted for such others, or the bonds of the town are issued to be loaned, which the citizens may ultimately be compelled to pay? All security of private rights, all protection of private property is at an end, when one is compelled to raise money to loan at the will of others, or to pay his contributory share of loans of money or bonds made to others for their own use and benefit, when the power is given to a majority to lend or give away the property of an unwilling minority.

Further, by the Constitution, "private property shall not be taken for public uses without just compensation, and unless public exigencies require it."

The right of eminent domain is an attribute of sovereignty. It is the right to seize and appropriate specific articles of property for public use when some public exigency requires it, and not otherwise. . . .

But even if the moving of a new saw mill from one town to another adjacent, or the building of a new grist-mill, the moving being for the benefit of the owners of the mill, and the building of the grist-mill for the benefit of the builders, or the giving or loaning money to produce such results for such purpose, were by some strange perversion of language from its ordinary acceptation to be deemed a public use, though the public have no more right to use it than they have any other property of individuals; and if by strength of imagination a public exigency could be perceived in making such change of location and such new erection, or in giving or loaning for such purposes, and a just compensation could be found when there is or may be none whatever, and it were to be deemed a just protection of property that a majority might loan the property of a minority, or encumber it with debts for private objects against the will and protestations of such minority, still the complainants are entitled to have the injunction heretofore granted made perpetual. The legislature have not said that the removal of the new saw-mill of Messrs. Hutchins & Lane, or their building a grist-mill with one run of stones is for the "public use," or is required by any public exigency, but many things may be for the "benefit" of Jay, and not for public use. Many things may be for the "benefit" of the people of the State, which are not required by any existing "public exigency." All the legislature seem to have determined is that Jay affords a better site for the saw-mill and grist-mill of Messrs. Hutchins & Lane than the one occupied by them in the town of Livermore.

The Constitution of the State is its paramount and binding law. The acquisition, possession, and protection of property are among the chief ends of government. To take directly or indirectly the property of individuals to loan to others for purposes of private gain and speculation against the consent of those whose money is thus loaned, would be to withdraw it from the protection of the Constitution and submit it to the will of an irresponsible majority. It would be the robbery and spoliation of those whose estates, in whole or in part, are thus confis-

cated. No surer or more effectual method could be devised to deter from accumulation — to diminish capital, to render property insecure, and thus to paralyze industry. *Injunction made perpetual.*

WALTON, BARROWS, and DANFORTH, JJ., concurred. DICKERSON, J., concurred in the result upon the principles stated in his opinion in 58 Maine, 600–606.[1]

BREWER BRICK COMPANY *v.* INHABITANTS OF BREWER.

SUPREME JUDICIAL COURT OF MAINE. 1873.

[62 *Me.* 62.[2]]

Wilson and *Woodward*, for the plaintiffs. *A. W. Paine*, for the defendants.

APPLETON, C. J. This is an action of *assumpsit* to recover three hundred and nine dollars and seventy-five cents paid by the plaintiffs for taxes. The proceedings on the part of the defendants are admitted to have been correct, and the only question presented is whether the property of the plaintiff, upon which the tax in question was assessed, is liable to assessment.

The business of brick-making has been carried on in the defendant town for more than fifty years until the present time, by the old process of making bricks with horse-power.

The plaintiff corporation was organized under the general law of the State, on the fourth day of June, 1870, for the purpose of manufacturing brick in the defendant town, and after its organization, proceeded at once to erect the necessary buildings and machinery for the manufacture of brick by new processes, in which business it has been engaged to the present time.

At the annual town meeting of the defendant town held March 14, 1870, the following vote was passed, *viz.*: "Voted, that the town will exempt from taxation, for a term of ten years, manufacturing and refining establishments hereafter erected in town, and the capital used for operating the same, together with such machinery hereafter put into buildings already erected, but not now used as such, and the capital used for operating the same, provided that the capital invested shall not be less than $10,000, and provided, further, that this vote shall not be construed to apply to manufacturing or business now carried on in the town, and no distillery of intoxicating drinks or malt beer shall be entitled to the benefit of this vote."

The estate of the plaintiffs was duly assessed for its just and proportional share upon the whole valuation of the property of the town

[1] And so other advisory opinions of the Maine justices in 58 Me. 590 (1871). See note to the principal case, by Judge Redfield, in 12 Am. Law Reg. N. S. 493. — ED.

[2] The statement of facts is omitted. — ED.

liable to assessment. The plaintiffs claim exemption from contributing toward the public expenses, under and by virtue of this vote of the town.

By an Act approved March 8, 1864, c. 234, § 1, it is enacted, that "all manufacturing establishments, and all establishments for refining, purifying, or in any way enhancing the value of any article or articles already manufactured, hereafter erected by individuals or by incorporated companies, and all the machinery and capital used for operating the same, together with all such machinery hereafter put into buildings already erected, but not now occupied, and all the capital used for operating the same, are exempted from taxation for a term not exceeding ten years, after the passage of this Act, where the amount of capital actually invested shall exceed the sum of two thousand dollars; provided, towns and cities in which such manufacturing establishments or refineries may be located, or in which it may be proposed to establish the same, shall in a legal manner give their assent to such exemption, and such assent shall have the force of a contract, and be binding for the full time specified; and provided further, that all property so exempted, shall be entered from year to year on the assessment books, and returned with the valuations of the several towns and cities, when required by the State for the purposes of making the State valuation." By an Act approved Feb. 8, 1867, c. 76, § 1, the exemption referred to in the Act of 1864, c. 234, § 1, takes effect from the date of the contract authorized by that Act. By an Act approved March 12, 1869, c. 65, § 1, the exemption referred to takes effect "from the date of the assent given by the town to such exemption." The preceding legislation on this subject is found condensed in R. S., 1871, c. 6, § 6, ninth clause.

Taxation exacts money from individuals as and for their contributory share of the public burdens. A tax is generally understood to mean the imposition of a duty or impost for the support of government. *Pray* v. *Northern Lib.*, 31 Penn. 69. "Taxes are burdens or charges imposed by the legislature upon persons or property," says Dillon, C. J., in *Hanson* v. *Vernon*, 27 Iowa, 28, "to raise money for public purposes or to accomplish some governmental end." Private property may be taken under the power of eminent domain for public purposes, if just compensation therefor be made. But for private purposes it cannot be wrested from its owner, even with compensation.

It has been settled by a series of decisions that the legislature cannot constitutionally authorize towns to raise money by taxation to give or loan to individuals or corporations for private purposes. A good public house may be very desirable, but in *Weeks* v. *Milwaukee*, 10 Wis. 242, the Supreme Court of Wisconsin justly treated with little consideration the claim of a right to favor, under the power of taxation, the construction of a public hotel, though the aid was to be rendered expressly "in view of the great public benefit which the construction of the hotel would be to the city." It was there decided that

the public could not be compelled to aid such an enterprise from any regard to the incidental benefits to be derived therefrom. It may be very desirable to have a saw-mill in a town, and those who wish it have full liberty to erect it; but the inhabitants cannot legally be taxed to raise money to give or to loan to those, who propose, for their own benefit, to erect one, or to take down one already erected, and to remove it from one town to another. *Allen* v. *Jay*, 60 Maine, 124. A terrible conflagration sweeps over a city destroying its wealth by millions. Its rebuilding is absolutely necessary for its commercial wants. But each lot of land is private property; each building to be erected thereon will be private property. Its erection is for private use. After full consideration, it was decided that the inhabitants of the city could not be taxed to raise money to loan to the sufferers to enable them to rebuild. *Lowell* v. *Boston*, 110 Mass. In the *Commercial Bank* v. *the City of Iola*, 2 Dillon, 353, it was held that the legislature of a State had no authority to authorize taxation in aid of private enterprises and objects; and that municipal bonds issued under legislative authority to be paid by taxation, as a *bonus* or donation to secure the location or aid in the erection of a manufactory or foundry, owned by private individuals, are void even in the hands of owners for value.

Contingent and incidental benefits may arise from the introduction of manufacturing capital whenever the enterprise is successful. But the reverse may equally ensue, and the enterprise become an injurious failure. The inhabitants of a town cannot legally be taxed to raise money to give or to loan to individuals or corporations for private purposes on account of any supposed incidental advantages which may possibly accrue therefrom. The benefits are precisely those arising from the introduction of capital or labor, and none other. It matters not whether it be the building of the huge factory of the capitalist or the cottage of the laborer, the benefits are the same in kind and differ only in degree. There are benefits arising from the introduction of capital well invested and of labor well employed; but they are of the same nature as those arising from the existent capital of the place in which the incoming capital is to be invested, and the incoming labor employed. One is just as much entitled to protection as the other, and no more. But this benefit, whatever it may be, if any, arises from all capital and all labor; and as all labor and all capital is equally entitled to equal protection according to its extent, it follows that equal protection to all leaves the matter as it found it. Hence, it is universally held that the incidental benefits of capital afford no justification for partial taxation.

It is conceded in the argument that towns and cities cannot constitutionally be authorized to raise by taxation money to be given away. The plaintiff's share of the expenses of the defendant town for all public purposes is conceded to be $309.75. If the town were empowered to raise that sum to give the plaintiffs, it is admitted that the Act so

empowering them would be unconstitutional, for if the town may raise money to give to A, they may do the same for B, and so on; and the property of the minority would be subject to the will of the majority. But the remission of a tax by a vote of the town is in substance and effect the same as a gift. What matters it to the plaintiffs or the defendants whether the town votes to give $309.75 to the plaintiffs, or to exempt their property from its just and proportional tax, and assess the amount of such exemption upon the remaining estate liable to taxation? It is a gift. The money raised by the rest of the tax-payers is raised to give away; and if it may be done for these plaintiffs, it may be done for any other inhabitant as well.

But there are other and grave objections to the constitutionality of the statute upon which the plaintiffs rely.

By the Constitution, article 9, § 7: "while the public expenses shall be assessed on polls and estates, a general valuation shall be taken at least once in ten years." The expenses for which assessments are to be made shall be public; those appertaining to the public service. No authority is given, either expressly or by implication, to assess for merely private purposes; as to give away, or to loan to individuals.

By article 9, § 8: "all taxes upon real estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof." Though this section applies specially to real estate, yet the very idea of taxation implies an equal apportionment and assessment upon all property, real and personal, "according to its just value." It cannot for a moment be admitted that the Constitution authorizes an unequal apportionment and assessment upon real and personal estate, without any reference to its "just value."

The power to impose taxes is broad and liberal: — for roads, that there may be facilities for travel; for schools, that the people may be educated; for libraries, that their means of improvement may be increased; for the poor, lest they may suffer from want; for the police of the State, for the safety of the public, that crime may be detected; for the courts of law, that individual rights may be protected and enforced, and that crime, when proved, may receive its fitting punishment; — in fine, for any and all purposes which, in the most liberal sense, can be deemed public. "Taxation having for its only legitimate object the raising of money for public purposes and the proper needs of government, the exaction of moneys from the citizens for other purposes is not a proper exercise of this power, and must therefore be unauthorized." Cooley's Const. Lim. 487.

The legislature may determine the amount of taxation and select the objects. They may exempt by general and uniform laws certain descriptions of property from taxation, and lay the burden of supporting government elsewhere. But while there are no limits in the amount of taxation for public purposes, nor in the subject-matter upon which it may be imposed, the requirement that it shall be uniform and equal upon the valuations made is universal.

The general Tax Act is based upon the whole valuation of the State. The taxes are apportioned among the several towns in the ratio of their respective valuations. The manufacturing capital to be exempted by this statute is included in the valuation of the town in which the investment is made. Whether there shall be an exemption or not depends upon the vote of the town. Now it is for the legislature to impose taxes and to exempt from taxation. But exemption from taxation includes the imposition of taxes. To the precise extent that one man's estate is exempted from taxation, to that same extent is there an imposition of the amount exempted upon the rest of the inhabitants. The $309.75 of which the plaintiffs would escape the payment would be imposed upon the residue of the inhabitants of Brewer. This imposition of, and this exemption from, taxation are by the town and not by the legislature.

To have uniformity of taxation, the imposition of, and the exemption from taxation, must be by one and the same authority — that of the legislature. It is for the legislature to determine upon what subject-matter taxation shall be imposed; upon land, upon loans, upon stock, &c., &c.; but the subject-matter once fixed, the rule is general, and applies to all property within its provisions. So it may relieve certain species of property from taxation, as the tools of the laborer, the churches of religious societies, &c.; but upon the non-exempted estate the taxation must be uniform, as the exemptions are uniform. It cannot be pretended that it would be constitutional to impose a tax on a church in A, and to exempt one of the same character in B; to say that all or a part of the farms in the former shall be subject to a tax, while those in the latter shall be free from taxation. But if it be conceded that each town has the right to tax part and exempt part of the property located therein, whatever its character, uniformity in relation to the subject-matter, as well as to the ratio of taxation, is at an end.

If, of the innumerable varieties of manufacture, different towns exempt different, or the same species of manufacture, the utter want of uniformity is obvious. The cotton manufacturer in one town is exempt, while in the next the woollen manufacturer pays his proportional share of the public burden. Nor is this all: — if the same kind of manufacture has been heretofore carried on as is proposed to be exempted from the payment of taxes, then in the same town in case of exemption, will be seen the remarkable spectacle of two manufacturers, engaged in the same industrial pursuits, the one with his capital freed from all public burdens, the other bearing his just and proportional share. The larger the investment of exempted capital, the heavier the burden upon the non-exempted capital. Of two competing capitalists, in the same branch of industry, one goes into the market with goods relieved from taxes, while the goods of the other bear the burden. One manufacturer is taxed for his own estate and for that which is exempted, to relieve his competing neighbor, and to enable the latter to undersell him in the common market, — and that

is precisely the relation these plaintiffs bear to their competing brick-makers, — a grosser inequality is hardly conceivable!

Nor is there any conceivable benefit to any one from this injustice. The town voting the exemption will be one in which the proposed manufactures thereby to be exempted could, or could not, be advantageously carried on. If the former, the very principle of self-interest will induce such manufacturer to establish himself in the town so voting, without the inducement of such vote. It would, then, be the unnecessary giving of money to one whose interests would be promoted by manufacturing in the place in question. It would be compelling the rest of the inhabitants to add to the gains of a capitalist without participation therein. If otherwise, and the town so voting is an injudicious place for the location of the manufactures to be exempted, it is an invitation to the manufacturer to engage in a losing business with a proffer to bear the loss to the extent of the exemption. The exemption is either unnecessary or unwise.

The plaintiffs have only paid their proportional share of the taxes in the defendant town according to its valuation. The plaintiffs are not entitled to recover. To permit them to do so would be to approve unconstitutional taxation for private purposes and to sanction a system which would destroy all uniformity as to the property upon which taxes are to be imposed, and all equality as to the ratio, so far as regards the valuation. It can never be admitted that the Constitution of this State permits or allows the taxation of a portion of its citizens for the private benefit of a chosen few, and that the taxes raised for such a purpose shall be assessed without reference to uniformity of taxable property, or equality of ratio. It becomes, therefore, entirely unnecessary to consider whether or not the plaintiffs are within the provisions of the statute or the terms of the vote under which they claim exemption from taxation. *Plaintiffs nonsuit.*

WALTON, DICKERSON, BARROWS, DANFORTH, and VIRGIN, JJ., concurred.

CUTTING, J., concurred in the result.

PETERS, J., having been of counsel for plaintiffs, did not sit in this case, but he concurred in a similar opinion and result in *Andrews* v. *Oxford,* involving precisely the same question.[1]

[1] Notwithstanding this decision, the people of some of the towns of Maine continue the practice here condemned as unconstitutional. The following is a duly attested extract from the records of the town of Enfield, Maine, fifteen years after the foregoing decision, *viz.*, May 10, 1888: "Voted, That the town exempt from taxation, for the term of ten years, all of the plant to be erected of the Piscataquis Falls Pulp and Paper Company, also if it is necessary for said manufacturing company to have a boarding-house for their employees, and a house for the superintendent, that said boarding-houses be also exempt from taxation for ten years. But all dwelling-houses built by company or others for private or public use to pay taxes in proportion with other taxable property in town."

The validity of such exemptions seems to be recognized in New Hampshire *Franklin Needle Co.* v. *Franklin,* 65 N. H. 177 (1889). — ED.

LOWELL ET AL. *v.* CITY OF BOSTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1873.

[111 *Mass.* 454.]

BILL in equity by John A. Lowell and nine others, taxable inhabitants of the city of Boston, praying that the defendants might be restrained from issuing bonds under the St. of 1872, c. 364,[1] on the ground that the statute was unconstitutional. The defendants demurred for want of equity, and the case was heard and reserved by GRAY, J., upon bill and demurrer, for the consideration of the full court.

B. R. Curtis and *J. G. Abbott*, for the defendants. *D. Foster*, for the petitioners.

WELLS, J. This is a proceeding under the provisions of the Gen. Sts. c. 18, § 79, to restrain the city of Boston from issuing its bonds for the purpose of raising a fund to be appropriated to the object of rendering aid, by way of loans, in rebuilding upon that portion of the city which was burned over in November, 1872. The issue of bonds for that purpose, to an amount not exceeding $20,000,000, was expressly authorized by the St. of 1872, c. 364. The question, therefore, is distinctly presented whether the authority thus conferred upon the city is contrary to the provisions of the Constitution of the Commonwealth.

The issue of bonds by the city, whatever provision may be made for their redemption, involves the possible and not improbable consequence of a necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money by taxation for payment of the bonds; or, what is equivalent, the right to levy a tax for the purposes for which the fund is to be raised by means of the bonds so authorized.

It is a question, not of municipal authority, but of legislative power. The point of difficulty is not as to the distribution of the burden by allowing it to be imposed upon a limited district within the State; but as to the right of the legislature to impose or authorize any tax for the object contemplated by this statute.

The power to levy taxes is founded on the right, duty, and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of

[1] The statute purported to authorize the city to issue bonds to an amount not exceeding $20,000,000, and provided for the appointment of three commissioners, with authority to apply the proceeds of these bonds in loans to the owners of land burned over in the great fire of Nov. 9 and 10, 1872, upon notes or bonds secured by first mortgages of this land, conditioned upon rebuilding within one year from Jan. 1, 1873. The commissioners were to apply the loans, and to make other conditions and provisions as they should think best calculated to insure the employment of the money in rebuilding on the land and repaying the loans. And they were authorized to withhold payment of any loan agreed on when they should think it necessary "to insure the speedy rebuilding on said land." — ED.

the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.

The principle of this distinction is fundamental. It underlies all government that is based upon reason rather than upon force. It is expressed in various forms in the Constitution of Massachusetts. In Art. XI. of c. 2, § 1, by restricting the issuing of moneys from the treasury to purposes of "the necessary defence and support of the Commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the Acts and Resolves of the General Court." In Art. IV. of c. 1, § 1, by declaring the purposes for which the power of taxation, in its various forms, may be exercised by the General Court to be "for the public service, in the necessary defence and support of the government of the said Commonwealth, and the protection and preservation of the subjects thereof." The purport and scope of these provisions are made more distinct, and the essential idea upon which they rest is disclosed by reference to the preceding Declaration of Rights, by which the theory and purpose of this frame of government were set forth by its founders. Art. X. declares, "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent or that of the representative body of the people. In fine, the people of this Commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

The power of the government, thus constituted, to affect the individual in his private rights of property, whether by exacting contribu-

tions to the general means, or by sequestration of specific property, is confined, by obvious implication as well as by express terms, to purposes and objects alone which the government was established to promote, to wit, public uses and the public service. This power, when exercised in one form, is taxation; in the other, is designated as the right of eminent domain. The two are diverse in respect of the occasion and mode of exercise, but identical in their source, to wit, the necessities of organized society; and in the end by which alone the exercise of either can be justified, to wit, some public service or use. It is due to their identity in these respects that the two powers, otherwise so unlike, are associated together in the same article. So far as it concerns the question what constitutes public use or service that will justify the exercise of these sovereign powers over private rights of property, which is the main question now to be solved, this identity renders it unnecessary to distinguish between the two forms of exercise, as the same tests must apply to and control in each. An appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. The distinction between this and its appropriation for the construction of a highway is marked and obvious. It is independent of all considerations of resulting advantage. The individual, by reason of his capacity, enterprise, or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community, to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. In this view, it might be shown to be for the public good to take from the unenterprising and thriftless their unemployed capital and intrust it to others who will use it to better advantage for the interests of the community. But it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation.

In the case of a highway, on the other hand, its direct purpose of public use determines conclusively the question in support of the exercise, both of the right of eminent domain and of taxation, however trifling the advantage to the public compared with that to individuals. The extent or value of the public use, and the wisdom and propriety of the appropriation, are matters to be determined exclusively by the legislature, either directly or by its delegated authority. When the power exists, it is not within the province of the court to interfere with its exercise, by any inquiry into its expediency.

The two instances above referred to illustrate the sense in which the furthering of the public good by promotion of the interests of many individuals differs from a public service. A public service may or may not be productive, practically, of public advantage. Resulting advantage to the public does not of itself give to the means by which it is produced the character of a public service.

There are, indeed, many cases in which the sovereign power of government is exercised to affect private rights of property in favor of private parties, either individuals or corporations. Most conspicuous among these are turnpikes and railroads, in whose favor this right of eminent domain is frequently exercised. Private rights are thus taken and transferred, not to the State, but to the private corporation; and the compensation to the persons injured, required by the Constitution, is also rendered from the corporation. Such an appropriation of property is justified, and can only be justified, by the public service thereby secured in the increased facilities for transportation of freight and passengers, of which the whole community may rightfully avail itself. The franchises of the corporation are held charged with this duty and trust for the performance of the public service, for which they were granted. *Commonwealth* v. *Wilkinson*, 16 Pick. 175; *Same* v. *Boston & Maine Railroad*, 3 Cush. 25, 45; *Old Colony & Fall River Railroad Co.* v. *County of Plymouth*, 14 Gray, 155, 161.

This right of eminent domain is often allowed to be exercised in favor of private aqueduct companies. Here, too, the public service, intended as the object of the grant of the right, is obvious. And although the interests of the aqueduct company are ordinarily relied upon to secure the proper performance of the service, yet, in case of any failure or abuse, the obligation may doubtless be otherwise enforced. *Lumbard* v. *Stearns*, 4 Cush. 60.

The Mill Acts, so called, are often referred to as authorizing the exercise of the right of eminent domain by private parties for their exclusive private benefit. And the language of the court, used *arguendo*, has been sometimes such as to imply that the growth and prosperity of manufacturing and other industrial enterprises were of such importance to the public welfare as to justify the exercise of the right of eminent domain in their behalf, as a public use. *Boston & Roxbury Mill Co.* v. *Newman*, 12 Pick. 467; *Hazen* v. *Essex Co.*, 12 Cush. 475, 478; *Talbot* v. *Hudson*, 16 Gray, 417, 426.

That mills for the sawing of lumber for purposes of building, grinding grain for food, and the manufacture of material for clothing, may be of such necessity to a community, especially in the early settlement of a country, as to make their establishment a provision for a public service, we do not question. It is doubtless within the power of the legislature to declare the existence of a public exigency for the establishment of a mill, for which the right of eminent domain may properly be exercised; as in the case of the Boston & Roxbury Mill Corporation, and the Salem Mill-dam Corporation. What may be the limits of legislative power in that direction, and whether there are any limits except in the sound discretion of the legislature, it is needless now to inquire. We are satisfied that the Mill Acts are not founded upon that power, and do not authorize its exercise.

The advantages to be derived from a running stream by the several riparian proprietors are of natural right. Each one may make use of its

waters, as they flow through his lands, in a reasonable manner, for such purposes as they are adapted to serve. In order that each may have his opportunity in turn, each is entitled to have the water allowed to flow to and from his land as it has been accustomed to flow, with only such modifications as result from such reasonable use. Hence, all proprietors upon a stream, from its source to its mouth, have, in a certain sense, a common interest in it, and a common right to the enjoyment of all its capacities. Among those capacities no one is more important than that of the force of the current to supply power for the operation of mills. To make that force practically serviceable requires a considerable head and fall at the point where it is to be applied; often more than can be gained within the limits of one proprietor. The use of the stream in this mode has always been regarded as a reasonable use, notwithstanding the effect of the dam, by which the head is created, to retard the water in its flow to the proprietor below, and to set it back and thus diminish or destroy the force of the current above. One who thus appropriates the force of the current is in the enjoyment of a common right, in which he is protected, although he may thereby prevent a like use subsequently by the proprietor above. *Hatch* v. *Dwight*, 17 Mass. 289, 296; *Cary* v. *Daniels*, 8 Met. 466; *Gould* v. *Boston Duck Co.*, 13 Gray, 442. But this protection extends no farther than to justify the appropriation of a part of that quality of the stream which, until so appropriated, is common to all. It does not justify any, even the least, injury to land outside the channel. Without some law to control, the mill owner would be exposed, not merely to the liability to make just compensation for injuries thus occasioned, but to harassing suits for damages and to abatement of his dam as causing a nuisance. This liability and the inevitable controversies growing out of conflicting rights in the stream itself, tending to defeat all advantageous use of its power, led to the adoption of laws regulating and protecting the beneficial use of streams for mill purposes. The St. of 1795, c. 74, is introduced by the recital, "Whereas the erection and support of mills, to accommodate the inhabitants of the several parts of the State, ought not to be discouraged by many doubts and disputes, and some special provisions are found necessary relative to flowing adjacent lands and mills held by several proprietors." But there is no public service secured through the Mill Acts, except so far as it may result incidentally, and as the inducements of private interest may lead mill-owners to devote their mills to purposes favorable to the public accommodation. The same rights and protection are secured to all who may be possessed of sites for mills, whatever the purpose for which their mills may be designed, and however useless for all purposes of public accommodation or advantage. There is no discrimination in this respect, and no provision to secure any public service that may be supposed to have been contemplated. Further than this, each proprietor is allowed to avail himself of the rights secured by the Mill Acts, in his own mode and for his own purposes, at his own discretion, without the interven-

tion of any public officer or other tribunal or board, to whom such a governmental function as the exercise of the right of eminent domain is ordinarily intrusted, when not under the special direction of the legislature itself.

A consideration, still more conclusive to this point, is, that in fact no private property, or right in the nature of property, is taken by force of the Mill Acts, either for public or private use. They authorize the maintenance of a dam to raise a head of water, although its effect will be to overflow the land of another proprietor. This right of flowage is sometimes inaccurately called an easement. *Hunt* v. *Whitney*, 4 Met. 603; *Talbot* v. *Hudson*, 16 Gray, 417, 422, 426. But it is not so. It confers no right in the land upon the mill-owner, and takes none from the land-owner. *Murdock* v. *Stickney*, 8 Cush. 113; *Storm* v. *Manchaug Co.*, 13 Allen, 10. In *Murdock* v. *Stickney*, Chief Justice Shaw remarks in reference to the Mill Acts, "The principle on which this law is founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use. It is not in any proper sense a taking of the property of an owner of the land flowed, nor is any compensation awarded by the public." In *Bates* v. *Weymouth Iron Co.*, 8 Cush. 548, 553, he says, "It is a provision by law, for regulating the rights of proprietors, on one and the same stream, from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it." Similar declarations are made in *Fiske* v. *Framingham Manuf. Co.*, 12 Pick. 68; *Williams* v. *Nelson*, 23 Pick. 141.

This regulation of the rights of riparian proprietors, both in respect to the stream and to their adjacent lands, liable to be affected by its use, involves no other governmental power than that "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances," as the General Court "shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same." Const. of Mass. c. 1, § 1, Art. IV.

All individual rights of property are held subject to this power, which alone can adjust their manifold relations and conflicting tendencies. The absolute right of the individual must yield to and be modified by corresponding rights in other individuals in the community. The resulting general good of all, or the public welfare, is the foundation upon which the power rests, and in behalf of which it is exercised; whether by restricting the use of private property in a manner prejudicial to the public (*Commonwealth* v. *Alger*, 7 Cush. 53); or by imposing burdens upon it for the protection or convenience in part of the public (*Goddard, Petitioner*, 16 Pick. 504); *Baker* v. *Boston*, 12 Pick. 184, 193 (*Salem* v. *Eastern Railroad Co.*, 98 Mass. 431); or by modifying rights of individuals, in respect of their mutual relations, in order to secure their more advantageous enjoyment by each.

It is *pro bono publico* that general provisions of law exist by which

joint tenants and tenants in common of houses and mills may require necessary repairs to be made, with indemnity out of the joint rents or income for the cost thereof. *Calvert* v. *Aldrich*, 99 Mass. 74. Upon the same principle one joint tenant is allowed to sever the joint tenancy by conveyance or partition, and thus change the nature of the estate of his co-tenant, as well as his own. *Shaw* v. *Hearsey*, 5 Mass. 521. Gen. Sts. c. 136, § 1.

Estates in common may be divided at the suit of any one of the co-tenants; and if not conveniently or advantageously divisible equally, one may be required to accept less than his full share, with an equivalent in money for the deficiency. *Hagar* v. *Wiswall*, 10 Pick. 152; *Buck* v. *Wolcott*, 13 Gray, 268. And by a recent statute, under certain conditions, the whole may be sold, and the proceeds in money divided instead of the land. St. 1871, c. 111.

Upon the same principle, proprietors of wharves, or of general fields, affected by a common interest or a common necessity, are allowed to adopt measures to secure their common advantage, although burdens or restrictions result therefrom which must be shared by the minority, as well as the majority, by whose determination the measures were adopted. Gen. Sts. c. 67. *Wright* v. *Boston*, 9 Cush. 233.

No other power was exercised for the construction of drains and sewers until 1841, when cities and towns were authorized to exercise for that object the power of taxation. St. 1841, c. 115. The property in such drains and sewers was by the same Act vested in the city or town; so that there was a public use as well as a public service, for which that power was delegated. The exercise of the right of eminent domain, for the same object, was delegated to the city of Boston by the St. of 1857, c. 225, § 1, and to all other cities and towns by the St. of 1869, c. 111.

In the statutes for the improvement of meadows, the provisions for the assessment and collection of the expenses, in form, resemble taxation, and the power exercised over private property is sometimes ascribed to the right of eminent domain. *Talbot* v. *Hudson*, 16 Gray, 417, 428. But there is no taking for public use. It is a proceeding of a semi-judicial nature, in which all those whose lands are to be affected are joined as parties. The action taken therein relates to that in which all have a common interest, or in reference to which all are affected by a common necessity. That common necessity is met, and that common interest secured, by subjecting the individual rights to such modifications as the commissioners may judge to be most practicable to secure the best advantage of all. The natural conflict of rights which would arise if each were left to insist on his own, regardless of consequences to others, is avoided by the intervention of this common agent, by whom they are adjusted with due regard to the interests of all as well as of each. For this purpose they are treated as owners of a common property. *Coomes* v. *Burt*, 22 Pick. 422.

The commissioners have no power to affect any lands of persons not

joined as parties in the proceedings, or to assess upon them any part of the expenses. *Sherman* v. *Tobey*, 3 Allen, 7; *Day* v. *Hulburt*, 11 Met. 321. They are, indeed, authorized to open flood-gates of any mill, or make needful passages through or round any dam, or erect a temporary dam on land of any person, though not a party, and maintain the same as long as necessary "for the purpose of obtaining a view of the premises, or of the more convenient or expeditious removal of obstructions." This is not sequestration, but simply a temporary subjection of the privileges of the mill-owner to the necessities which pertain to the exercise of the general power of regulation over the common rights in the entire stream. It accords with the general principle that the particular right of the individual must yield to the greater right, in the same degree, of the whole.

We find in these statutes no exercise of the right of eminent domain, or of the governmental power of taxation. That which, in form, resembles taxation, is, in effect, only an equitable apportionment, among the parties to the proceedings, of the expenses incurred for their common benefit, by their common agents, or rather by the officers of the tribunal charged by the legislature with the conduct of those proceedings which it authorizes for the execution of its wholesome and reasonable orders and laws in that behalf made and provided. It differs from assessments for drains (*Hildreth* v. *Lowell*, 11 Gray, 345), sidewalks (*Lowell* v. *Hadley*, 8 Met. 180), and street "betterments" (*Jones* v. *Aldermen of Boston*, 104 Mass. 461), not only in the manner in which all persons to be assessed are required to be made parties to the whole proceedings, but also and especially in the absence of any public use or service as the leading and direct object of the expenditure for which it is made.

"The good and welfare of this Commonwealth," for which "reasonable orders, laws, statutes, and ordinances" may be made, by force of which private rights of property may be affected, is a much broader and less specific ground of exercise of power than "public use" and "public service." The former expresses the ultimate purpose, or result sought to be attained by all forms of exercise of legislative power over property. The latter imply a direct relation between the primary object of an appropriation and the public enjoyment. The circumstances may be such that the use or service intended to be secured will practically affect only a small portion of the inhabitants or lands of the Commonwealth. The essential point is, that it affects them as a community, and not merely as individuals. Cooley, Const. Limit. 531. This distinction is indicated, and recognized as vital, in *Talbot* v. *Hudson*, 16 Gray, 417, 423, 425, and it lies at the foundation of the decision in that case. There was a taking of private property, by direct authority of the legislature, which the court held to have been intended as an exercise of the constitutional power to take private property for public use, rendering compensation. The main question was, whether the relief of an extensive territory of valuable lands, in a thickly settled agricultural region, from the nuisance of flooding by the waters of a

stream, caused by a single dam below, constituted such an object of public concern as to justify the exercise of the power by removing the dam. The court recognized the difficulty that, so far as the removal of the dam benefited each land-owner, it was a private use which would not justify the exercise of that power. But the obstruction in the stream injuriously affected "so large a territory, situated in different towns, and owned by a great number of persons," as to give it the character of a public nuisance, the removal of which "would seem to come fairly within the scope of legislative action." While we do not assent to the suggestions in that opinion, that the general provisions of law for the regulation of mills and the improvement of meadows are based upon the constitutional power to appropriate private property under the right of eminent domain, we accord fully with the judgment rendered and the general principle upon which it is founded.

The same principle is developed in *Dorgan* v. *Boston*, 12 Allen, 223, and *Dingley* v. *Boston*, 100 Mass. 544. The public use, in one case, was in the improvement of the public streets; in the other, in the remedy for a great public nuisance requiring extraordinary measures for its removal. In both there was a great improvement in the character and value of the new buildings erected upon the territory affected, and thus a promotion of the general prosperity and public welfare. This benefit to the community was anticipated, and was doubtless one of the influential inducements to the adoption of the statutes giving authority for the improvements. It was not in this general advantage, however, that the justification, under the Constitution, for such an exercise of power was found, but in the direct and special public service.

In *Hazen* v. *Essex Co.*, 12 Cush. 475, before referred to, there was a distinct and clear public service declared as the object of the Act conferring the power to destroy private property, to wit, the improvement of the navigation of Merrimack River. The case does not rest upon the general benefit from the establishment of mills.

Without such public use or service expressly declared, or implied from the nature of the object of the expenditure, taxation in any form cannot be justified. *Lowell* v. *Oliver*, 8 Allen, 247; *Freeland* v. *Hastings*, 10 Allen, 570; *Dorgan* v. *Boston*, 12 Allen, 223, 240; *Merrick* v. *Amherst*, Ib. 500.

In *Morse* v. *Stocker*, 1 Allen, 150, it was held that an assessment for the expense of a sidewalk in a street which was so by dedication only, and in which no right of way was secured to the party assessed, or to the public by its acceptance or location by the proper authorities, was unconstitutional and void.

There is no public use or public service declared in the statute now under consideration, and we are of opinion that none can be found in the purposes of its provisions. By its terms the proceeds of the bonds, thereby authorized, are to be expended in loans to persons who are or may become owners of land in Boston, "the buildings upon which were burned by the fire in said Boston on the ninth and tenth days of

November," 1872. The ultimate end and object of the expenditure, as indicated by the provisions of the statute itself, is "to insure the speedy rebuilding on said land."

The general result may indeed be thus stated collectively, as a single object of attainment; but the fund raised is intended to be appropriated distributively, by separate loans to numerous individuals, each one of which will be independent of any relation to the others, or to any general purpose, except that of aiding individual enterprise in matters of private business. The property thus created will remain exclusively private property, to be devoted to private uses at the discretion of the owners of the land; with no restriction as to the character of the buildings to be erected, or the uses to which they shall be devoted; and with no obligation to render any service or duty to the Commonwealth, or to the city, — except to repay the loan, — or to the community at large or any part of it. If it be assumed that the private interests of the owners will lead them to re-establish warehouses, shops, manufactories, and stores, and that the trade and business of the place will be enlarged or revived by means of the facilities thus provided, still these are considerations of private interest, and, if expressly declared to be the aim and purpose of the Act, they would not constitute a public object, in a legal sense.

As a judicial question the case is not changed by the magnitude of the calamity which has created the emergency; nor by the greatness of the emergency, or the extent and importance of the interests to be promoted. These are considerations affecting only the propriety and expediency of the expenditure as a legislative question. If the expenditure is, in its nature, such as will justify taxation under any state of circumstances, it belongs to the legislature exclusively to determine whether it shall be authorized in the particular case; and however slight the emergency, or limited or unimportant the interests to be promoted thereby, the court has no authority to revise the legislative action.

On the other hand, if its nature is such as not to justify taxation in any and all cases in which the legislature might see fit to give authority therefor, no stress of circumstances affecting the expediency, importance, or general desirableness of the measure, and no concurrence of legislative and municipal action, or preponderance of popular favor in any particular case, will supply the element necessary to bring it within the scope of legislative power.

The expenditure authorized by this statute being for private and not for public objects, in a legal sense, it exceeds the constitutional power of the legislature; and the city cannot lawfully issue the bonds for the purposes of the Act.

This discussion has, for obvious reasons, taken a somewhat wider range than was required for the decision of the case immediately before us. We have purposely confined it to the consideration of judicial decisions and utterances in Massachusetts; because the question is of legislative power under the Constitution of this Commonwealth. The

recent decision of the Supreme Judicial Court of Maine, however, in the case of *Allen* v. *Jay*, 60 Maine, 124, to which we are referred, is of especial significance and importance from the similarity in the organic law of the two States, and the almost exact identity of the question presented by the facts. It fully sustains the conclusions to which we have been led in this case.

Demurrer overruled. Injunction ordered.[1]

[1] But see *Gillan* v. *Gillan*, 55 Pa. 430 (1867). Compare 1 Hare, Am. Const. Law, 283.

In *Kingman et al. Petrs.* 153 Mass. 566, 577 (1891), the court (CHARLES ALLEN, J.) said: "The constitutionality of the St. of 1889, c. 439, is attacked by the different respondents on several grounds. The first objection is, that the object in view, which is to provide for the disposal of sewage from a number of cities and towns, is not of such a character that the legislature can properly appropriate money in furtherance of it from the treasury of the Commonwealth. . . . Assuming that the respondents may so far represent the general public as to be entitled to raise this question, it is plain that the objection can hardly be considered as of great weight, since the decision in *Talbot* v. *Hudson*, 16 Gray, 417. It was there held, on the greatest consideration, that the legislature might provide for the removal of a dam, by means of which a large tract of land situated in different towns, and owned by a large number of persons, was overflowed, and might provide for compensation out of the treasury of the Commonwealth to persons whose property was thereby injured; the court saying, at page 425, 'It has never been deemed essential that the entire community or any considerable portion of it should directly enjoy or participate in an improvement or enterprise in order to constitute a public use, within the true meaning of these words as used in the Constitution.' The improvement which the statute of 1889 is designed to effect stands far stronger, as an object of general public utility, than that which was the subject of consideration in *Talbot* v. *Hudson*. It has for its purpose to promote the public health, to avert disease, and to prevent nuisances. The territory to be benefited according to the Report of the State Board of Health, to which we are referred, includes an area of one hundred and thirty square miles, and contains one sixth of the population of the State. The legislature has declared that a system of sewerage to accommodate this territory and this portion of the people of the State is an object of public utility, such as warrants the expenditure or the advancement for the time being of money from the treasury of the Commonwealth. It is impossible for us to say to the contrary. The argument is made to us, that, if such an expenditure of public money is warranted, the legislature might authorize an appropriation for the benefit of a single town, and construct and maintain forever a local improvement for such town. But in determining the power of the legislature in a case like this, little assistance is obtained by imagining extreme instances of possible abuse of the power. *Norwich* v. *County Commissioners*, 13 Pick. 60, 62. Nor need we undertake to define how far the legislature might properly go, in a special emergency, in giving direct assistance to a particular town. Those curious in prosecuting such an inquiry may find examples of what has been done in the past in the St. of 1874, c. 325, providing for the payment of one hundred thousand dollars towards the expenses of rebuilding roads and bridges in the town of Williamsburg, which had been destroyed by a flood; and, in earlier times, in the grants to Boston of £600 in 1752 for the relief of the poor, on account of the small-pox, and of £1,100 in 1760, on account of losses by fire. Prov. St. 1751–52, c. 19, 3 Prov. Laws (State ed.), 606. Prov. St. 1760–61, c. 35, 4 Prov. Laws (State ed.), 440. See also *Moore* v. *Sanford*, 151 Mass. 285; *Lowell* v. *Oliver*, 8 Allen, 247, 255. It is enough for us to say that no valid objection lies to the St. of 1889 on this ground."

The last Province statute referred to in the foregoing opinion (4 Prov. Laws, State ed. 440), is found in one of the editor's notes, and is as follows: "Chap. 11. 'June

LOAN ASSOCIATION *v.* TOPEKA.

SUPREME COURT OF THE UNITED STATES. 1874.

[20 *Wall.* 655.]

ERROR to the Circuit Court for the District of Kansas.

The Citizens' Savings and Loan Association of Cleveland brought their action in the court below, against the city of Topeka, on coupons for interest attached to bonds of the city of Topeka.

The bonds on their face purported to be payable to the King Wrought-Iron Bridge Manufacturing and Iron-Works Company, of Topeka, to aid and encourage that company in establishing and operating bridge shops in said city of Topeka, under and in pursuance of section twenty-six of an Act of the Legislature of the State of Kansas, entitled "An Act to incorporate Cities of the Second Class," approved February 29, 1872; and also of another "Act to authorize Cities and Counties to issue Bonds for the purpose of building Bridges, aiding Railroads, Water-power, or other Works of Internal Improvement," approved March 2, 1872.

The city issued one hundred of these bonds for $1,000 each, as a donation (and so it was stated in the declaration), to encourage that company in its design of establishing a manufactory of iron bridges in that city.

The declaration also alleged that the interest coupons first due were paid out of a fund raised by taxation for that purpose, and that after this payment the plaintiff became the purchaser of the bonds and the coupons on which suit was brought for value.

A demurrer was interposed by the city of Topeka to this declaration.

The section of the Act of February 29, on which the main reliance was placed for the authority to issue these bonds, reads as follows:

"SECTION 76. The council shall have power to encourage the establishment of manufactories and such other enterprises as may tend to develop and improve such city, either by direct appropriation from the general fund or by the issuance of bonds of such city in such amounts as the council may determine; *Provided*, That no greater amount than one thousand dollars shall be granted for any one purpose, unless a majority of the votes cast at an election called for that purpose shall

19, 1760. In the House of Representatives — In answer to the prayer of the petition of the selectmen of the town of Boston, Voted that the sum of eleven hundred pounds be granted and paid out of the public treasury of this Province to the town of Boston, in lieu of any abatement on their proportion of the Province tax, on account of their losses by the fire on the twentieth of March last; the same to be applied to the abatement of the taxes of the particular persons who have sustained losses by said fire, in such proportion as the assessors of said town shall determine. In Council, read and concurred. Consented to by the Lieutenant-Governor.' — *Council Records*, vol. xxiii., page 463."

The value of the material preserved by the learned editor of these volumes of the Massachusetts Province Laws is not as widely known as it should be. — ED.

authorize the same. The bonds thus issued shall be made payable at any time within twenty years, and bear interest not exceeding ten per cent per annum."

It was conceded that the steps required by this Act prerequisite as to issuing the bonds were regular, as were also the other details, and that the language of the statute was sufficient to justify the action of the city authorities, if the statute was within the constitutional competency of the legislature.

The single question, therefore, for consideration raised by the demurrer was the authority of the Legislature of the State of Kansas to enact this part of the statute.

The court below denied the authority, placing the denial on two grounds: —

1st. That this part of the statute violated the fifth section of Article XII. of the Constitution of the State of Kansas; a section in these words: —

"SECTION 5. Provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power."

[The argument here was that the section of the Act of February 29, 1872, conferring the power to issue bonds, contained no restriction as to the amount which the city might issue to aid manufacturing enterprises, and that the failure of the legislature to limit and restrict the power so as to prevent abuse, violated the fifth section of Article XII. of the Constitution above referred to.]

2d. That the Act authorized the towns and other municipalities to which it applied, by issuing bonds or lending its 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 were not of a public character; that this was a perversion of the right of taxation, which could only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The court below accordingly, sustaining the demurrer, gave judgment in favor of the defendant, the city of Topeka; and to its judgment this writ of error was taken.

Mr. Alfred Ennis, for the plaintiff in error. *Messrs. Ross*, *Burns*, and *A. L. Williams*, *contra*.

MR. JUSTICE MILLER delivered the opinion of the court.

Two grounds are taken in the opinion of the circuit judge and in the argument of counsel for defendant, on which it is insisted that the section of the statute of February 29, 1872, on which the main reliance is placed to issue the bonds, is unconstitutional.

The first of these is, that by section five of article twelve of the Constitution of that State it is declared that provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts,

and loaning their credit, shall be so restricted as to prevent the abuse of such power.

The argument is that the statute in question is void because it authorizes cities and towns to contract debts, and does not contain any restriction on the power so conferred. But whether the statute which confers power to contract debts should always contain some limitation or restriction, or whether a general restriction applicable to all cases should be passed, and whether in the absence of both the grant of power to contract is wholly void, are questions whose solution we prefer to remit to the State courts, as in this case 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 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 Pennsylvania State, 147, 167; *Hanson* v. *Vernon*,

27 Iowa, 28; *Allen* v. *Inhabitants of Jay*, 60 Maine, 127; *Lowell* v. *Boston*, Massachusetts (MS.); *Whiting* v. *Fon du Lac*, 25 Wisconsin, 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 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 Wallace, 689; *People* v. *Salem*, 20 Michigan, 452; *Jenkins* v. *Andover*, 103 Massachusetts, 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. *Fon du Lac*, 25 Wisconsin, 188; Cooley on Constitutional Limitations, 129, 175, 487; Dillon on Municipal Corporations, § 587.[1]

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 pervading 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 *M'Culloch* v. *The State of Maryland*, 4 Wheaton, 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 Pennsylvania State, 104; see also *Pray* v. *Northern Liberties*, 31 Id. 69; *Matter of Mayor of New York*, 11 Johnson, 77; *Camden* v. *Allen*, 2

[1] "To determine, then, the extent of the law-making power, we have only to look to the provisions of the Constitution. It has, and can have, no other limit than such as is there prescribed; and the doctrine that there exists in the judiciary some vague, loose, and undefined power to annul a law, because in its judgment it is 'contrary to natural equity and justice,' is in conflict with the first principles of government, and can never, I think, be maintained. I am aware that some eminent judges, when the question was not before them, have expressed a belief in the existence of such a power; but no court has ever, I believe, assumed to declare an explicit enactment of the legislature void on that ground." — SELDEN, J., in *Wynehamer* v. *The People*, 13 N. Y. 430 — ED.

Dutcher, 398; *Sharpless* v. *Mayor of Philadelphia*, *supra*; *Hanson* v. *Vernon*, 27 Iowa, 47; *Whiting* v. *Fon du Lac*, 25 Wisconsin, 188, 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."

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. . . . [Here follows a statement of *Allen* v. *Jay*, 60 Me. 124; *Lowell* v. *Boston*, 111 Mass. 454; *Curtis* v. *Whipple*, 24 Wisc. 350; and *Whiting* v. *Fon du Lac*, 25 Wisc. 188.]

These cases are clearly in point, and they assert a principle which meets our cordial approval. . . . *Judgment affirmed.*[1]

[1] The same point was passed upon in *Cole* v. *La Grange*, 113 U. S. (1884). GRAY, J., for the court, said: "In *Loan Association* v. *Topeka*, 20 Wall. 655, bonds of a city,

CLIFFORD, J., gave a dissenting opinion, in the course of which he said: "Courts cannot nullify an Act of the State Legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the Constitution, where neither the terms nor the implications of the instrument disclose any such restriction. *Walker* v. *Cincinnati*, 21 Ohio State, 41. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the Constitution and the people, and convert the government into a judicial despotism. *Golden* v. *Prince*, 3 Washington's Circuit Court, 313. Subject to the Federal Constitution the legislature of the State possesses the whole legislative power of the people, except so far as the power is limited by the State Constitution. *Bank* v. *Brown*, 26 New York, 467; *People* v. *Draper*, 15 Id. 532. . . . Unwise laws and such as are highly inexpedient and unjust are frequently passed by legislative bodies, but there is no power vested in a Circuit Court nor in this Court, to determine that any law passed by a State legislature is void if it is not repugnant to their own Constitution nor the Constitution of the United States.

issued, as appeared on their face, pursuant to an Act of the Legislature of Kansas, to a manufacturing corporation, to aid it in establishing shops in the city for the manufacture of iron bridges, were held by this court to be void, even in the hands of a purchaser in good faith and for value. A like decision was made in *Parkersburgh* v. *Brown*, 106 U. S. 487. The decisions in the courts of the States are to the same effect. *Allen* v. *Jay*, 60 Maine, 124; *Lowell* v. *Boston*, 111 Mass. 454; *Weismer* v. *Douglas*, 64 N. Y. 91; *In re Eureka Co.*, 96 N. Y. 42; *Bissell* v. *Kankakee*, 64 Illinois, 249; *English* v *People*, 96 Illinois, 566; *Central Branch Union Pacific Railroad* v. *Smith*, 23 Kansas, 745. We have been referred to no opposing decision. . . . It is averred in the answer, and admitted by the demurrer, that the La Grange Iron and Steel Company, to which the bonds were issued, was 'a private manufacturing company, formed and established for the purpose of carrying on and operating a rolling-mill,' and 'was a strictly private enterprise, formed and prosecuted for the purpose of private gain, and which had nothing whatever of a public character.' The ordinance referred to shows that the mill was to manufacture railroad iron; but that is no more a public use than the manufacture of iron bridges, as in the Topeka case, or the making of blocks of stone or wood for paving streets. There can be no doubt, therefore, that the Act of the Legislature of Missouri is unconstitutional, and that the bonds, expressed to be issued in pursuance of that Act, are void upon their face."

In *Burlington* v. *Beasley*, 94 U. S. 310 (1876), in error to the United States Circuit Court for Kansas, the question was as to the validity of certain bonds issued under a statute to aid an individual "in the construction and completion, and to furnish the motive-power of a steam custom grist-mill." In sustaining a judgment in favor of the holder of the bonds, HUNT, J., for the court, said: "The statute of Kansas upon the subject of grist-mills is based upon the idea, and, indeed upon the declaration, that all grist-mills are public institutions. In c. 65 of the statute of 1868, p. 573, it is thus enacted: '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.' Regulation is then made for the order in which customers shall be attended to (first come first served), the liability of the miller, his duty in assisting to load or unload, and that the rates of toll shall be conspicuously posted.

"Under our recent decision in *Munn* v. *Illinois*, 94 U. S. p. 112, and the other cases upon kindred subjects, it would be competent to the Legislature of Kansas to regulate

NORTH DAKOTA *v.* NELSON COUNTY.

SUPREME COURT OF NORTH DAKOTA. 1890.

[1 *No. Dak.* 88.]

THIS is a proceeding brought in the Supreme Court by application made for leave to file an information in order to procure an injunction restraining defendant from issuing seed-grain bonds. No briefs were filed.

George F. Goodwin, Attorney-General, and *Burke Corbett*, for the motion. *M. N. Johnson*, State's Attorney, and *F. R. Fulton*, opposed.

WALLIN, J. . . . The objects and purposes contemplated by the statute may be readily gathered from the above extracts, and they are clear and unmistakable in their character. The legislature, by this enactment, so far as it can do so, has clothed the several counties of the State where there has been a preceding crop failure with authority to lend their aid in procuring seed-grain to such of their citizens as are engaged in farming pursuits, who make it appear, in manner and form as detailed by the law, that they are unable to procure such seed-grain by any other means. The law empowers the counties to lend their aid out of money to be obtained by the issue and sale of county bonds, such bonds to be paid, principal and interest, from funds obtained by means of a general tax levy upon all of the taxable property situated within the counties that issue such bonds. Two features of this statute stand out in conspicuous prominence. First. All benefits obtainable under the Act are confined to persons engaged in the pursuit of farming, and among farmers only those who propose to continue the business of farming after the aid in contemplation has been received by them. Second. No part of the fund is intended to be used in support or aiding such indigent persons as have already become a county charge, *viz.*, paupers.

The objections which may be made to the validity of this statute are twofold: First, it may be claimed that the tax authorized by the statute is not for a public purpose, hence not a valid tax; second, it may be contended that, under § 185 of the State Constitution, counties are expressly forbidden to make donations, or lend their aid to either corporations or individuals, hence that the proposed aid is unconstitutional, as repugnant to said section. The courts of this country, and of all countries where constitutional liberty exists, agree with the elementary

the toll to be taken at these mills. It is a reasonable construction of this statute to hold that aid to this mill is aid of a public work within its meaning, and that the construction and equipment of a steam grist-mill was an internal improvement. The case of *Loan Association* v. *Topeka*, 20 Wall. 661, will adjudge these bonds to be legal. The point is there expressly made that bonds, when issued for a public purpose, a public use, which it is the right and the duty of the State government to assist, are valid. The issue we are considering falls within this definition." — ED.

writers upon the science of government that it is essential to the validity of a tax that it be laid for a public purpose. Difficulty has frequently arisen in discriminating between public and private objects; but where the object is primarily to foster private enterprises, and the only benefit to be derived by the public is incidental and secondary, the tax will be annulled by the courts as an abuse of the legislative prerogative. In the first instance the duty devolves upon the legislative branch of the government to determine whether a proposed tax is or is not for a public purpose; and courts are loath to interpose and declare any tax unlawful, and will only do so in case of a palpable disregard of the wise limitations, express and implied, restricting the power of taxation. But where the legislature assumes, in the guise of taxation, to compel A to advance his private means to aid B in the prosecution of a purely private enterprise, the courts will not hesitate to perform the duty of declaring such tax void, as subversive of fundamental and vested individual rights, and will do so even in cases where there is no express constitutional inhibition. The power of confiscation does not exist in the legislature. The cases cited below are but a few of the numberless cases which have applied these principles to statutes imposing pretended taxes. *Association* v. *Topeka*, 20 Wall. 655; *Bank* v. *City of Iola*, 2 Dill. 353; *City of Parkersburgh* v. *Brown*, 106 U. S. 487, 1 Sup. Ct. Rep. 442; *Cole* v. *City of La-Grange*, 113 U. S. 1, 5 Sup. Ct. Rep. 416; *Allen* v. *Jay*, 60 Me. 124; *Lowell* v. *Boston*, 111 Mass. 453; *State* v. *Osawkee Tp.*, 14 Kan. 422; *Coates* v. *Campbell* (Minn.), 35 N. W. Rep. 366; Cooley, Const. Lim. (marg.) p. 487; Cooley, Tax'n (2d ed.), pp. 55, 126.

Under these authorities, the test to be applied to the seed-grain statute is this: Is the tax provided for in the statute laid for a public purpose? If this question is answered in the negative, the statute must be declared null and void, without reference to § 185 of the State Constitution, to which the attention of the court has been particularly directed. The statute makes provision for levying a general tax, in counties issuing the bonds, for the benefit of a numerous body of citizens, who, without fault of theirs, and solely by reason of successive crop failures, are now reduced to extremities, and are in fact impoverished to such an extent that they are, for the present time, wholly without the ability to obtain the grain necessary for seeding the lands from which they derive the necessaries of life. It is agreed on all sides that this class of citizens, having already exhausted their private credit, must have friendly aid from some source in procuring seed-grain, if they put in crops this year. The legislature, by this statute, has devised a measure which seems well adapted to meet the exigency, and promises to give the needed relief, with little prospect of ultimate loss to the county treasuries. It is reasonable to anticipate that the beneficiaries of the Act will be enabled to tide over their present embarrassments, and, through the aid granted them by this statute, a wide-spread calamity, both public and private, will be averted. The crisis in the

development of the State which renders some measure of wholesale relief imperatively necessary is fully recognized by all well-informed citizens of the State, and this court will be justified in taking judicial notice of the existing status. The stubborn fact exists that a class of citizens, numbered by many thousands, is in such present straits from poverty, that unless succored by some comprehensive measure of relief they will become a public burden, in other words, paupers, dependent upon counties where they reside for support. It is to avert such a widespread disaster that the seed-grain statute was enacted, and it should be interpreted in the light of the public danger which was the occasion of its passage. "The support of paupers, and the giving of assistance to those who, by reason of age, infirmity, or disability are likely to become such, is, by the practice and the common consent of civilized countries, a public purpose." Cooley, Tax'n (2d ed.), pp. 124, 125. "The relief of the poor — the care of those who are unable to care for themselves — is among the unquestioned objects of public duty." Opinion of Brewer, J., in *State* v. *Osawkee Tp.*, 14 Kan. 424. If the destitute farmers of the frontier of North Dakota were now actually in the almshouses of the various counties in which they reside, all the adjudications of the courts, State and Federal, upon this subject could be marshalled as precedents in support of any taxation, however onerous, which might become necessary for their support. But is it not competent for the legislature, representing the tax-payers, in the exercise of its discretion, and within the limits of county indebtedness prescribed by the State Constitution to clothe county commissioners with authority to be exercised at their discretion, to make small loans, secured by prospective crops, to those whose condition is so impoverished and desperate as to reasonably justify the fear that, unless they receive help, they and their families will become a charge upon the counties in which they live?

We have carefully examined the authorities above cited, and many others of similar import, and while fully assenting to the principles enunciated by the cases, *viz.*, that all taxation must be for a public purpose, we do not, with the single exception of the Kansas case, regard them as parallel cases, and applicable to the question presented in the case at bar. As we view the matter, the tax in question is for a public purpose, *i. e.*, a tax for the "necessary support of the poor." The case of *State* v. *Osawkee Tp.*, *supra*, asserts a doctrine which would defeat the tax in question. This court has great respect for the court which promulgated that decision, and the most sincere admiration for the distinguished jurist now upon the Supreme bench of the nation, who wrote the opinion in that case. Nevertheless, we cannot yield our assent to the reasoning of the case, leading to the conclusion that a loan of aid to an impoverished class, not yet in the poorhouse, is necessarily a tax for a private purpose. In our view, it is not certain, or even probable, in the light of subsequent experience in the West, that the court of last resort in the State of Kansas would enunciate

the doctrine of that case at the present day. The decision was made fifteen years ago. While the fundamental principles which underlie legislation and taxation have not changed in the interval, it is also true that the development of the Western States has been attended with difficulties and adverse conditions which have made it necessary to broaden the application of fundamental principles to meet the new necessities of those States. Under the stress of adversity peculiar to the condition of the frontier farmer, there has come to be an expansion of the legal meaning of the term "poor" sufficient to embrace a class of destitute citizens who have not yet become a public charge. The main features of the seed-grain statute are neither new nor novel. It was borrowed from territorial legislation, and long prior to that, the State of Minnesota, in aid of agricultural settlers upon its western frontier, enacted a series of statutes which are open to every criticism which can be made upon the statute under consideration. Chapter 43 Laws Dak. 1889. See also pp. 1024–1030, Gen. St. Minn. 1878.

The Legislature of Minnesota has frequently, and by a variety of laws, extended aid to the frontier farmers of that State, who, far from being paupers, were yet reduced to extremities, by reason of continued crop failures resulting from hailstorms, successive seasons of drought, and from the ravages of grasshoppers. Under one law, towns are authorized to vote a tax to defray the expense of destroying grasshoppers; under another statute, the governor, State auditor, and State treasurer were authorized to borrow $100,000 on State bonds, to be issued by them, and the proceeds were to be expended in the purchase of seed-grain for the needy farmers. Again, and at the same session, the same State officials were empowered to issue additional bonds to the same amount, to pay a debt contracted for a similar purpose, upon warrants of the State auditor. § 6 of the Minnesota Act of 1878, c. 93, provides as follows: "The credit of the State is hereby pledged to the payment of the interest and principal of the bonds mentioned in this Act, as the same may become due." By another section the State auditor is authorized and required to levy an annual tax necessary to meet the interest and principal of the debt created by these bonds. Many of the features of the two seed-grain statutes passed at the first session of the legislature of this State are borrowed from Minnesota. In principle, the legislation of the two States is identical. The aid extended is furnished in the form of a loan to individual farmers, secured on their crops, but to be met primarily by taxation. The destitute communities of farmers who were thus assisted in a neighboring State were enabled thereby to tide over their temporary necessities, and are now self-supporting.

This review of legislation in aid of destitute farmers will serve to illustrate the well-known fact that legislation under the pressure of a public sentiment, born of stern necessity, will adapt itself to new exigencies, even if in doing so a sanction is given to a broader application of elementary principles of government than have before been recog-

nized and applied by the court in adjudicated cases. It is the boast of the common law that it is elastic, and can be adjusted to the development of new social and business conditions. Can a statute enacted for such broadly humane and charitable purposes be annulled by another branch of the government as an abuse of legislative discretion? We think otherwise. Great deference is due from the courts to the legislative branch of the State government, and it is axiomatic that in cases of doubt the courts will never interfere to annul a statute. Cooley, Const. Lim. (marg.) p. 487.

It will be presumed that the legislature, in passing the seed-grain statute, acted upon the fullest knowledge of the necessities of the situation, and also presumed that they have passed the statute after due deliberation and with the clearest apprehension of the scope and purpose of the language used in § 185 of the State Constitution. That section is not only restrictive upon counties, but it is also permissive. It permits counties to lend aid for "the necessary support of the poor." To our mind, the restrictive words of that section were intended to prevent the loan of aid either to individuals or corporations, for the purpose of fostering business enterprises, either of a public or private nature; but that the people who adopted the Constitution, as well as those who framed the instrument, expressly intended by the language of that section to grant a power affirmatively to the municipal corporations named in § 185, to lend their aid and make donations for the "necessary support of the poor." The attention of the court has been directed to the constitutions of nineteen of the States, in which the language of § 185 is used *verbatim*, except only that in the States of North and South Dakota the words above quoted are interpolated. Why was this peculiar language introduced into the constitutions of North and South Dakota, when nothing of the kind was found in that of the other seventeen States? Why did not the conventions which formed the organic law for North and South Dakota simply copy the language which, with this exception, is borrowed from the other constitutions, without inserting the excepting clause under consideration? To our mind, the answer to these questions is found in the peculiar and alarming condition of the people of Dakota Territory in the year 1889, when the two Dakotas assumed the responsibilities of statehood. Such conditions had not before existed, and hence the constitutions of other States had made no provisions to meet such necessities. When the two States formed and adopted their constitutions the fact was well known and recognized by the people of Dakota that the condition of many farming communities was such that some comprehensive measure for their relief was an imperative necessity. In such a conjuncture the words were interpolated into § 185 of the Constitution, which permit counties to loan their aid for the "necessary support of the poor." No constitutional grant of power was necessary to give the new governments authority to provide for the support of paupers in the poorhouses. That power is inherent, and exists in all governments as

among their implied powers and duties. By universal consent, taxes are valid when laid for the support of paupers, or those likely to become paupers. There was no necessity and no reason for inserting a provision in the State constitutions of North and South Dakota authorizing counties to loan their aid to maintain the almshouses. It would be absurd to assume that the framers of the constitutions and the people who adopted them intended by this provision to enable local municipalities to issue and sell bonds, and loan the proceeds to the inmates of the poorhouses; yet the power to loan aid in "support of the poor" is given. In our opinion, this power is conferred in the organic law expressly to meet the exigencies of the situation then existing, and that it is our duty to give it that effect. We believe, and so hold, that the class referred to in the exception contained in § 185 of the State Constitution is the poor and destitute farmers of the State, and that the first legislature which met after the State was admitted, has, by the seed-grain statute, put a proper construction upon the language in question. We therefore refuse to grant the writ applied for, and hold that the seed-grain statute is a valid enactment.[1] . . .

PERRY *v.* KEENE.

SUPREME COURT OF NEW HAMPSHIRE. 1876.

[56 *N. H.* 514.[2]]

Sargent and *Chase* and *Hardy*, for the plaintiffs. *Lane*, for the defendants. *C. H. Burns*, for the Manchester & Keene Railroad.

LADD, J. "Any town may, by a two-thirds vote, raise by tax or loan such sum of money as they shall deem expedient, not exceeding five per cent of the valuation thereof, . . . and appropriate the same to aid in the construction of any railroad in this State, in such manner as they shall deem proper." Gen. Stats., ch. 34, sec. 16. In accordance with the provisions of this statute, the inhabitants of the city of Keene have voted a subsidy equal to three per cent of their last property valuation, to aid in the construction of that part of the Manchester & Keene Railroad located between Greenfield and Keene. This sum, amounting to upwards of $130,000, is called a "gratuity" in the vote. It is, in fact, an appropriation of that amount, to be raised by a public

[1] In *State* v. *Osawkee Township*, 14 Kans. 418 (1875), in a similar case the court (BREWER, J.) held that provision for "the poor" must be limited to paupers, that the statute in question merely secured loans to persons temporarily embarrassed, that there was no public purpose, and that the argument that the prevention of pauperism was a public purpose is "dangerous and unsound." The cases of *Loan Assoc.* v. *Topeka*, 20 Wall. 655; *Allen* v. *Jay*, 60 Me. 124; and *Lowell* v. *Boston*, 111 Mass. 454, were cited. See *Curtis* v. *Whipple*, 18 Wis. 350 (1869). — ED.

[2] The statement of facts is omitted. — ED.

tax, to the purpose of building a railroad, with no equivalent except the expected benefits to be derived from the opening of such railroad. The plaintiffs, who are citizens and large tax-payers in Keene, contend that the legislature, in passing the Act quoted above, transcended the limits of their constitutional power; that the action of the city in voting the gratuity is therefore without warrant of law; and they ask for an injunction to prevent the issuing of bonds or the levy of taxes in accordance with said vote.

The question we are thus called upon to consider is an important one, not only in its legal aspects, but in its practical bearing upon the rights and interests of these parties, as well as others in a similar situation, both tax-payers and holders of municipal bonds heretofore issued for a like purpose under the authority of the Act in question.

In one view, the duty of the court is extremely plain and simple; in another, it is very delicate, and not free from difficulty. We have not to inquire into the policy of the law, or, if the purpose be admitted to be public, whether the supposed public good to be attained was sufficient to justify the legislature in conferring upon two-thirds of the legal voters of a town the power to devote not only their own property but that of the unwilling other third to such a purpose.

All mere questions of expediency, and all questions respecting the just operation of the law, within the limits prescribed by the Constitution, were settled by the legislature when it was enacted. The court have only to place the statute and the Constitution side by side, and say whether there is such a conflict between the two that they cannot stand together. If, upon such examination, there appears to be a conflict, and if the conflict is so clear and palpable as to leave no reasonable doubt that the legislature have undertaken to do what they were prohibited from doing by the Constitution, the court cannot avoid the high though unwelcome duty of declaring the statute inoperative, because the Constitution, and not the statute, is the paramount law; and the court must interpret and administer all the laws alike.

The learned counsel for the plaintiffs have not pointed out the particular part or clause of the Constitution which they say is violated by this statute. Their position, however, is, that the Act authorizes the taking of private property, under the name and guise of taxation, and appropriating it to a use that is really and essentially private; and that such a proceeding, being manifestly at war with those fundamental principles upon which the right of the citizen to be secure in the possession and enjoyment of his property depends, is in violation of all those provisions in the Constitution established to guard and perpetuate that right. The proposition assumes this form; — the legislature are forbidden by the Constitution to exact money from the people of the State under the name of taxes, and apply it to a private purpose: this statute authorizes the Act thus forbidden, and is therefore void. The first part of this proposition is admitted by the defendants, and so we need not now inquire in what particular provision of the Constitution

the inhibition is to be found. Whether it rests upon the commonly received meaning and definition of the terms taxes, rates, assessments, &c., used in the Constitution, and the general guaranties of private property contained in the bill of rights; or whether, by a fair construction of art. 5, the levying of all taxes, municipal as well as State, is limited to the purposes therein named, — *viz.*, for the public service, in the necessary defence and support of the government of this State, and the protection and preservation of the subjects thereof, — is at present immaterial, inasmuch as we are to start with the assumption that taxes cannot be imposed or authorized by the legislature for any other than a public purpose.

Is the building of a railroad a public purpose? The legislature have undoubtedly passed their judgment on that question, and determined that it is. It is not to be denied that the levying of taxes is specially and entirely a legislative function, and the court are not to encroach upon the province of a co-ordinate branch of the government in the exercise of that power. Where is the line that divides the province of the court from that of the legislature in a matter of this sort? The court is to expound and administer the laws, and there the judicial function and duty end. How much of the question, whether a given object is public, lies within the province of the law, and how much in the domain of political science and statesmanship? When the judge has declared all the law that enters into the problem, how much is still left to the determination of the legislator? Admitting, as has indeed been more than intimated in this State (*Concord Railroad* v. *Greeley*, 17 N. H. 57), that it is for the court finally to determine whether the use is public, — what is the criterion? What are the rules which the law furnishes to the court wherewith to eliminate a true answer to the inquiry? In what respect does the question as presented to the court differ from the same question as presented to the legislature? If the court stop when they reach the borders of legislative ground, how far can they proceed?

If the legislature should take the property of A, or the property of all the tax-payers in the town of A, and hand it over, without consideration, without pretence of any public obligation or duty, to B, to be used by him in buying a farm, or building a house, or setting himself up in business, the case would be so clear that the common-sense of every one would at once say the limits of legislative power had been overstepped by a taking of private property, and devoting it to a private use. That is the broad ground upon which such cases as *Allen* v. *Jay*, 60 Me. 124, *Lowell* v. *Boston*, 111 Mass. 454, and *The Citizens' Loan Association* v. *Topeka Sup. Ct. U. S.* (not yet reported) were decided. And yet, what rule of law do the courts find to aid them in thus revising the judgment of the legislature? Is it not clear that the question they pass upon is the same question as that decided by the legislature, and that they must determine it in the same way the legislature have done, simply by the exercise of reason and judgment? What is it that settles

the character of a given purpose, in respect of its being public or otherwise? It has been said that for the legislature to declare a use public does not make it so — 17 N. H. 57; and the same may certainly be said with equal truth of a like declaration by the court. A judicial christening can no more affect the nature of the thing itself, than a legislative christening. Judging *a priori*, and without some knowledge of the wants of mankind when organized in communities and States, I do not quite understand how it could be predicated of any use, that it is "*per se*" public, as is said by Dixon, C. J., in *Whiting* v. *Sheboygan Railway Co.*, 9 Am. Law Reg. (N. S.) 161. Of light, air, water, etc., the common bounties of providence, it might, indeed, be said beforehand that they are in a very broad sense public; but it is not of such uses that we are speaking. Without knowledge of human nature, knowledge derived from experience and observation of what may be needful for the comfort, well-being, and prosperity of the people of a State advanced in civilization, — and knowledge, gained in the same way, as to what necessary conditions of their welfare will be supplied by private enterprise, and what will go unsupplied without interference by the State, — I do not see how any use could be said to be *per se* public, or how either a legislature, or a court, could form a judgment that would not be founded almost wholly upon theory and conjecture. No one doubts that the building and maintaining of our common highways is a public purpose. Why? Certainly for no other reason than that they furnish facilities for travel, the transmission of intelligence, and the transportation of goods. But why should the State take this matter under its fostering care, imposing upon the people a very great yearly burden in the shape of taxes for their support, any more than many others that might be mentioned, of equal and perhaps greater importance to its citizens? Is it of greater concern to the citizen that he should have a road to travel on, when he desires to visit his neighbor in the next town, or transport the products of his farm or of his factory to market and bring back the commodities for which they may be exchanged, than that he should have a mill to grind his corn, — a tanner, a shoemaker, and a tailor to manufacture his raw material into clothing, wherewith his body may be covered? Doubtless highways are a great public benefit. Without them I suppose the whole State would soon return to its primal condition of a howling wilderness, fit only for the habitation of wild beasts and savages. How would it be if there were no mills for the manufacture of lumber, no joiners or masons to build houses, no manufacturers of cloth, no merchants or tradesmen to assist in the exchange of commodities? These suppositions may appear somewhat fanciful, but they illustrate the inquiry, Why is the building of roads to be regarded as a public service, while many other things equally necessary for the upholding of life, the security of property, the preservation of learning, morality, and religion, are by common consent regarded as private, and so left to the private enterprise of the citizens? The answer to this question, surely, is not to be found in

any abstract principle of law. It is essentially a conclusion of fact and public policy, the result of an inquiry into the individual necessities of every member of the community (which in the aggregate show the character and urgency of the public need), and the likelihood that those necessities will be supplied without interference from the State. Obviously it bears a much closer resemblance to the deduction of a politician, than the application of a legal principle by a judge. Should it be found by experience that no person in the State would, voluntarily and unaided, establish and carry on any given trade or calling, necessary, and universally admitted to be necessary, for the upholding of life, the preservation of health, the maintenance of decency, order, and civilization among the people, would not the carrying on of such necessary trade or calling thereupon become a public purpose, for which the legislature might lawfully impose a tax?

Experience shows that highways would not be built, or, if built, would not be located in the right places with reference to convenient transit between distant points, nor kept in suitable repair, but for the control assumed over the whole matter by the State; and so the State interferes, and establishes a system, and imposes an enormous burden upon the people in the shape of taxes, compelling them to supply themselves with what they certainly need, but need no more than they need shoes or bread, — and nobody ever complained that the interference was unauthorized, or the purpose other than a public one.

Enough has been said to show the delicate nature of the task imposed upon the court when they are called upon to revise the judgment of the legislature in a matter of this description. It is especially delicate for two reasons, — first, because the discretion of the legislature, with respect to the whole subject of levying taxes, is so very large, and their power so exclusive, that it is not always easy to say when the limits of that discretion and power have been passed; and, second, because the rule to be applied is furnished, not so much by the law as by those general considerations of public policy and political economy to which allusion has been made. I do not deny the power and duty of the court, when private rights of property are in question, to settle those rights according to a just interpretation of the Constitution; and the discharge of that duty may involve a revision of the judgment of the legislature upon a question which, like this, partakes more or less of a political character. But before the court can reverse the judgment of the legislature and the executive, and declare a statute levying or authorizing a tax to be inoperative and void, a very clear case must be shown. After the legislature and the executive have both decided that the purpose for which a tax is laid is public, nothing short of a moral certainty that a mistake has been made, can, in my judgment, warrant the court in overruling that decision, especially when nothing better can be set up in its place than the naked opinion of the court as to the character of the use proposed. Certainly it is not for the court to shrink from the discharge of a constitutional duty; but, at the same

time, it is not for this branch of the government to set an example of encroachment upon the province of the others. It is only the enunciation of a rule that is now elementary in the American States, to say that, before we can declare this law unconstitutional, we must be fully satisfied — satisfied beyond a reasonable doubt — that the purpose for which the tax is authorized is private and not public.

I have spoken incidentally of our common highways; and it has been said that their purpose is, to furnish to the public facilities for travel, for the transmission of intelligence, and the carrying of goods. No one will contend that to build and maintain them is not a public purpose. Indeed, the public nature of this use is so very obvious, that it has been classed among those said to be public *per se* (*Whiting* v. *Sheboygan Railway Co.*, *supra*), standing in need of no credentials from the court to entitle it to legislative recognition. Wherein does the use of a railroad differ? What public benefit can be mentioned, that comes from the building of a common road, that does not come, in kind if not in degree, from the building of a railroad? It is not necessary to enlarge upon the benefits of either: they are, doubtless, numerous and varied, — so numerous, indeed, so interwoven with everything that distinguishes an intelligent, virtuous, rich, well-organized, and well-governed State, from a tribe of primitive barbarians, that an attempt to trace them all would be little less than an attempt to search out the sources of our civilization. The point is, they are alike in kind; and when it is admitted that the construction of one class of roads is clearly, beyond all possibility of doubt, a public purpose, I cannot conceive upon what ground it is to be said that the construction of the other class is, beyond all reasonable doubt, a private purpose.

It is said that railroad corporations are private; that the roads are built and run for private gain; that the public can only enjoy the benefits offered by them upon payment of a toll, — and, therefore, their purpose is private. The short and conclusive answer to all this, in my mind, is, that the character of the agency employed does not and cannot determine the nature of the end to be secured. To say of a railroad corporation that it is a private corporation, and therefore the construction of a railroad is a private purpose, seems to me, in truth, no more logical, if less absurd, than to say of any officer or agent of the State, — He is an individual, with all the private interests and private associations of other citizens; therefore the purpose of his office and of all his official acts is private. The argument that because a toll is granted, therefore the purpose must be private, carried to its logical results, would certainly declare the purpose of a very large number of public offices in the State to be private, — among them the Secretary of State, justices of the peace and of police courts, registers of probate, registers of deeds, sheriffs, clerks of the courts, town-clerks, etc., etc.

If the purpose is public, it makes no difference that the agent by whose hand it is to be attained is private. Nor, if the purpose were private, would it make any difference that a public agent was employed.

The question, therefore, whether a railroad corporation is to be regarded as public, or private, or both, — that is, public in one aspect and private in another, — seems to me quite immaterial, and that the decision of that question one way or the other does not advance the inquiry we have in hand.

It has been admitted by some, who have maintained with singular ability and zeal the position of the plaintiffs in this case, that the State might legally take into its own hands the whole matter of railroads within its limits; might build, equip, operate, and control them, making use of no intermediate agents in the business, — because in that case the people would remain owners of the property into which their money had been converted. With great deference, it seems to me, this is a concession of the very point in dispute. The form of the argument seems to be this: The State cannot levy a tax for a private purpose. So much, all admit. The building of a railroad is a private purpose; but the State may nevertheless levy a tax to build a railroad, provided the tax be large enough to carry through the whole enterprise without calling in the aid of any other agency; — or, to draw from the same premises the conclusion sought to be established here, the State cannot levy a tax for a private purpose. The State may levy a tax to wholly build, equip, and run a railroad; therefore the building of a railroad is a private purpose. This does not bear examination.

Another argument may be noticed here. It has been said by courts, whose decisions we are accustomed to regard with great respect, that, admitting the power of the legislature to authorize towns and cities to subscribe for stock in railroad corporations, and issue bonds or levy taxes in payment thereof, it does not follow that they can lawfully authorize the direct appropriation of the public funds to aid in the construction of a railroad where no stock is taken; because, in that event, no interest or ownership results to the town in the property of the corporation, and no voice in the control and management of its affairs is secured. I do not understand how this can be said by a court of law. Upon what ground can the legislature authorize the raising of a tax to pay for stock in a corporation of any sort, unless the purchase of such stock will be a devotion of the public funds to a public service? It is a matter of common knowledge that the original stock in railroad corporations often becomes worthless, or nearly so; but whether such a result is to be apprehended or not, makes no difference, so far as I can see, with the argument. If the end in view is private and not public, the legislature might as well authorize a town to enter into copartnership with any private person, in the prosecution of any private enterprise or business, and furnish its stipulated proportion of the capital to be invested, by levying a tax, as to authorize it to purchase such stock, even were it likely to advance in value on their hands, and the people thus be gainers by the operation. Deny that the end is public, and at the same time admit that a tax may be levied for the purchase of the stock, and the inevitable conclusion appears to be, that towns may be

authorized to engage in the private and perilous business of dealing in stocks, and so apply the public funds to a purpose as remote as any that can well be conceived from that permitted by the Constitution, to say nothing of the fact that such investment must be made with a reasonable assurance that the money will be lost. Clearly, one or the other of these propositions must be changed; — either we must admit that the end in view is public, or deny the power to purchase stocks when the end in view is merely a private end.

It is said that the power to tax involves the power to destroy; and that this is true is well shown by the recent example of the State banks, whose existence was terminated by a tax of ten per cent imposed by Congress on their circulation. But how does this strengthen the position of the plaintiffs? They say that if the legislature have the constitutional right and power to authorize a tax of three per cent to aid this railroad, they have the constitutional right and power to levy a tax upon all the property in the city of Keene equal to the full value of such property, and give that to the same road. Suppose this be granted, what does it prove as to the object for which the tax is laid? Is it not equally true that they might authorize a tax equal to the full value of all the property in the city for the support of the public schools, the public highways, or any other object of a confessedly public nature? The suggestion is plainly of no force in an inquiry as to the nature of the purpose for which a tax has been authorized or levied, for the reason that the supposed power of destruction is a necessary incident of the taxing power, and follows it whatever be the object for which it is put forth, whether public and legal, or private and illegal. It amounts to little more, in the present case, than the truism that any governmental power may be abused by the agent in whose hands it is reposed.

But if the question on which this case must turn has been rightly apprehended, I think it was decided more than thirty years ago, in the case of *Concord Railroad* v. *Greeley*, 17 N. H. 47, where it was held that a railroad is in general such a public use as affords just ground for the taking of private property, and appropriating it to that use. . . . [Here follows a consideration of certain legislation of New Hampshire, and of *Concord R. R.* v. *Greeley*.]

Undoubtedly a legislative declaration, that a given use is public, cannot be regarded as conclusive to all intents, without denying the power of the court to interpret the Constitution; nevertheless it is true, that the creator of a thing may generally impose upon the work of his own hands such qualities and characteristics as he chooses; — and when we see that the legislature, in establishing railroad corporations, has always been so careful, not only to bestow upon them attributes and powers consistent with no other idea than that their purpose is public, but to lay upon them also obligations and duties which would be clearly unjust and arbitrary in any other view; and when, in addition to this, we find the statutes full of declarations that the use is a public use, it

would seem that nothing which falls much short of absolute demonstration would warrant the court in holding that the use is, after all, private.

Thus far, indeed, the cases all agree. It is nowhere contended, and is not contended by the plaintiffs, that a railroad is not a public use in such sense that land, the private property of individuals, may be taken for its construction. But a strenuous effort has been made to distinguish between the nature of a public use that warrants the exercise of the power of eminent domain, and that which warrants the exercise of the taxing power in its behalf. Of course the use which warrants the taking of land for a road-bed must be public, otherwise every charter granting that right, and every general law recognizing its existence and regulating the mode of its exercise, has been nothing less than an arbitrary and despotic interference by the legislature with private rights of property, in flagrant violation of Art. 12 of the Bill of Rights, as well as the other provisions of the Constitution whereby those rights are secured. The argument, then, admits that the use is public, but holds that it is not sufficiently public, or is not public in the particular way, to bring it within the category of objects for which taxes may be imposed: either in degree or kind, the public quality which it confessedly possesses falls short of that required by the Constitution to justify an exercise of the taxing power.

It is incumbent on those who undertake to maintain this distinction, to point out clearly the differences on which it rests. An assertion that it does exist is not enough, nor is the argument advanced by a repetition of such assertion, even though made in confident and emphatic terms. What is the rule wherewith we are to determine when a given public use is of a character to warrant the exercise of one power and not the other? What is the principle to be applied? No one will contend that the power of eminent domain and the taxing power, though similar, are in all respects identical; but all agree that neither can be exercised except for a public end. Which is the higher power? or, in other words, which requires the greater public exigency to call it forth? What is the nature of those objects which lie on one side of the line, and what of those upon the other side? Where is the line to be drawn, and what are the reasons that determine its location? These are some of the questions not to be evaded, or met with much speech and ingenious ratiocination, but to be answered fairly and clearly, before a court can say that the legislature have beyond all reasonable doubt transcended their constitutional powers in declaring that a use which is of such character — that is, public in such sense that private property may be taken and appropriated in its behalf — is also public in such sense that taxes may be levied in its behalf. In those cases to which we have been referred by the plaintiffs' counsel, where an attempt to do this is made, it does appear to me the failure has been rendered only more conspicuous by the eminent ability of those who have undertaken the task. And, after a most careful ex-

amination of those cases, if we were to hold that a railroad, being a public use for which the land of individuals may be taken against their consent, is not a public purpose for which taxes may be imposed, I should be utterly at a loss what sound reason to give for the distinction, or in what terms to frame a rule to govern the future action of the legislature in cases of a like description.

Unless the court are to stand between the people and their representatives and declare when the latter have misjudged in their deliberations, and set up limits to the legislative powers of the General Court not found in the organic law of the State, it is clear to my mind that this law cannot be annulled by a judicial sentence or decree.

[SMITH, J., and RAND, J., gave concurring opinions.[1]]

[1] See also *Sharpless* v. *Mayor of Phila.*, 21 Pa. 147 (1853), especially the opinion of BLACK, C. J.

In *R. R. Co.* v. *Otoe*, 16 Wall. 667 (1872), on a certificate of division from the United States Circuit Court of Nebraska, the court (STRONG, J.) said: "The first question upon which the judges of the Circuit Court divided was whether the Act of the Legislature of Nebraska, approved February 15th, 1869, authorizing the county of Otoe to issue bonds in aid of a railroad outside of the State, conflicts with the Constitution of that State.

"Unless we close our eyes to what has again and again been decided by this court, and by the highest courts of most of the States, it would be difficult to discover any sufficient reason for holding that this Act was transgressive of the power vested by the Constitution of the State in the legislature. That the legislative power of the State has been conferred generally upon the legislature is not denied, and that all such power may be exercised by that body, except so far as it is expressly withheld, is a proposition which admits of no doubt. It is true that, in construing the Federal Constitution, Congress must be held to have only those powers which are granted expressly or by necessary implication, but the opposite rule is the one to be applied to the construction of a State Constitution. The legislature of a State may exercise all powers which are properly legislative, unless they are forbidden by the State or National Constitution. This is a principle that has never been called in question. If, then, the Act we are considering was legislative in its character, it is incumbent upon those who deny its validity to show some prohibition in the Constitution of the State against such legislation. And that it was an exercise of legislative power is not difficult to maintain. No one questions that the establishment and maintenance of highways, and the opening facilities for access to markets, are within the province of every State legislature upon which has been conferred general legislative power. These things are necessarily done by law. The State may establish highways or avenues to markets by its own direct action, or it may empower or direct one of its municipal divisions to establish them, or to assist in their construction. Indeed, it has been by such action that most of the highways of the country have come into existence. They owe their being either to some general enactment of a State legislature or to some law that authorized a municipal division of the State to construct and maintain them at its own expense. They are the creatures of law, whether they are common county or township roads, or turnpikes, or canals, or railways. And that authority given to a municipal corporation to aid in the construction of a turnpike, canal, or railroad is a legitimate exercise of legislative power, unless the power be expressly denied, is not only plain in reason, but it is established by a number and weight of authorities beyond what can be adduced in support of almost any other legal proposition. The highest courts of the States have affirmed it in nearly a hundred decisions, and this court has asserted the same doctrine nearly a score of times. It is no longer open to debate. . . . [It is then pointed out that the Constitution of Nebraska does not forbid this.]

"It is urged, however, against the validity of the Act now under consideration that

it authorized a donation of the county bonds to the railroad company, and it is insisted that if even the legislature could empower the county to subscribe to the stock of such a corporation, it could not constitutionally authorize a donation. Yet there is no solid ground of distinction between a subscription to stock and an appropriation of money or credit. Both are for the purpose of aiding in the construction of the road; both are aimed at the same object, securing a public advantage, obtaining a highway or an avenue to the markets of the country; both may be equally burdensome to the tax-payers of the county. The stock subscribed for may be worthless, and known to be so. That the legislature of the State might have granted aid directly to any railroad company by actual donation of money from its treasury will not be controverted. No one questions that in the absence of some constitutional inhibition the power of a State to appropriate its money, however raised, is limited only by the sense of justice and by the sound discretion of its legislature. If the power to tax be unrestricted, the power to appropriate the taxes is necessarily equally so. Accordingly nothing has been more common in the State and Federal governments than appropriations of public money raised by taxation to objects, in regard to which no legal liability has existed. State legislatures have made donations for numerous purposes, wherever, in their judgment, the public well-being required them, and the right to make such gifts has never been seriously questioned. As has been said, the security against abuse of power by a legislature in this direction is found in the wisdom and sense of propriety of its members, and in their responsibility to their constituents. But if a State can directly levy taxes to make donations to improvement companies, or to other objects which, in the judgment of its legislature, it may be well to aid, it will be found difficult to maintain that it may not confer upon its municipal divisions power to do the same thing. Counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will. When they are authorized or directed to levy a tax, or to appropriate its proceeds, the State through them is doing indirectly what it might do directly. It is true the burden of the duty may thus rest upon only a single political division, but the legislature has undoubted power to apportion a public burden among all the tax-payers of the State, or among those of a particular section. In its judgment, those of a single section may reap the principal benefit from a proposed expenditure, as from the construction of a road, a bridge, an almshouse, or a hospital. It is not unjust, therefore, that they should alone bear the burden. This subject has been so often discussed, and the principles we have asserted have been so thoroughly vindicated, that it seems to be needless to say more, or even to refer at large to the decisions. A few only are cited. *Blanding* v. *Burr*, 13 California, 343; *The Town of Guilford* v. *The Supervisors of Chenango County*, 3 Kernan, 149; *Stuart* v. *Supervisors*, 30 Iowa, 9; *Augusta Bank* v. *Augusta*, 49 Maine, 507; *Railroad Co.* v. *Smith*, a case decided by the Supreme Court of Illinois and not reported.

"One other objection to the constitutionality of the Act is urged. It is that it authorized aid to a railroad beyond the limits of the county, and outside the State. There is nothing in this objection. It was for the legislature to determine whether the object to be aided was one in which the people of the State had an interest, and it is very obvious that the interests of the people of Otoe County may have been more involved in the construction of a road giving them a connection with an eastern market than they could be in the construction of any road wholly within the county. But that the objection has no weight may be seen in *Gelpcke* v. *Dubuque*, 1 Wallace, 175, and in *Walker* v. *Cincinnati*, 21 Ohio, 14.

"We conclude, therefore, that the Act of the Legislature of February 15th, 1869, is not in conflict with the Constitution of the State."

In *Olcott* v. *The Supervisors*, 16 Wall. 678 (1872), the same doctrine was laid down.

In both these cases, CHASE, C. J., and JUSTICES MILLER and DAVIS, dissented. Compare Cooley, Const. Lim. (6th ed.) 264 *n.* who refers to express prohibitions upon such legislation in some of the newer constitutions. For the principles governing the general question, see Cooley, Const. Lim. (6th ed.), 598 *et seq.* (1890). Judge Cooley himself, in 1870, speaking for the Supreme Court of Michigan, held such proceedings unconstitutional. *People* v. *Salem*, 20 Mich. 452, 472. — ED.

CASE OF THE STATE TAX ON FOREIGN-HELD BONDS.

SUPREME COURT OF THE UNITED STATES. 1872.

[15 *Wall.* 300.]

ERROR to the Supreme Court of Pennsylvania; the case being thus:

The plaintiff in error, in this case, the Cleveland, Painesville, and Ashtabula Railroad Company, was incorporated by an Act of the Legislature of Ohio, passed in 1848, and authorized to construct a railroad from the city of Cleveland, in that State, to the line of the State of Pennsylvania. Under this Act and its supplement, passed in 1850, the road was constructed. By an Act of the Legislature of Pennsylvania, passed in 1854, the company was authorized to construct a railroad from the city of Erie, in that State, to the State line of Ohio, so as to connect with this road from Cleveland, and also to purchase a railroad already constructed between those points. This grant of authority was subject to various conditions, which the company accepted, and under its provisions the road between the points designated was constructed, or the one already constructed was purchased, and connected with the road from Cleveland, so that the two roads together formed one continuous line between the cities of Cleveland and Erie. The whole road between those places was ninety-five and a half miles in length, of which twenty-five miles and a half were situated in the State of Pennsylvania, and the rest, seventy miles, were situated in the State of Ohio. The company, so far as it acted in Pennsylvania under the authority of the Act of her legislature, has been held by her courts to be a separate corporation of that State, and as such subject to her laws for the taxation of incorporated companies. 29 Penn. St. 781. But there was only one board of directors, who managed the affairs of both companies as one company, and had the entire control of the whole road between Cleveland and Erie.

In 1868 the funded debt of the company amounted to $2,500,000, and was in bonds of the company, secured by three mortgages, one for $500,000, made in 1854, one for $1,000,000, made in 1859, and one for $1,000,000, made in 1867. Each of the mortgages was executed upon the entire road, from Erie, in Pennsylvania, to Cleveland, in Ohio, including the right of way and all the buildings and other property of every kind connected with the road. The principal and interest of the bonds first issued were payable in the city of Philadelphia; the principal and interest of the other bonds were payable in the city of New York. All the bonds were executed and delivered in Cleveland, Ohio, and nearly all of them were issued to, and have been ever since held and owned by non-residents of Pennsylvania and citizens of other States. The interest was at 7 per cent.

On the 1st of May, 1868, the Legislature of the State of Pennsylvania passed an Act entitled "An Act to Revise, Amend, and Consolidate

the Several Laws taxing Corporations, Brokers, and Bankers;" the eleventh section of which provided as follows:

"The president, treasurer, or cashier of every company, except banks or savings institutions, incorporated under the laws of this Commonwealth, doing business in this State, which pays interest to its bond-holders or other creditors, shall, before the payment of the same, retain, from said bond-holders or creditors, a tax of five per centum upon every dollar of interest paid as aforesaid; and shall pay over the same semi-annually, on the first days of July and January in each and every year, to the State treasurer for the use of the Commonwealth; and every president, treasurer, or cashier as aforesaid shall annually, on the thirty-first day of each December, or within thirty days thereafter, report to the auditor-general, under oath or affirmation, stating the entire amount of interest paid by said corporation to said creditors during the year ending on that day; and thereupon the auditor-general and State treasurer shall proceed to settle an account with said corporation as other accounts are now settled by law."

The treasurer of the company, under this Act, made a report in May, 1869, showing that during the previous year the company had paid interest on its funded debt of $2,500,000, at the rate of 7 per cent, amounting to $175,000. Upon this report the auditor-general and State treasurer "settled an account" against the company, finding that it owed to the State the sum of $2,336.50 for the tax on the interest which the company had paid.

In reaching this conclusion these officers apportioned the interest upon the debt owing by the company according to the length of the road, assigning to the part in the State of Pennsylvania an amount in proportion to the whole indebtedness which that part bears to the whole road. There was no law, however, in existence at the time directing or authorizing this proceeding.

From the settlement thus made the company appealed, under the law of the State, to the Court of Common Pleas of one of her counties, specifying various objections to the settlement, and among others substantially the following:

That the greater portion of the bonds of the company having been issued upon loans made and payable out of the State, to non-residents of Pennsylvania, citizens of other States, and being held by them, the Act in question, in authorizing the tax upon the interest stipulated in the bonds, so far as it applied to the bonds thus issued and held, impaired the obligation of the contracts between the bond-holders and the company, and is therefore repugnant to the Constitution of the United States, and void.

The contest in the Court of Common Pleas took the form of a regular judicial proceeding, a declaration having been filed by the Attorney-General on behalf of the State against the company as for a debt, and the company having joined issue by a plea of non-assumpsit and payment. The Common Pleas sustained the validity of the alleged tax

against the objections of the company, and verdict and judgment passed in favor of the State. On error to the Supreme Court of the State the judgment was affirmed, and the case is brought here for review under the second section of the amendatory Judiciary Act of 1867.

The judgment of the Supreme Court of Pennsylvania in the case now brought here, was rested, it may be well to say, upon a prior decision of that court; one made in *Maltby* v. *Reading and Columbia Railroad Co.*, 52 Penn. St. 140. . . . [Here follows a statement of this case and a long quotation from the opinion.]

Messrs J. E. Gowen and *J. W. Simonton*, for the plaintiff in error. *Messrs. F. Carroll Brewster* and *J. W. M. Newlin*, *contra*.

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 bond-holders 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 7th Wallace. 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 bond-holder is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bond-holder, 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 bond-holder 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 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.

Mr. Justice Davis, with whom concurred Justices Clifford, Miller, and Hunt, dissenting.[1]

[1] See their opinion, *infra*, note following.

At the same time with the adjudication as to the tax in the preceding case was adjudged the validity [*sic*] of the tax in the cases of two other railroad companies, to wit. The Pittsburg, Fort Wayne, and Chicago; and the Delaware, Lackawanna, and Western, both writs of error against the State of Pennsylvania, and to judgments of the Supreme Court of that State. The tax levied in these last two cases upon the bonds of non-residents of the State was three mills on the dollar of capital, to be paid out of the interest; and the law laying the tax, a law of 1844, was in existence when the bonds were issued. In the previous case it will be remembered that the tax levied was five per cent upon the interest of the bonds, and the law levying it was not in such existence. The last two cases, therefore, resembled the case of *Maltby* v. *Reading and Columbia Railroad*, the particulars of which are stated *supra* [15 Wall.], 303–307.

Mr. Justice Field, who delivered the judgment of the court, in the additional two cases now mentioned, as in the first one, said that the cases involved the same questions that had been considered and decided in the previous case, that of the Cleveland, Painesville, and Ashtabula Railroad; and that "the difference in the mode of the assessment of the tax did not affect the principle decided."

Upon the authority of the case cited, the judgments in these two cases, now mentioned, were accordingly reversed, and the causes remanded for further proceedings, Justices Clifford, Miller, Davis, and Hunt dissenting; and Mr. Justice Davis saying, for himself and them, in all the cases, as follows:

"I cannot agree to the opinion of a majority of my brethren in these cases. That the tax in question is valid and binding, both on the corporation and its creditor, is clearly settled in *Maltby* v. *The Philadelphia and Reading Railroad Company*, and that, too, whether the creditor resides in Pennsylvania or elsewhere. As the highest court of the State has decided that the Act of 1844 authorized the imposition of the tax in controversy, and as that Act was in force when the bonds and mortgages were issued, I cannot see how any principle of the Federal Constitution is violated, nor can I see how this court can reach the conclusion it does in these cases without denying to the State government the right to construe its own local laws. This right has been recognized so often and in such a variety of ways, that it is no longer an open question. Indeed this court in *Railroad Company* v. *Jackson* has expressly recognized the binding force of the construction which the Supreme Court in Pennsylvania has put on the Act of 1844. Mr. Justice Nelson, delivering the opinion of the court, said:

"'It has been argued for the plaintiff, that the Acts of the Legislature of Pennsylvania, when properly interpreted, do not embrace the bonds or coupons in question; but it is not important to examine the subject, for it is not to be denied, as the courts of the State have expounded these laws, that they authorized the deduction, and, if no other objection existed against the tax, the defence would fail.'

"I am also of opinion that a State legislature is not restrained by anything in

the Federal Constitution nor by any principle which this court can enforce against the State court, from taxing the property of persons which it can reach and lay its hands on, whether these persons reside within or without the State." — [Reporter's note]

Compare *R. A. Co.* v. *Jackson*, 7 Wall. 262; *U. S.* v. *R. R. Co.*, 17 Wall. 322; *Com.* v. *Lehigh Val. R. Co.*, 129 Pa. 429, 456 (1889). See also *Jenkins* v. *Charleston*, 5 So. Ca. 393 (1874), holding that the city of Charleston could tax its own stock, whether owned by residents or non-residents; overruled in 96 U. S. 449, on the doctrine of *Murray* v. *Charleston*, 96 U. S. 432; *Com.* v. *Ham. Man. Co.*, 12 Allen, 298 (1866); *Oliver* v. *Wash. Mills*, 11 Allen, 268, 270–271 (1865).

In *Murray* v *Charleston*, 96 U. S. 432 (1877), it was held that the defendant could not treat a non-resident owner of its securities as thereby having property in its limits, which might be taxed; that such taxation was invalid as impairing the obligation of the contract.

In *Tappan* v. *Merch. Bank*, 19 Wall. 490 (1873), CHASE, C. J., for the court, said: "We are called upon in this case to determine whether the General Assembly of the State of Illinois could, in 1867, provide for the taxation of the owners of shares of the capital stock of a national bank in that State, at the place, within the State, where the bank was located, without regard to their places of residence. . . .

"The power of taxation by any State is limited to persons, property, or business within its jurisdiction. State Tax on Foreign-held Bonds (*Railroad* v. *Pa.*), 15 Wall. 319. Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its *situs* at his domicile. But, for the purposes of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located. These are familiar principles, and have been often acted upon in this court and in the courts of Illinois. If the State has actual jurisdiction of the person of the owner, it operates directly upon him. If he is absent, and it has jurisdiction of his property, it operates upon him through his property.

"Shares of stock in national banks are personal property. They are made so in express terms by the Act of Congress under which such banks are organized. 13 Stat. at Large, 102, § 12. They are a species of personal property which is, in one sense, intangible and incorporeal, but the law which creates them may separate them from the person of their owner for the purposes of taxation, and give them a *situs* of their own. This has been done. By section forty-one of the National Banking Act, it is in effect provided that all shares in such banks, held by any person or body corporate, may be included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed under State authority, at the place where the bank is located, and not elsewhere. 13 Stat. at Large, 112. This is a law of the property. Every owner takes the property subject to this power of taxation under State authority, and every non-resident, by becoming an owner, voluntarily submits himself to the jurisdiction of the State in which the bank is established for all the purposes of taxation on account of his ownership. His money invested in the shares is withdrawn from taxation under the authority of the State in which he resides, and submitted to the taxing power of the State where, in contemplation of the law, his investment is located. The State, therefore, within which a national bank is situated has jurisdiction, for the purposes of taxation, of all the shareholders of the bank, both resident and non-resident, and of all its shares, and may legislate accordingly." — ED.

KIRTLAND *v.* HOTCHKISS.

SUPREME COURT OF THE UNITED STATES. 1879.

[100 *U. S.* 491.]

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

Charles W. Kirtland, 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 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 court below 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 by Kirtland upon the ground, among others, that the statute of Connecticut thus interpreted and sustained is repugnant to the Constitution of the United States.

Mr. Ashbel Green, *Mr. William Cothren*, and *Mr. Julien T. Davies*, for the plaintiff in error. *Mr. Morris W. Seymour*, *contra*.

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the Court.

We will not follow the interesting argument of counsel by entering upon an extended discussion of the principles upon which the power of taxation rests under our system of constitutional government. Nor is it at all necessary that we should now attempt to state all limitations which exist upon the exercise of that power, whether they arise from the essential principles of free government or from express constitutional provisions. We restrict our remarks to a single question, the precise import of which will appear from the preceding statement of the more important facts of this case.

In *M'Culloch* 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 co-extensive 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, 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 is property in his hands constituting a portion of his wealth, from which he is under the 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 purposes 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, and if destroyed, the debt — the right to demand payment of the money loaned, with the stipulated interest — remains. Nor is 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 in *State Tax on Foreign-held Bonds*, *supra*, 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, then, having its *situs* at the creditor's residence, both he and it 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 cannot be supervised or controlled by any department of the Federal government, 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; 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 citizens 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, with which the Federal government cannot rightly interfere. *Judgment affirmed.*[1]

In the Matter of THE ESTATE OF SWIFT.

New York Court of Appeals. 1893.

[137 *N. Y.* 77.]

Appeal from order of the General Term of the Supreme Court in the first judicial department, made June 3, 1892, which affirmed an order of the Surrogate's Court of the city and county of New York, which affirmed an order assessing the value of the property of James T. Swift, deceased, which affirmed an order assessing the value of the property of said decedent subject to taxation under the Collateral Inheritance Tax Act. The facts, so far as material, are stated in the opinion.

S. W. Rosendale, for appellants. *Nelson S. Spencer*, for respondents.

Gray, J. . . . The Attorney-General has argued that this law, commonly called the collateral inheritance tax law, imposes not a property tax but a charge for the privilege of acquiring property, and, as I apprehend it, the point of his argument is that, as there is no absolute right to succeed to property, the State has a right to annex a condition to the permission to take by will, or by the intestate laws, in the form of

[1] "There is also sometimes what seems to be a double taxation of the same property to two individuals; as where the purchaser of property on credit is taxed on its full value, while the seller is taxed to the same amount on the debt. (See *Savings & Loan Society* v. *Austin*, 46 Cal. 416). How this would operate may be readily perceived by supposing the extreme case that *all* the property in a town is sold on credit; in which case, if the property is taxed to the purchasers, and the debts to sellers, it is manifest that the town taxes twice as much wealth as lies within its borders.

"Now, whether there is injustice in the taxation in every instance in which it can be shown that an individual who has been *directly* taxed his due proportion is also compelled *indirectly* to contribute, is a question we have no occasion to discuss. It is sufficient for our purposes to show that the decisions are nearly, if not quite, unanimous in holding that taxation is not invalid because of any such unequal results. It cannot be too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances. . . . The legislature must judge of the general result, and when the law has apportioned the tax, individual hardships must be regarded as among the inconveniences which are incident to regular government." — Cooley, *Taxation*, 2d ed. 220.

See *Phil. Sav. Fund* v. *Yard*, 9 Pa. 359; *Com.* v. *Lehigh, &c. Co.*, 29 Atl. Rep. 664 (Pa. July, 1894). As regards the question in hand, it seems to make no difference in a sale on credit, whether there be security or not. — Ed.

a tax, to be paid by the persons for whose benefit the remedial legislation has been enacted. That is, substantially, the way in which he puts the proposition, and if the premise be true that the tax imposed is upon the privilege to acquire, and, as he says in his brief, is like "a duty imposed, payable by the beneficiary," possibly enough, we should have to agree with him. We might think, in that view of the Act, that the *situs* of property in a foreign jurisdiction was not a controlling circumstance. But if we take up the provisions of the law by which the tax is imposed, and if we consider them as they are framed and the principle which then seems to underlie the peculiar system of taxation created, I do not think that his essential proposition finds adequate support. . . .

But I do not think it at all important to our decision here that we should hold it to be a tax upon property precisely. A precise definition of the nature of this tax is not essential, if it is susceptible of exact definition. Thus far, in this court, we have not thought it necessary, in the cases coming before us, to determine whether the object of taxation is the property which passes, or not; though, in some, expressions may be found which seem to regard the tax in that light. (*Matter of McPherson*, 104 N. Y. 306; *Matter of Enston*, 113 Id. 174; *Matter of Sherwell*, 125 Id. 379; *Matter of Romaine*, 127 Id. 80, and *Matter of Stewart*, 131 Id. 274.) The idea of this succession tax, as we may conveniently term it, is more or less compound; the principal idea being the subjection of property, ownership of which has ceased by reason of the death of its owner, to a diminution, by the State reserving to itself a portion of its amount, if in money, or of its appraised value, if in other forms of property. The accompanying, or the correlative idea should necessarily be that the property, over which such dominion is thus exercised, shall be within the territorial limits of the State at its owner's death, and, therefore, subject to the operation and the regulation of its laws. The State, in exercising its power to subject realty, or tangible property, to the operation of a tax, must, by every rule, be limited to property within its territorial confines.

The question here does not relate to the power of the State to tax its residents with respect to the ownership of property situated elsewhere. That question is not involved. The question is whether the legislature of the State, in creating this system of taxation of inheritances, or testamentary gifts, has not fixed as the standard of right the property passing by will, or by the intestate laws.

What has the State done, in effect, by the enactment of this tax law? It reaches out and appropriates for its use a portion of the property at the moment of its owner's decease; allowing only the balance to pass in the way directed by testator, or permitted by its intestate law, and while, in so doing, it is exercising an inherent and sovereign right, it seems very clear to my mind that it affects only property which lies within it, and, consequently, is subject to its right of eminent domain. The theory of sovereignty, which invests the State with the right and

the power to permit and to regulate the succession to property upon its owner's decease, rests upon the fact of an actual dominion over that property. In exercising such a power of taxation, as is here in question, the principle, obviously, is that all property in the State is tributary for such a purpose and the sovereign power takes a portion, or percentage, of the property, not because the legatee is subject to its laws and to the tax, but because the State has a superior right, or ownership, by force of which it can intercept the property, upon its owner's death, in its passage into an ownership regulated by the enabling legislation of the State.

The rules of taxation have become pretty well settled, and it is fundamental among them that there shall be jurisdiction over the subject taxed; or, as it has been sometimes expressed, the taxing power of the State is coextensive with its sovereignty. It has not the power to tax directly either lands or tangible personal property situated in another State or country. As to the latter description of property no fiction transmuting its *situs* to the domicile of the owner is available, when the question is one of taxation. . . .

The proposition which suggests itself from reasoning, as from authority, is that the basis of the power to tax is the fact of an actual dominion over the subject of taxation at the time the tax is to be imposed.

The effect of this special tax is to take from the property a portion, or a percentage of it, for the use of the State, and I think it quite immaterial whether the tax can be precisely classified with a taxation of property or not. It is not a tax upon persons. If it is called a tax upon the succession to the ownership of property; still it relates to and subjects the property itself and when that is without the jurisdiction of the State, inasmuch as the succession is not of property within the dominion of the State, succession to it cannot be said to occur by permission of the State. As to lands this is clearly the case, and rights in or power over them are derived from or through the laws of the foreign State or country. As to goods and chattels it is true; for their transmission abroad is subject to the permission of and regulated by the laws of the State or country where actually situated. Jurisdiction over them belongs to the courts of that State or country for all purposes of policy, or of administration in the interests of its citizens, or of those having enforceable rights, and their surrender, or transmission, is upon principles of comity.

When succession to the ownership of property is by the permission of the State, then the permission can relate only to property over which the State has dominion and as to which it grants the privilege or permission. . . .

We can arrive at no other conclusion, in my opinion, than that the tax provided for in this law is only enforceable as to property which, at the time of its owner's death, was within the territorial limits of this State. As a law imposing a special tax, it is to be strictly construed

against the State and a case must be clearly made out for its application. We should incline against a construction which might lead to double taxation; a result possible and probable under a different view of this law. If the property in the foreign jurisdiction was in land, or in goods and chattels, when, upon the testator's death, a new title, or ownership, attached to it, the bringing into this State of its cash proceeds, subsequently, no matter by what authority of will, or of statute, did not subject it to the tax. . . .

My brethren are of the opinion that the tax imposed under the Act is a tax on the right of succession, under a will, or by devolution in case of intestacy; a view of the law which my consideration of the question precludes my assenting to.

They concur in my opinion so far as it relates to the imposition of a tax upon real estate situated out of this State, although owned by a decedent, residing here at the time of his decease; holding with me that taxation of such was not intended, and that the doctrine of equitable conversion is not applicable to subject it to taxation. But as to the personal property of a resident decedent, wheresoever situated, whether within or without the State, they are of the opinion that it is subject to the tax imposed by the Act.

The judgment below, therefore, should be so modified as to exclude from its operation the personal property in New Jersey and, as so modified, it should be affirmed, without costs to either party as against the other. MAYNARD, J., not sitting.[1]

ASH *v.* THE PEOPLE.

SUPREME COURT OF MICHIGAN. 1863.

[11 *Mich.* 347.]

ERROR to the Recorder's Court of Detroit.

G. V. N. Lothrop, for plaintiff in error. *Wm. Gray*, for the People.

MARTIN, CH. J. The Charter of the city of Detroit empowers the Common Council to erect and maintain market houses, establish markets and market places, &c., and to provide fully for the good government and regulation thereof; and to license and regulate butchers and the keepers of shops, stalls, booths, or stands at markets, or any other place in the city, for the sale of any kind of meats, fish, poultry, &c.; and to authorize the mayor to grant such license, &c., and to prescribe the sum of money to be paid therefor into the city treasury. The city has established a market, and an ordinance exists prohibiting persons from keeping a meat shop or stand outside such market without a license from the mayor, and upon terms of paying into the city treasury five

[1] Compare *Scholey* v. *Rew*, 23 Wall. 331. — ED.

dollars, and executing a bond conditioned that they will faithfully observe the provisions of the ordinance.

Ash keeps a meat shop outside the market, without a license; and alleges and insists that he has a right to do so, upon the ground that the ordinance is unconstitutional: 1st, in requiring a license fee from persons selling meats outside the market, and 2d, in requiring a fee beyond the sum necessary to defray the expense of making and registering the license, and which it is claimed is in fact a tax.

The power to license and regulate the vending of meats and vegetables is not denied, nor its necessity questioned. The health of the city demands that it should exist. If the power to regulate exists, then the city has the power to prescribe the limits within which the trade or calling shall be carried on without license. If carried on elsewhere the city may require the license and bond, for protection and regulation; and may require such reasonable fee as will compensate either partially or fully for the additional expense of inspection and regulation thereby incurred. The market being under the immediate supervision of the city officers, no extraordinary expenses need be incurred, and if there were, the rent of the stalls is considered a compensation. An ordinance of this kind does not in fact operate unequally, and is not against common right or in restraint of trade.

Nor is this exaction of five dollars a tax. It is but a reasonable compensation which the city demands from those who will not sell in the public market, for the additional labor of officers, and expense thereby imposed. If it be conceded that the city may demand a sum sufficient to defray the expense of making out the license, it is difficult to conceive why it may not also demand enough to pay all the expense attending the supervision of the trade at the place licensed. As we regard the sum exacted as a reasonable fee for the indemnity of the city, and not as in any sense a tax, we do not deem it expedient to discuss the further question of the extent of the power of the city to exact license fees, or the limits of such power.

The judgment must be affirmed.

MANNING and CHRISTIANCY, JJ., concurred. CAMPBELL, J., gave a brief dissenting opinion.

Judgment affirmed.[1]

[1] And so *Jacksonville* v. *Ledwith*, 26 Fla. 163 (1890), Cooley, Const. Lim. 6 ed. 242. Compare *Chaddock* v. *Day*, 75 Mich. 527; *Tugwell* v. *Eagle Pass. Ferry Co.*, 74 Texas, 480; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365.

In *Bostick* v. *The State*, 47 Ark. 126 (1886), in a prosecution for keeping a tavern without a license. It was held that there was no right to tax tavern-keeping, under the clause in the Constitution of Arkansas of 1868, providing "that the General Assembly should tax all privileges, pursuits, and occupations that were of no real use to society; all others to be exempt," — since the occupation is useful and necessary. "The true answer," said the court (SMITH, J.), . . . "doubtless is that it is not a tax at all, but a valid exercise of the police power of the State, and that the object aimed at is not the raising of revenue, but the regulation of the business." — ED.

LICENSE TAX CASES.

SUPREME COURT OF THE UNITED STATES. 1866.

[5 *Wall.* 462.]

CONGRESS, by an internal revenue Act of 1864, subsequently amended, enacted, that no persons should be engaged in certain trades or businesses, including those of selling lottery tickets and retail dealing in liquors, until they should have obtained a "license" (see 13 Stat. at Large, 248, 249, 252, 472, 485; 14 Id. 113, 116, 137, 301) from the United States. . . .

In New York and New Jersey, selling lottery tickets, as in Massachusetts retailing liquors (except in special cases, not important to be noted), is, by statute, wholly forbidden. Such selling or dealing is treated as an offence against public morals; made subject to indictment, fine, and imprisonment; and in one or more of the States named, high vigilance is enjoined on all magistrates to discover and to bring the offenders to justice; and grand juries are to be specially charged to present them.

In this condition of statute law, national and State, seven cases were brought before this court. They all arose under the provisions of the internal revenue Acts relating to licenses for selling liquors and dealing in lotteries, and to special taxes on the latter business. 13 Stat. at Large, 252, 472, 485, and 14 Id. 116, 137, 301–2. . . . [Here follows a statement of five of the cases.]

The general question in these five cases was: Can the defendants be legally convicted upon the several indictments found against them for not having complied with the Acts of Congress by taking out and paying for the required licenses to carry on the business in which they were engaged, such business being wholly prohibited by the laws of the several States in which it was carried on? . . . [Here follows a statement of the other two cases.]

In these two cases, therefore, the general question was: Could the defendants be legally convicted upon an indictment for being engaged in a business on which a special tax is imposed by Acts of Congress, without having paid such a special tax, notwithstanding that such business was, and is, wholly prohibited by the laws of New York?

The different cases were argued here for the different defendants by different counsel, *Mr. W. M. Evarts* representing the defendants in the New York cases, *Mr. Sennott*, the defendant in the case from Massachusetts, and *Mr. Woodbury* (by brief), one of the defendants in the cases, each, like the other, from New Jersey.

Mr. Speed, A. G. (at the last term), *Mr. Stanbery*, A. G. (at this), with the former of whom was *Mr. Reed*, A. G., of Massachusetts, *contra*.

The CHIEF JUSTICE, having stated the case, delivered the opinion of the court. . . .

We come now to examine a more serious objection to the legislation of Congress in relation to the dealings in controversy. It was argued for the defendants in error that a license to carry on a particular business gives an authority to carry it on; that the dealings in controversy were parcel of the internal trade of the State in which the defendants resided; that the internal trade of a State is not subject, in any respect, to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under Acts of Congress, must therefore be absolutely null and void; and, consequently, that penalties for carrying on such trade without such license could not be constitutionally imposed.

This series of propositions, and the conclusion in which it terminates, depends on the postulate that a license necessarily confers an authority to carry on the licensed business. But do the licenses required by the Acts of Congress for selling liquor and lottery tickets confer any authority whatever?

It is not doubted that where Congress possesses constitutional power to regulate trade or intercourse, it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give to the licensee authority to do whatever is authorized by its terms.

Thus, Congress having power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, may, without doubt, provide for granting coasting licenses, licenses to pilots, licenses to trade with the Indians, and any other licenses necessary or proper for the exercise of that great and extensive power; and the same observation is applicable to every other power of Congress, to the exercise of which the granting of licenses may be incident. All such licenses confer authority, and give rights to the licensee.

But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject. It is true that 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. But it reaches only existing subjects. Congress cannot authorize a trade or business within a State in order to tax it.

If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution.

But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits, they give none, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it.

This construction is warranted by the practice of the government from its organization. As early as 1794 retail dealers in wines or in foreign distilled liquors were required to obtain and pay for licenses, and renew them annually, and penalties were imposed for carrying on the business without compliance with the law. 1 Stat. at Large, 377. In 1802 these license-taxes and the other excise or internal taxes, which had been imposed under the exigencies of the time, being no longer needed, were abolished. 2 Stat. at Large, 148. In 1813 revenue from excise was again required, and laws were enacted for the licensing of retail dealers in foreign merchandise, as well as to retail dealers in wines and various descriptions of liquors. 3 Id. 72. These taxes also were abolished after the necessity for them had passed away, in 1817. Id. 401. No claim was ever made that the licenses thus required gave authority to exercise trade or carry on business within a State. They were regarded merely as a convenient mode of imposing taxes on several descriptions of business, and of ascertaining the parties from whom such taxes were to be collected.

With this course of legislation in view, we cannot say that there is anything contrary to the Constitution in these provisions of the recent or existing internal revenue acts relating to licenses.

Nor are we able to perceive the force of the other objection made in argument, that the dealings for which licenses are required being prohibited by the laws of the State, cannot be taxed by the national government. There would be great force in it if the licenses were regarded as giving authority, for then there would be a direct conflict between national and State legislation on a subject which the Constitution places under the exclusive control of the States.

But, as we have already said, these licenses give no authority. They are mere receipts for taxes. And this would be true had the internal revenue Act of 1864, like those of 1794 and 1813, been silent on this head. But it was not silent. It expressly provided, in section sixty-seven, that no license provided for in it should, if granted, be construed to authorize any business with any State or

Territory prohibited by the laws thereof, or so as to prevent the taxation of the same business by the State. This provision not only recognizes the full control by the States of business carried on within their limits, but extends the same principle, so far as such business licensed by the national government is concerned, to the Territories.

There is nothing hostile or contradictory, therefore, in the Acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union.

These considerations require an affirmative answer to the first general question, Whether the several defendants, charged with carrying on business prohibited by State laws, without the licenses required by Acts of Congress, can be convicted and condemned to pay the penalties imposed by these Acts? . . .

ST. LOUIS *v.* WESTERN UNION TELEGRAPH COMPANY.

SUPREME COURT OF THE UNITED STATES. 1893.

[148 *U. S.* 92.[1]]

[ERROR to the Circuit Court of the United States for the Eastern District of Missouri. The plaintiff sued for money alleged to be due from the defendants under a city ordinance, for maintaining telegraph poles in the plaintiff's streets. The city ordinance required of the defendant to pay "for the privilege of using the streets . . . the sum of five dollars per annum for each . . . telegraph or telephone pole erected or used by them. . . . The defendants, alleging other defences, denied the validity of this ordinance. The court below entered judgment for the defendants, holding that this was a privilege or license-tax which the city had no authority to impose.]

Mr. W. C. Marshall for plaintiff in error. *Mr. John F. Dillon* (with whom was *Mr. Rush Taggart* on the brief), and *Mr. Elenious Smith* (with whom were *Mr. Charles W. Wells*, *Mr. Willard Brown*, and *Mr. George H. Fearons* on the brief), for defendant in error.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court. . . .

And, first, with reference to the ruling that this charge was a privilege or license tax. To determine this question, we must refer to the language of the ordinance itself, and by that we find that the charge

[1] The statement of facts is omitted. — ED.

is imposed for the privilege of using the streets, alleys, and public places, and is graduated by the amount of such use. Clearly, this is no privilege or license-tax. The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city — that which may properly be called rental. "A tax is a demand of sovereignty; a toll is a demand of proprietorship." *State Freight Tax Case*, 15 Wall. 232, 278. If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section would no longer have any application to it. That by it the city receives something which it may use as revenue, does not determine the character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes. Supposing the city of St. Louis should find its city hall too small for its purposes, or too far removed from the centre of business, and should purchase or build another more satisfactory in this respect; it would not thereafter be forced to let the old remain vacant or to immediately sell it, but might derive revenue by renting its various rooms. Would an ordinance fixing the price at which those rooms could be occupied be in any sense one imposing a tax? Nor is the character of the charge changed by reason of the fact that it is not imposed upon such telegraph companies as by ordinance are taxed on their gross income for city purposes. In the illustration just made in respect to a city hall, suppose that the city, in its ordinance fixing a price for the use of rooms, should permit persons who pay a certain amount of taxes to occupy a portion of the building free of rent, that would not make the charge upon others for their use of rooms a tax. Whatever the reasons may have been for exempting certain classes of companies from this charge, such exemption does not change the character of the charge, or make that a tax which would otherwise be a matter of rental. Whether the city has power to collect rental for the use of streets and public places, or whether, if it has, the charge as here made is excessive, are questions entirely distinct. That this is not a tax upon the property of the corporation, or upon its business, or for the privilege of doing business, is thus disclosed by the very terms of the section. The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent. While we think that the Circuit Court erred in its conclusions as to the character of this charge, it does not follow therefrom that the judgment should be reversed, and a judgment entered in favor of the city. Other questions are presented which compel examination.

Has the city a right to charge this defendant for the use of its streets and public places? And here, first, it may be well to consider

the nature of the use which is made by the defendant of the streets, and the general power of the public to exact compensation for the use of streets and roads. The use which the defendant makes of the streets is an exclusive and permanent one, and not one temporary, shifting, and in common with the general public. The ordinary traveller, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveller. This use is common to all members of the public, and it is a use open equally to citizens of other States with those of the State in which the street is situate. But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public. By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of companies and for the transportation of messages.

We do not mean to be understood as questioning the right of municipalities to permit such occupation of the streets by telegraph and telephone companies, nor is there involved here the question whether such use is a new servitude or burden placed upon the easement, entitling the adjacent lot-owners to additional compensation. All that we desire or need to notice is the fact that this use is an absolute, permanent, and exclusive appropriation of that space in the streets which is occupied by the telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public. Now, when there is this permanent and exclusive appropriation of a part of the highway, is there in the nature of things anything to inhibit the public from exacting rental for the space thus occupied? Obviously not. Suppose a municipality permits one to occupy space in a public park, for the erection of a booth in which to sell fruit and other articles; who would question the right of the city to charge for the use of the ground thus occupied, or call such charge a tax, or anything else except rental? So, in like manner, while permission to a telegraph company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental. We do not understand it to be questioned by counsel for the defendant that, under the Constitution and laws of Missouri, the city of St. Louis has the full control of its streets, and in this respect represents the public in relation thereto.

It is claimed, however, by defendant, that under the Act of Congress of July 24, 1866, c. 230, 14 Stat. 221, and by virtue of its written acceptance of the provisions, restrictions, and obligations imposed by that Act, it has a right to occupy the streets of St. Louis with its telegraph poles. The first section of that Act contains the supposed grant of power. It reads: "That any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph 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: Provided, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads." By sec. 3964, Rev. Stat. U. S.: "The following are established post roads: . . . All letter-carrier routes established in any city or town for the collection and delivery of mail matters." And the streets of St. Louis are such "letter-carrier routes." So also by the Act of March 1, 1884, 23 Stat. 3: "All public roads and highways, while kept up and maintained as such, are hereby declared to be post routes."

It is a misconception, however, to suppose that the franchise or privilege granted by the Act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the Federal government to a corporation, State or national, to construct interstate roads or lines of travel, transportation, or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the State-house grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the State-house grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not

within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State. While for purposes of travel and common use they are open to the citizens of every State alike, and no State can by its legislation deprive the citizens of another State of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another State, or a corporation of the national government, it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated.

This is not the first time that an effort has been made to withdraw corporate property from State control, under and by virtue of this Act of Congress. In *Western Union Telegraph Company* v. *Massachusetts*, 125 U. S. 530, the telegraph company set up that Act as a defence against State taxation, but the defence was overruled. Mr. Justice Miller, on page 548, speaking for the court, used this language: "This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal government, carries with it any exemption from the ordinary burdens of taxation. While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

If it is, as there held, simply a permissive statute, and nothing in it which implies that the permission to extend its lines along roads not built or owned by the United States carries with it any exemption from the ordinary burdens of taxation, it may also be affirmed that it carries with it no exemption from the ordinary burdens which may

be cast upon those who would appropriate to their exclusive use any portion of the public highways. . . .

Another matter is discussed by counsel which calls for attention, and that is the proposition that the ordinance charging five dollars a pole per annum is unreasonable, unjust, and excessive. Among other cases cited in support of that proposition is *Philadelphia* v. *Western Union Telegraph Co.*, 40 Fed. Rep. 615, in which an ordinance similar in its terms was held unreasonable and void by the Circuit Court of the United States for the Eastern District of Pennsylvania. We think that question, like the last, may be passed for further investigation on the subsequent trial. *Prima facie*, an ordinance like that is reasonable. The court cannot assume that such a charge is excessive, and so excessive as to make the ordinance unreasonable and void; for, as applied in certain cases, a like charge for so much appropriation of the streets may be reasonable. If within a few blocks of Wall Street, New York, the telegraph company should place on the public streets fifteen hundred of its large telegraph poles, it would seem as though no court could declare that five dollars a pole was an excessive annual rental for the ground so exclusively appropriated; while, on the other hand, a charge for a like number of poles in a small village, where space is abundant and land of little value, would be manifestly unreasonable, and might be so excessive as to be void. Indeed, it may be observed, in the line of the thoughts heretofore expressed, that this charge is one in the nature of rental; that the occupation by this interstate commerce company of the streets cannot be denied by the city; that all that it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated; and it follows in the nature of things that it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open in the courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city.

We think that this is all that need be said in reference to the case as it now stands. For the reasons given, the judgment is

Reversed, and the case remanded for a new trial.

Mr. Justice Brown, dissenting.

The tax in this case cannot be considered, and does not purport to be a tax upon the property of the defendant. The gross disparity of the tax to the value of such property is of itself sufficient evidence of this fact — the total valuation of all of defendant's property in the city of St. Louis in 1884, as fixed by the State board of equalization, being but $17,064.63, while the tax of $5 upon 1,509 poles amounted to $7,545, or more than 44 per cent of the entire value of the property.

If it be treated as a tax upon the franchise, then it is clearly invalid within the numerous decisions of this court, which deny the right of a State or municipality to impose a burden upon telegraph and other companies engaged in interstate commerce for the exercise of their

franchises. *Leloup* v. *Mobile*, 127 U. S. 640; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Moran* v. *New Orleans*, 112 U. S. 69; *Harmon* v. *City of Chicago*, 147 U. S. 396; *Western Union Telegraph Co.* v. *Alabama*, 132 U. S. 472; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339.

If this tax be sustainable at all, it must be upon the theory adopted by the court that the municipality has the right to tax the company for the use of its streets. While I have no doubt of its right to impose a reasonable tax for such use, the tax must be such as to appear to have been laid *bona fide* for that purpose. It seems to me, however, that the imposition of a tax of $5 upon every pole erected by the company throughout the entire municipality is so excessive as to indicate that it was imposed with a different object. In the city of St. Louis alone the tax amounts, as above stated, to $7,545. A similar tax in the city of Philadelphia amounted to $16,000, while the facts showed that, at the most, only $3,500 per year was required to cover every expenditure the city was obliged to make upon this account. *Philadelphia* v. *W. U. Tel. Co.*, 40 Fed. Rep. 615. A like tax imposed by every city through which the defendant company carries its wires would result practically in the destruction of its business. While, as stated in the opinion of the court, $5 per pole might not be excessive if laid upon poles in the most thickly settled business section of the city, the court will take judicial notice of the fact that all the territory within the boundaries of our cities is not densely populated, that such cities include large areas but thinly inhabited, and that a tax which might be quite reasonable if imposed upon a few poles would be grossly oppressive if imposed upon every pole within the city. In my opinion the tax in question is unreasonable and excessive upon its face, and should not be upheld. The fact that it was nominally imposed for the privilege of using the streets is not conclusive as to the actual intent of the legislative body. As was said by this court in the *Passenger Cases*, 7 How. 283, 458: "It is a just and well-settled doctrine established by this court, that a State cannot do that indirectly which she is forbidden by the Constitution to do directly. If she cannot levy a duty or tax from the master or owner of a vessel engaged in commerce graduated on the tonnage or admeasurement of the vessel, she cannot effect the same purpose by merely changing the ratio, and graduating it on the number of masts, or of mariners, the size and power of the steam-engine, or the number of passengers which she carries. We have to deal with things, and we cannot change them by changing their names."

The tax in question seems to me to indicate upon its face that it was not imposed *bona fide* for the privilege of using the streets, but was intended either as a tax upon the franchise of the company, or for the purpose of driving its wires beneath the ground. While the latter object may be a perfectly legitimate one, I consider it a misuse of the taxing power to seek to accomplish it in this way. I am, therefore, constrained to dissent from the opinion of the court.

THE PEOPLE EX REL. GRIFFIN *v.* THE MAYOR, &C., OF BROOKLYN.

NEW YORK COURT OF APPEALS. 1851.

[4 *N Y* 419.]

UNDER the charter of the city of Brooklyn, the Common Council in the year 1848 caused Flushing Avenue, one of the streets of that city, to be graded and paved at an expense of $20,390.25, which, according to a provision in the charter, was assessed upon the owners or occupants of the lands benefited by the improvement in proportion to the amount of such benefit. After the assessment had been confirmed by the Common Council, Griffin and others, the relators, caused the proceedings to be removed by *certiorari* into the Supreme Court, where the proceedings were reversed and the assessment annulled, on the ground that the statute authorizing such assessments was unconstitutional and void. The Mayor and Common Council appealed to this court. The case is stated in the opinion of the court.

S. Beardsley and *J. C. Spencer*, for appellants. *A. Crist* and *R. Mott*, for respondents.

RUGGLES, J. . . . For the purpose of determining the constitutional question raised on the argument of this case, the first inquiry will be whether the street assessment in question was a rightful exercise of the power of taxation. If that question be answered in the affirmative, the objections made in the court below to the validity of the assessment are inapplicable. They were founded on those clauses in the Constitution which declare that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation. Neither of these prohibitions apply to taxation.

No land was taken from the relators, or other persons assessed for the making of Flushing Avenue. The question, therefore, whether compensation for land taken for such use, could be made in estimated benefits, does not arise.

If the assessment was a rightful exercise of the power of taxation, nothing has been exacted under the right of eminent domain, and no compensation need be made, except that which is supposed in all taxation to be derived by the tax-payer from the application of the money raised to the purpose for which the tax is laid. . . .

It is conceded that the grading and paving of Flushing Avenue was a public work, the expense of which might rightfully have been raised by general taxation upon all the taxable inhabitants of Brooklyn. The legislature thought proper to shift the burden of this taxation upon that part, or class of the taxable inhabitants exclusively, whose lands were benefited by the work, and to impose it on them in proportion to the benefit they respectively received therefrom.

This change in the apportionment of the burden was obviously made for the purpose of avoiding the injustice of general taxation for a special local object, the benefit of which extended only to a portion of the inhabitants of the city. It professed to apportion the tax according to the maxim, that "he who receives the advantage ought to sustain the burden," and to exact from each of the parties assessed no more than his just share of the burden according to this equitable rule of apportionment. The assessment, therefore, was taxation, and not an attempt to exercise the right of eminent domain.

If there be any sound objection to the assessment as a tax, it must be an objection which applies to the principle on which the tax is apportioned; because the object for which the money was to be raised is, without dispute, one for which taxation by a different rule of apportionment would have been lawful.

It remains to be seen whether anything can be found in the Constitution; in legal adjudication; in the practice of the government, or in the nature of things, by which taxation upon this principle of apportionment can be judicially annulled. . . . [Here follow quotations from the opinions of Marshall, C. J., in *Providence Bank* v. *Billings*, 4 Peters, 514, and *M'Culloch* v. *Maryland*, 4 Wheat. 428.]

Assuming this, as we safely may, to be sound doctrine, it must be conceded that the power of taxation and of apportioning taxation, or of assigning to each individual his share of the burden, is vested exclusively in the legislature, unless this power is limited or restrained by some constitutional provision. The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment: and the power of apportionment is therefore unlimited, unless it be restrained as a part of the power of taxation.

There is not, and since the original organization of the State government there has not been, any such constitutional limitation or restraint. The people have never ordained that taxation must be limited or regulated by any or either of the rules laid down by the Supreme Court in the case of *The People* v. *The Mayor of Brooklyn*, 6 Barb. 209, or in the case now under consideration. They have not ordained that taxation shall be general, so as to embrace all persons or all taxable persons within the State, or within any district, or territorial division of the State; nor that it shall or shall not be numerically equal, as in the case of a capitation tax; nor that it must be in the ratio of the value of each man's land, or of his goods, or of both combined; nor that a tax "must be co-extensive with the district, or upon all the property in a district which has the character of and is known to the law as a local sovereignty." Nor have they ordained or forbidden that a tax shall be apportioned according to the benefit which each taxpayer is supposed to receive from the object on which the tax is expended. In all these particulars the power of taxation is unrestrained.

The application of any one of these rules or principles of apportion-

ment, to all cases, would be manifestly oppressive and unjust. Either may be rightfully and wisely applied to the particular exigency to which it is best adapted.

Taxation is sometimes regulated by one of these principles, and sometimes by another; and very often it has been apportioned without reference to locality or to the tax-payer's ability to contribute, or to any proportion between the burden and the benefit. The excise laws, and taxes on carriages and watches, are among the many examples of this description of taxation. Some taxes affect classes of inhabitants only. All duties on imported goods are taxes on the class of consumers. The tax on one imported article falls on a large class of consumers, while the tax on another affects comparatively a few individuals. The duty on one article consumed by one class of inhabitants is twenty per cent of its value; while on another, consumed by a different class, it is forty per cent. The duty on one foreign commodity is laid for the purpose of revenue mainly, without reference to the ability of its consumers to pay; as in the case of the duty on salt. The duty on another is laid for the purpose of encouraging domestic manufactures of the same article; thus compelling the consumer to pay a higher price to one man than he could otherwise have bought the article for, from another. These discriminations may be impolitic, and in some cases unjust; but if the power of taxation upon importations had not been transferred by the people of this State to the Federal government, there could have been no pretence for declaring them to be unconstitutional in State legislation.

A property tax for the general purposes of the government, either of the State at large or of a county, city, or other district, is regarded as a just and equitable tax. The reason is obvious. It apportions the burden according to the benefit more nearly than any other inflexible rule of general taxation. A rich man derives more benefit from taxation, in the protection and improvement of his property, than a poor man, and ought therefore to pay more. But the amount of each man's benefit in general taxation cannot be ascertained and estimated with any degree of certainty; and for that reason a property tax is adopted instead of an estimate of benefits. In local taxation, however, for special purposes, the local benefits may in many cases be seen, traced, and estimated to a reasonable certainty. At least this has been supposed and assumed to be true by the legislature, whose duty it is to prescribe the rules on which taxation is to be apportioned; and whose determination of this matter, being within the scope of its lawful power, is conclusive.

In the case of *The People* v. *Brooklyn*, before referred to, it was said that a tax to be valid must be apportioned "upon principles of just equality," and upon all the property in the same political district; and that this is a fundamental principle of free government, which, although not contained in the Constitution, limits and controls the power of the legislature. This is new and it seems to me to be dan-

gerous doctrine. It clothes the judicial tribunals with the power of trying the validity of a tax by a test neither prescribed nor defined by the Constitution. If by this test we may condemn an assessment apportioned according to the relation between burden and benefit, we may with far better reason condemn a capitation tax on the ground that numerical equality is not just equality; or a general property tax, for a local object, because it compels one portion of the community to pay more than their just share for the benefit of another portion. All discriminations in the taxation of property, and all exemptions from taxation on grounds of public policy, would fall by the application of this test. If this doctrine prevails it places the power of the courts above that of the legislature in a matter affecting not only the vital interests, but the very existence of the government. It assumes that the apportionment of taxation is to be regulated by judicial and not by legislative discretion. It obstructs the exercise of powers which belong to, and are inherent in the legislative department, and restrains the action of that branch of the government in cases in which the Constitution has left it free to act.

The idea that a tax or assessment of this kind must be made to embrace all the property within the city or ward in which the improvement is made, seems to have originated in Kentucky from the opinion of an eminent judge of the Court of Appeals of that State, in the case of *Sutton's Heirs* v. *The City of Louisville*, 5 Dana, 28. But that opinion was founded mainly on a clause in the Constitution of that State, which is not to be found in ours; and in respect to this point, the opinion was afterwards modified by the same judge, and the principle in effect abandoned in the case of *The City of Lexington* v. *McQuillan's Heirs*, 9 Dana, 513. . . .

But there never was any just foundation for saying that local taxation must necessarily be limited by or co-extensive with any previously established district. It is wrong that a few should be taxed for the benefit of the whole; and it is equally wrong that the whole should be taxed for the benefit of a few. No one town ought to be taxed exclusively for the payment of county expenses; and no county should be taxed for the expenses incurred for the benefit of a single town. The same principle of justice requires that where taxation for any local object benefits only a portion of a city or town, that portion only should bear the burden. There being no constitutional prohibition, the legislature may create a district for that special purpose, or they may tax a class of lands or persons benefited, to be designated by the public agents appointed for that purpose, without reference to town, county, or district lines. General taxation for such local objects is manifestly unjust. It burdens those who are not benefited, and benefits those who are not burdened. This injustice has led to the substitution of street assessments in place of general taxation; and it seems impossible to deny that in the theory of their apportionment they are far more equitable than general taxation for the purpose they are designed for.

The same principle of apportionment has been applied to bridges and turnpike roads. The money paid for their construction and maintenance is reimbursed by means of tolls. Tolls are delegated taxation; and this taxation is charged and apportioned upon those only who derive a benefit from the original expenditure, and in proportion to that benefit. General taxation upon a town or county for the building of a bridge is valid and lawful, but obviously unjust; because it compels one to pay for the benefit of another. Tolls are more equitable, because they equalize the burden with the benefit.

But this theory of apportioning taxation is not confined in practice to street assessments and tolls on bridges and turnpike roads. The main revenues of the State, the canal tolls, are regulated upon the same principle; and so far as the objection to street assessments applies to the principle of selecting those only who are benefited, and laying the burden on them in proportion to their respective advantages, it applies with equal force to tolls on bridges and turnpikes, and on the public canals. The difference is only in the mode in which each tax-payer's share of the burden is ascertained.

It has been said that the benefits derived from the grading and paving of a street are sometimes fanciful and imaginary, and always uncertain and incapable of being estimated with that exactness which is necessary for the purposes of justice to the individuals assessed. But this is a consideration to be addressed to the legislature, and not to the judicial authorities. The courts cannot assume that this proposition is true in point of fact. The legislature has evidently acted on the belief that it is untrue. That mistakes may have happened, that abuses may have been practised, and that injustice may have been done, in making street assessments, it is not necessary to deny. Mistakes, abuses, and injustice have often occurred in general taxation. These are not grounds on which either system of supplying the public treasury can be denounced as unconstitutional. If the systems are imperfect, they should be reformed by the legislature. If street assessments are in their practical operation oppressive and unjust, the statutes which authorize them should be repealed. The remedy for unjust or unwise legislation is not to be administered by the courts. It remains in the hands of the people; and is to be wrought out by means of a change in the representative body, if it cannot be otherwise obtained. The Constitution has imposed upon the legislature the duty of restraining the power of municipal corporations in making assessments, and of preventing abuses therein. Art. 8, § 9. To assume that this duty has been and will be neglected, is a denial of that reasonable confidence which one department of the government ought always to entertain towards the others. The danger of abuse which is supposed to exist in the making of street assessments, exists in a greater or less degree, in every conceivable system of taxation, according to value; and if the courts have authority to annul an assessment on this ground, they have the like authority to annul any other tax assessed upon valu-

ation, on the same ground. It need not be said that this would be a much more alarming power than the unlimited right of taxation intrusted by the people to their representatives.

The constitutionality of the assessment in question, as a tax, has thus far been considered upon reason and principle, and without reference to judicial decisions on this subject. An examination of these authorities will show that they are in conformity with conclusions derived from reason and principle.

The difference between general taxation and special assessments for local objects requires that they should be distinguished by different names, although both derive their authority from the taxing power. They have always been so distinguished, and it is therefore evident that the word "tax" may be used in a contract, or in a statute, in a sense which would not include a street assessment, or any other local or special taxation within its meaning. Several cases are found in which it has been adjudged to have been so used. But in no case has it been adjudged that street assessments are not made by virtue of the legislative taxing power. If there are expressions to the contrary, in some of the cases, it will be found that they are *dicta* inapplicable to the point decided; or if applicable, that they were unnecessary to the decision, and not well considered. . . . [Here follows a statement of *Matter of Mayor of New York*, 11 Johns. 77; *Bleecker* v. *Ballou*, 3 Wend. 263; and *Sharp* v. *Spier*, 4 Hill, 76.]

It is true that Bronson, J., who delivered the opinion [in *Sharp* v. *Spier*] repeated the *dicta* found in the *Matter of the Mayor of New York*, 11 Johns. 77, that an assessment is not regarded as a burden, but as an equivalent for benefit, and therefore, cannot be regarded as a tax; but the decision rested clearly and safely on other grounds; although if it had stood on this alone it would have established nothing except that an assessment was not a tax within the meaning of the 7th section of the Act incorporating the village. The question whether street assessments are not made in virtue of the power of taxation, was not in that case decided. On the contrary, a question involving that point was expressly reserved as undecided, by Mr. Justice Bronson, who said, "I have not overlooked the fact that street assessments are, by the third section of this Act, made a lien or charge on the land. Whether that fact, taken in connection with the power conferred by the 7th section, will authorize a sale of land for street assessment, we are not now called upon to determine."

But the question now in controversy was involved and decided in the court for the correction of errors in the case of *The Mayor, &c. of New York* v. *Livingston*, 8 Wend. 85, 101. . . .

This case affords an example of the exercise of the two powers before mentioned, that is, the power of eminent domain and the power of taxation; the first in taking the land for the use of the street, and the second in requiring contribution to defray the expenses of improving it, from that class of persons on whom the burden ought to fall.

The case affirms the validity of street assessments, in virtue of the latter power. In 15 Wend. 376, *Owners of Ground Assessed* v. *Mayor, &c. of Albany*, the land of Mr. Betts, adjoining a square laid out in Albany, was assessed to pay the expenses, and Chief Justice Savage said: "It cannot be conceded that any constitutional question properly arises in relation to Mr. Betts. His property has not been taken for public use." And although he did not affirm or deny that the assessment was a tax, he affirmed the validity of the assessment against the objection of unconstitutionality expressly raised; and this could have been done on no other principle than that it was an exercise of the power of taxation. . . . [The court here consider *Thomas* v. *Leland*, 24 Wend. 65, and *Stryker* v. *Kelly*, 7 Hill, 9.]

The examination of the cases decided in this State terminates in the conclusion (although several of the cases contain *dicta* to the contrary) that street assessments like that in controversy in this suit, have been adjudged, both in the Supreme Court and in the court for the correction of errors, to be lawful and constitutional taxation.

One of the objections to the validity of the assessment and of the statute under which it was made, was that the assessment was not made by a jury or by commissioners, as required by section 7 of Article 1 of the Constitution. It is only necessary to say in reference to this objection, that the constitutional provision referred to applies only to private property taken for public use by right of eminent domain, and not to cases of taxation.

Taxation similar to that now in controversy has been sanctioned by long usage in this State and elsewhere.

In England, the commissioners of sewers assess the lands affected by their operations, without reference to other locality. 23 H. 8, ch. 5, § 3; 4 Evans' Stat. 26.

In Massachusetts, meadows, swamps, and lowlands may be assessed among the proprietors for the expense of draining the same, without reference to any political district, and in proportion to the benefit each proprietor derives from the work. R. S. of Mass. 673. In Connecticut, the same power is given by statute to commissioners for draining marshy lands. Stat. of Conn. ed. of 1839, p. 544.

In Pennsylvania, South Carolina, and Louisiana, taxation upon this principle has been practised and sanctioned as constitutional (9 Dana, 524); and in New Jersey, Maryland, Virginia, Ohio, and Indiana, it is understood that local taxation upon similar principles is authorized by law.

In the Colony and State of New York, the system of taxation for local purposes by assessing the burden according to the benefit, has been in force for more than one hundred and fifty years. It was applied to highways in the County of Ulster in 1691. Bradf. Laws, 45. The power was given to the corporation of New York in the same year. Id. 9. This statute remained in force in 1773, when Van Schaack's edition of the statutes was published, and no evidence of its

repeal is found until 1787, when it seems to have been revised, and its provisions re-enacted under the State Constitution. Van Schaack's L. 8, 9; 2 Jones & Var. 152; 1 Greenl. 443. The colonial statute was doubtless in force when the State Constitution was adopted. It is not unworthy of remark, that in April, 1691, a Bill of Rights was passed for the security and protection of the people of the Province. The statute authorizing the assessments first mentioned was passed afterwards during the same year. In January, 1787, an Act was passed declaring the rights of the citizens of this State, and prohibiting among other things that any person should be deprived of his property except by due course of law. The statute of 1787, authorizing street assessments in the city of New York, was passed by the same legislature, and sanctioned by the same council of revision, which had assented to the Bill of Rights. Street assessments upon the same principle were authorized in the city of New York in 1793, 3 Greenl. 58; and in 1795, Id. 244, 245; and in 1796, Id 333, 334; and in 1801, 2 K. & R. 130; and in 1813, 2 R L. 407. The corporation of New York have had and exercised authority to make street assessments from the infancy of that city. Similar powers have been conferred on nearly every city, and on many of the villages in this State. It has also been applied to highways, to turnpike roads, and to the draining of marshes.

This system of taxation was in force at the time of the making and adoption of our first, second, and third constitutions, and has stood in our statute books along with the constitutions from 1777 until now, without prohibition or restraint. Sales of real estate to large amounts have been made, and the lands so sold are now held on the faith of the validity of these assessment laws. Proceedings under them have been brought before the Supreme Court for review, continually during the last thirty years. They have been litigated often on the ground of irregularity, and sometimes upon constitutional objections. They have been confirmed in cases almost without number. If the uniform practice of the government, from its origin, can settle any question of this nature, the power of the legislature to exercise this kind of taxation would seem to be established by it.[1] Constitutional objections never

[1] In *Reeves* v. *Treasurer Wood County*, 8 Oh. St. 333, 343 (1858), the court (BRINKERHOFF, J.), after citing the passage of the opinion in the text which ends at this point, said: "The exercise of certain powers of government are often imperiously demanded by peculiar topographical and climatic conditions In Holland, nearly the whole surface of which is lower than the sea at high tide, the regulation of dikes and drains becomes a necessary function of government. So does the matter of irrigation in Egypt, Peru, and some other countries. It is notorious that a large district in the northwest portion of this State, not less probably than one-sixth the whole, and possessing elements of unsurpassed fertility — while it is sufficiently elevated above Lake Erie on the one side, and the basin of the Ohio River on the other, and almost everywhere with sufficient inclination in some direction, readily to carry off its surplus waters, if there were channels for its conveyance — has yet such an unbroken surface, and is so destitute of ravines and natural channels, as to render the appellation of 'black swamp' appropriate and familiar, and the district proverbial — more so probably than it really deserves — for dampness, miasm, and disease. To this large district,

prevailed against it until 1846, when the case of *The People* v. *The Mayor, &c. of Brooklyn*, was decided.

It is true, however, that they were complained of as operating harshly and unjustly in many instances. The subject was frequently brought before the legislature, and was debated in the public press.

The attempt was made in the convention of 1846 to abolish this mode of taxation. A standing committee was appointed to consider and report on the organization and power of cities and incorporated villages, and especially on their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit. Convention Documents, Nos. 10 & 15. . . .

Both the propositions reported by the committee failed; and after an unsuccessful effort by the chairman for their adoption (Debates, Argus ed. 806, 980), he submitted the following substitute, which was adopted and incorporated into the present Constitution as the 9th section of the 8th Article thereof, to wit: "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and

capable of transformation, and in fact now being rapidly transformed, into a region at once healthful and productive, drains are a necessity. They must often be several miles in extent, and laid out with reference to some general plan. It is easy to see that the execution of these works is beyond the power of isolated individual effort, and that the public authority must be invoked to prescribe the location and plan, and thus to overrule the conflicts of individual opinion and individual selfishness. It is certainly possible to execute these necessary works by means of assessments upon property in proportion to benefits received, and thus to secure results more equitable to individuals than could be obtained in any other way, or by any other system of taxation. Looking, therefore, to the urgent necessity for the exercise of this power, however cogent may be the considerations which address themselves to the legislature to induce that body carefully to guard against its abuse, I can see no cause to regret, and no argument against, its existence. We conclude, therefore, that the power of the General Assembly to authorize local assessments, in proportion to benefits conferred, for the construction of free turnpike roads, and for the drainage of lands, remains unabridged by any provision of the present Constitution.

"It is proper, however, that, before concluding this branch of the case, I should say, as a matter of justice to my brethren, that the considerations which I have thus presented, are more clear, convincing, and conclusive to my mind than they are to theirs; but all of them are of opinion that they are weighty enough to render the unconstitutionality of such assessments too doubtful to justify judicial interference with legislative discretion. If, therefore, the Act of May 1, 1854, and the Act amendatory thereto, presented no constitutional question other than that in relation to assessments, we should not feel ourselves at liberty to hold it to be unconstitutional."

In *City of Norfolk* v. *Chamberlain*, 89 Va. 196 (1892), in a very long and elaborate *obiter* discussion, RICHARDSON, J., denies the whole doctrine of local assessments: "The whole system and its every feature is opposed to equality and uniformity, is diametrically opposed to every principle of equitable apportionment, and so far from being legitimate taxation, is arbitrary exaction in its most odious form. After careful and laborious investigation, we are fully convinced that the doctrine held in the leading New York case of *The People* v. *The Mayor, &c. of Brooklyn*, and in numerous cases following it, cannot be sustained upon either reason or principle, and is opposed to the very letter, as well as the spirit of our own Constitution." Affirmed, *obiter*, in *McCrowell* v. *Bristol*, Id., 652, 673 (1893). See *Bloomington* v. *Latham et al.*, 142 Ill. 462 (1892). — ED.

to restrict their powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments, and in contracting debt by such municipal corporations."

Instead of abolishing the system of assessments, this section of the Constitution refers it to the legislature for the correction of its abuses. The direction given to restrict the power of cities and villages to make assessments presupposes and admits the existence of a power to be restricted. The Constitution, therefore, in this section, recognizes and affirms the validity of the legislation by which city and village assessments for local purposes like that now in controversy are authorized; and seems to remove all doubt in relation to the legislative power in question. . . . The judgment of the Supreme Court should be reversed, and the assessment affirmed. *Ordered accordingly.*[1]

[1] Compare the striking observations of CHURCH, C. J., for the court, in *Guest v. Brooklyn et al.*, 69 N. Y. 506 (1877), a case relating to local assessments. "The facts found by the referee indicate extravagance, irregularity, and to some extent abuses, and the proceedings culminating in an assessment of nearly $5,000 upon the 'lot' of the plaintiff is significant of the great burden which must have been imposed upon property owners for the improvement in question, the whole expense aggregating about $300,000. The case is not exceptional. Similar instances have been of frequent occurrence during the demoralized period of the last few years, and statutes have been easily procured to legalize whatever may have occurred.

"It may well be claimed that the whole system of assessments for local improvements, especially as authorized and practised in New York and Brooklyn, is unjust and oppressive, unsound in principle and vicious in practice. The right to make a public street or avenue is based upon a public necessity, and the public should pay for it. Such an improvement is in no sense for private use or benefit, and it is difficult to find more reason for assessing the accidental owner of property situate in its vicinity, the amount of a mere incidental advantage supposed to be derived from the improvement, than for compensating him for an incidental injury, and all right to such compensation has been uniformly denied. When land is taken for the improvement, there is some propriety, when determining the amount of compensation, in regarding the advantages to the owner arising from the manner of its proposed public use, because it may be said that, in some sense, it goes to the question of damages for the injury actually committed. So the harsh features of the obnoxious principle underlying the system are mitigated, if not avoided, when the consent of the owners, or even a majority of them, is required to authorize the construction of the improvement But, to force an expensive improvement upon a few property owners, against their consent, and compel them to pay the entire expense, under the delusive pretence 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) afforded in a free country against unjust taxation; the responsibility of the representative for his acts to his constituents. Marshall, C. J., in *M'Culloch v. State of Maryland*, 4 Wheat. 428, said: 'The only security against the abuse of this power (the taxing 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.' This is true to a degree, as it respects general taxation, when all are equally affected, but it has no beneficial application in preventing local taxation for public improvements. The majority of the constituents would generally approve, certainly not dissent from taxing the small minority.

"The few are powerless against the legislative encroachments of the many. The 'constituents,' under this system, are attacked in detail, a few only selected at a time,

DORGAN *v.* CITY OF BOSTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1866.

[12 *Allen*, 223.]

BILL in equity setting forth that the plaintiff is the owner of an estate situated on the corner of Belmont and Purchase streets, in Boston, with valuable buildings thereon; that the city of Boston, by its mayor and aldermen, have ordered Belmont Street to be laid out and widened to a width of not less than fifty feet, and so graded that the rise or fall shall in no place exceed two and one-half feet in one hundred; that for these purposes they have further ordered that a portion of the plaintiff's estate shall be taken and graded, containing in all about fourteen hundred and fifty-seven feet; that they have also ordered and resolved that said mayor and aldermen shall estimate the damages sustained by the plaintiff, including the value of the whole of the buildings, part of which are so taken, deducting therefrom the value of the materials to be removed and of the buildings which will remain standing, and that in estimating the value of the land cut off the same shall be estimated at its value before the widening, and such estimate shall not include the increased value occasioned merely by the widening, laying out and grading of the street, and that said mayor and aldermen shall assess the whole expense of the widening, including the damages for

and they have no power to enforce accountability, or to punish for a violation of duty on the part of the representative. The majority are never backward in consenting to, and even demanding, improvements which they may enjoy without expense to themselves. The inevitable consequence is, to induce improvements in advance of public necessity, to cause extravagant expenditures, fraudulent practices, and ruinous taxation. The system operates unequally and unjustly, and leads to oppression and confiscation. It is difficult to discover in it a single redeeming feature which ought to commend it to public favor. I make these observations to enable me to say more impressively, that the effective remedy is not with the judiciary. Whatever our individual views may be of the policy, we are obliged to maintain established rules of law, and to restrain our own power within prescribed limits, as well as to enforce restrictions upon other departments of government. We should regard a departure by the courts from rules of law wisely established for the protection of all, to meet the equities of a particular case or class of cases, as a far greater evil than that sought to be remedied. Courts can confine the legislature within constitutional authority; and, when the questions are legitimately up, can and do exact a strict compliance with all the requirements of law leading to a forcible taking of the property of the citizen, but, beyond this, they have no discretion, and are themselves bound to observe and enforce legislative provisions, whether they approve them or not. The only effective remedy is with the legislative department of the government, and it may possibly have been before applied but for the existence of other more engrossing abuses affecting the whole people; but among the manifold evils complained of in municipal administration, there is no one, in my judgment, calling more loudly for reform than this arbitrary system of local assessments. The order must be affirmed, and judgment absolute for defendant.

"All concur. Order affirmed, and judgment accordingly."

Compare Mr. Victor Rosewater's valuable study of "Special Assessments" (New York, Columbia College, 1893). — ED.

land taken and the net expense of grading the whole widened street upon the estates abutting upon said street, in proportion to their value, as they shall be appraised by said mayor and aldermen when the widening and grading shall have been made.

The bill further set forth that the portion of the petitioner's estate remaining would be almost valueless to him; that nevertheless the defendants were proceeding to assess a large sum upon him, claiming that they were authorized to do so by St. 1865, c. 159; that said statute is unconstitutional and void; that the mayor and aldermen in assessing the damages for taking the plaintiff's estate proceeded according to the provisions of the above statute; and that their assessment is void. The prayer was for an injunction, and for other relief.

The answer admitted the plaintiff's title, and the taking of the portion of his estate alleged in the bill for the purposes and in the manner set forth, and alleged that the mayor and aldermen had duly awarded damages to him therefor, in the sum of $6,304.88, and ordered that the cost of the laying out and grading of the street be hereafter assessed according to the provisions of St. 1865, c. 159; and further set forth that the plaintiff's estate would be greatly benefited by the proposed change, and that the statute referred to is constitutional, and all the proceedings of the mayor and aldermen were authorized thereby.

The plaintiff filed a general replication, and the case was reserved, by CHAPMAN, J., on the bill, answer and replication, for the determination of the whole court, with leave for either party, after the decision upon the constitutionality of St. 1865, c. 159, to move for a further hearing upon such matters as the court should think proper.

I. F. Redfield and *J. G. Abbott* (*W. A. Herrick* with them), for the plaintiff. *J. P. Healy* and *C. M. Ellis*, for the defendants.

BIGELOW, C. J. . . . It remains for us to consider that branch of the plaintiff's case which involves an inquiry into the validity of the assessment or mode of taxation prescribed by the statute, by means of which the expenses of the proposed improvement are to be defrayed. The broad position assumed by the plaintiff is, that this is a palpable violation of that provision of the Constitution, part 2, c. 1, § 1, art. 4, by which the power is given to the legislature to impose only proportional and reasonable taxes. We have already had occasion to consider the force and effect of these words, in connection with other portions of the same article in the Constitution, as applied to the imposition of taxes for the public charges of government. As to this class of taxation, the intent seems to be clear to put a restraint on the legislative authority, and to require that taxes levied for general purposes shall be laid on property, so that, taking all estates, real and personal, within the Commonwealth, as one of the elements of proportion, each person subject to taxation shall be obliged to pay only such portion of the taxes as the property owned by him bears to the whole sum to be raised. But this conclusion as to taxation for general purposes is drawn mainly from the clause in the Constitution which provides that, in order that assessments

for such purposes may be made with equality, a valuation of estates shall be taken anew as often, at least, as once in ten years. This requirement seems to indicate very clearly that such taxation, in order to be proportional, shall be laid according to the property owned by each person liable to assessment within the Commonwealth. But this provision is in terms limited to the public charges of government; that is, to expenditures incurred for those objects of a public nature for which it is the duty of the government to provide, and the burden of which properly rests and is to be distributed among the whole people of the Commonwealth; such, for example, as the charges for carrying on the several departments of the government, for the support of a system of general education, and for the common protection and defence of the people and government of the State. These and other like expenditures, whether incurred by the immediate agents and officers of the State, or through the instrumentality of counties or towns, are to be defrayed by assessments laid with equality and in proportion to the property held by each person liable to taxation.

But there is another large class of expenditures for objects of a public nature for which it is the proper province of the government to provide, which cannot be deemed to come within the designation of public charges of government, or be held to be a proper subject of general assessment on the whole people of the Commonwealth. Take the case of money expended in effecting an improvement of a local character, which, although it may enure, to a certain extent, to the benefit of the public, is nevertheless especially necessary for and beneficial to private property in the immediate vicinity. It certainly would not be equitable or just, or tend to an equalization of public burdens, that the cost of such a work should be laid on the whole people, or upon those lying remote from the locality, having no property connected with the improvement, and who could derive but little or no benefit or advantage from its construction. The duty of the government to make provision to carry into effect works of such character is clear and unquestionable. Indeed, it is often indispensable for police or sanitary purposes, or the convenience and accommodation of persons living within a certain town or municipality, or a district or section thereof, that money should be expended for purposes of a public nature, but essentially local in their operation and effect. Nor can there be any doubt that ample power to procure the accomplishment of such objects is vested in the legislature, in the exercise of their authority to pass all manner of wholesome and reasonable laws for the good and welfare of the Commonwealth and the subjects thereof. This great and essential attribute of sovereignty would be greatly abridged, if it should be held that the legislature are restricted in their authority to provide means by the levying of taxes for those objects only which would form a proper subject of a general charge on the whole people of the Commonwealth, and have no power to authorize assessments for objects of a local character, the execution of which is required by the convenience and necessities of a town or

district or neighborhood. We see no reason for construing the provision in the Constitution giving to the legislature the power of imposing proportional and reasonable assessments, rates, and taxes, as an inhibition on the levy of a tax for local purposes of a public nature upon those who will reap the benefit on their estates of a proposed expenditure of money. Such is not the natural or reasonable interpretation of the clause, standing as it does in relation to this class or species of taxation, without other words to qualify or restrict its meaning. As has been already said, it is in regard to the public charges of government that the mode of raising money by the imposition of taxes is specially pointed out, and it is as to these only that a restriction is found on the meaning of the preceding clause, by which the power to levy proportional and reasonable taxes is given. As to all other assessments which may be required by the enactment and execution of wholesome and reasonable laws, no limitation of authority is expressed, and none can be implied except that which arises from the natural and proper import of the words used. It certainly cannot be said that all taxes laid for local purposes of a public nature on those who would be chiefly and directly benefited by the execution of a proposed work, and in proportion to the degree of benefit or profit which each will receive therefrom, are necessarily either unreasonable or unproportional. Nor can it be contended that the Constitution, in regard to this species of taxation, furnishes any fixed rules of proportion, or gives any absolute standard by which to determine whether a particular tax is within the limits of the legitimate exercise of the power granted. Undoubtedly a very wide discretion was intended to be left to the legislature as to the subjects and method of executing the authority conferred on them of imposing taxes for purposes other than those of a general nature; and yet the power is not wholly without limit. In requiring that taxes should be proportional and reasonable, the framers of the Constitution intended to erect a barrier against an arbitrary, unjust, unequal or oppressive exercise of the power. *Oliver* v. *Washington Mills*, 11 Allen, 268. If, for instance, the legislature should arbitrarily designate a certain class of persons on whom to impose a tax, either for general purposes or for a local object of a public nature, without any reference to any rule of proportion whatever, having no regard to the share of public charges which each ought to pay relatively to that borne by all others, or to any supposed peculiar benefit or profit which would accrue to those made subject to the tax which would not enure to others, so that in effect the burden would fall on those who had been selected only for the reason that they might be made subject to the tax, we cannot doubt that the imposition of it would be an unlawful exercise of power not warranted by the Constitution, against the exercise of which a person aggrieved might sue for protection. But no such case is made by the present bill. This part of the plaintiff's case rests on the broad proposition that the legislature have no power to authorize the assessment of the cost of a work of a public nature, but

the construction of which will be of special and peculiar benefit to adjacent property, on the abutting estates in proportion to their value. For the reasons already given, we are of opinion that such a tax is neither unreasonable nor unproportional, and that it was competent for the legislature to impose it in the mode prescribed by the statute.

We are greatly strengthened in this conclusion by the consideration that such a mode of assessment of taxes for similar objects has been adopted and carried into effect without doubt or question in this Commonwealth, both under the colonial government and since the adoption of the Constitution. As early as 1658 it was ordered by the General Court of the colony that a certain way should be laid out through Roxbury to "Boston Farms," and power was given to impose the cost on "all such of Boston or other towns as shall have benefit of such way." 4 Mass. Col. Rec. pt. 1, 327. The Prov. St. 4 Wm. & Mary, c. 1 (Mass. Perp. Laws, 1), which provided for the laying out of streets in the city of Boston, and also for regulating and enlarging narrow and crooked lanes and passages therein, enacted that the damages for land taken for such enlargement and regulation should be assessed by a jury and paid "by the neighborhood or town" "in proportion to the benefit or conveniency any shall have thereby." A similar enactment was contained in Prov. St. 33 Geo. II. c. 3 (Mass. Perp. Laws, 387), which was an Act for rebuilding that part of Boston which had been laid waste by fire. It was thereby provided that a jury should view the streets laid out and the several tenements or lots of land abutting thereon, and should estimate the damages which any person might sustain by such laying out, and "likewise the benefit or advantage that may accrue to any person or persons thereby," which damages "shall be made good to the party endamaged either by such particular person or persons as shall be thereby benefited, or by the town of Boston, or by both, in such proportion as the said jury shall find reasonable." By Prov. St. 8 Anne, c. 99, and Prov. St. 3 Geo. III. c. 293 (Anc. Chart. 389, 651), persons receiving any benefit from common sewers, either direct or remote, were obliged to pay such a proportional part of making and repairing the same as should be assessed to them by the selectmen of the towns. Similar enactments were made by St. 1796, c. 47; Rev. Sts. c. 27; St. 1841, c. 115; and Gen. Sts. c. 48. By Prov. Sts. 12 Anne, c. 110, and 10 Geo. II. c. 194, § 1 (Anc. Chart. 403, 505), it was provided that damages caused by the laying out of particular and private ways necessary for towns and for the general benefit, should be paid by the towns, otherwise by such of the inhabitants as should have the benefit of the way, to be assessed by the justices of the Court of Sessions. So by the fifth section of the last-named statute it was provided that certain bridges should be repaired and maintained in whole or in part by those "who live near and reap the principal advantage" therefrom. By statute passed October 30, 1781, St. 1781, c. 14 (1 Mass. Special Laws, 21), entitled "an Act for widening and amending the streets, &c., of Charlestown" in that part which was laid waste by fire by the British

troops, it was enacted that the selectmen should call on persons whose estates were benefited by the proposed improvement to join in the appointment of appraisers to determine the sum that the owner of an estate so benefited ought to pay, and the estate of such owner was made subject to pay the sum awarded against him. This Act is in this particular and in many others of its provisions very similar to the one under which the defendants have acted in taking land of the plaintiff; and it is especially noticeable because it was passed within a year from the time when the Constitution of Massachusetts was adopted, and by a legislature composed of many persons who had taken part, some of them a leading one, in the formation of that instrument. In a question touching the powers of the government under the Constitution, such contemporaneous action of the legislature is entitled to great weight in determining the true construction to be given to a particular clause. The principle of assessing the cost of a local improvement on those whose estates are benefited thereby was also embodied substantially in St. 1795, c. 62, which made provision for the draining of meadows and swamps, re-enacted in Rev. Sts. c. 115, and in Gen. Sts. c. 148; and likewise in St. 1855, c. 104, which authorized the construction of roads to low lands, mines and quarries, and the assessment of the cost on all parties according to the benefits received by each. So the numerous statutes passed by the legislature imposing the construction and maintenance of certain bridges on towns in the immediate vicinity, whose inhabitants derive the greatest benefit therefrom, are based on the same principle. Without extending citations further, it is apparent that the statute in question cannot be regarded as an innovation. On the contrary, it seems to be entirely in accordance with the established course of legislation from the foundation of the government to the present time.

Although no case has arisen heretofore in this court which presents the precise questions raised in the present case as to the power of the legislature to authorize a tax to be assessed on estates in the mode provided by the statute under consideration, the principle on which the assessment is based has been repeatedly recognized and sanctioned by this court. The result of these decisions, and the conclusion to which our own minds have been brought on this part of the case, may be stated to be, that taxes levied for public purposes of a local character are not unconstitutional, as being unreasonable and unproportional, solely because they are imposed only on a certain town or district, or on persons residing or owning property in a particular locality, and that an assessment made on persons in respect of their ownership of certain property which receives a peculiar benefit from the expenditure of the money raised by a tax, or by reason of their residence in the vicinity of a proposed public improvement, and the special advantage or convenience which will accrue to them and their property therefrom, will not be held invalid, although it does not operate on all persons and property in the community in the same manner as taxes levied for general

purposes. *Norwich* v. *County Commissioners*, 13 Pick. 60; *Goddard, petitioner*, 16 Pick. 504; *Attorney-General* v. *Cambridge*, 16 Gray, 247; *Morse* v. *Stocker*, 1 Allen, 150, 159; *Hingham & Quincy Turnpike Co.* v. *County of Norfolk*, 6 Allen, 353, 359. . . .

Upon these grounds we are of opinion that the plaintiff shows no claim to equitable relief, and that the order must be

Bill dismissed.[1]

In *The Tide-Water Company* v. *Coster*, 18 N. J. Eq. 518, 526 (1866), a statute providing for the draining of certain tide-water marshes and for assessing the cost proportionately upon the lands benefited, was held invalid for not limiting the assessment so as not to exceed the benefits of the improvement. Beasley, Chief Justice, for

[1] Compare *Beaumont* v. *Wilkes Barre*, 142 Pa. 198 (1891). In *Hagar* v *Reclamation District*, 111 U. S. 701, 704 (1884), on appeal from the United States Circuit Court for California, the court (Field, J.) said: "There being no Federal question touching these matters, we follow the decision of the State tribunals as to the construction and validity of the statutes. It is not open to doubt that it is in the power of the State to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for the construction of canals for draining marshy and malarious districts, and of levees to prevent inundations, as well as for the opening of streets in cities and of roads in the country. The system adopted in California to reclaim swamp and overflowed lands by forming districts, where the lands are susceptible of reclamation in one mode, is not essentially different from that of other States where lands of that description are found. The fact that the lands may be situated in more than one county cannot affect the power of the State to delegate authority for the establishment of a reclamation district to the supervisors of the county containing the greater part of the lands. Such authority may be lodged in any board or tribunal which the legislature may designate.

"In some States the reclamation is made by building levees on the banks of streams which are subject to overflow; in other States by ditches to carry off the surplus water. Levees or embankments are necessary to protect lands on the lower Mississippi against annual inundations. The expense of such works may be charged against parties specially benefited, and be made a lien upon their property. All that is required in such cases is that the charges shall be apportioned in some just and reasonable mode, according to the benefit received. Absolute equality in imposing them may not be reached; only an approximation to it may be attainable. If no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode pursued that, to some extent, inequalities may arise. It may possibly be that in some portions of the country there are overflowed lands of so large an extent that the expense of their reclamation should properly be borne by the State. But this is a matter purely of legislative discretion. Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure. *County of Mobile* v. *Kimball*, 102 U. S. 691, 704. The rule of equality and uniformity, prescribed in cases of taxation for State and county purposes, does not require that all property, or all persons in a county or district, shall be taxed for local purposes. Such an application of the rule would often produce the very inequality it was designed to prevent. As we said in *Louisiana* v. *Pillsbury*, 105 U. S. 278, 295, there would often be manifest injustice in subjecting the whole property of a city, and the same may be said of the whole property of any district, to taxation for an improvement of a local character. The rule, that he who reaps the benefit should bear the burden, must in such cases be applied." Compare *Lent* v. *Tillson*, 140 U. S. 316, s. c. *supra*, p. 654. — Ed.

the Court of Errors and Appeals, said: "But looking more closely into the structure and effect of this statute, there appears to be a defect which seems to be both radical and incurable, and which must prevent its judicial enforcement. The defect alluded to is this: no provision is made for the indemnification of the owner of the land subjected to the operation of this law, in case the expense of the improvement shall exceed the benefits which shall be conferred. The Act authorizes the entire expense of drainage to be imposed upon the lands, whether such expense falls below, or rises above, the increase in value which may accrue to the lands by reason of such drainage. In other words, the cost of the enterprise is to be imposed as a burden on the lands, even though a full equivalent in the way of improvement shall not be given to the land-owner. Thus, if the cost of drainage should be $5 an acre, such sum is to be assessed on the land, although such land may not be benefited more than to the extent of $3 an acre. The statute does not require that the apportionment of expense shall be limited, as the maximum rate, by the increase in the value to result from the improved condition of the land. Now, therefore, it seems to me obvious, that if this scheme be carried into effect, in the event of an excess of expenses over benefits, private property, *pro tanto*, will be taken for public use without compensation. Where lands are improved by legislative action, on the ground of public utility, the cost of such improvement, it has been frequently held, may, to a certain degree, be imposed on the parties who, in consequence of owning lands in the vicinity of such improvement, receive a peculiar advantage. By the operation of such a system, it is not considered that the property of the individual, or any part of it, is taken from him for the public use, because he is compensated in the enhanced value of such property. But it is clear this principle is only applicable when the benefit is commensurate to the burden; when that which is received by the land-owner is equal or superior in value to the sum exacted; for if the sum exacted be in excess, then to that extent, most incontestably, private property is assumed by the public. Nor, as to this excess, can it be successfully maintained that such imposition is legitimate as an exercise of the power of taxation. Such an imposition has none of the essential characteristics of a tax. We are to bear in mind that this projected improvement is to be regarded as one in which the public has an interest; the owners of these waste lands have a special concern in such improvement, so far as their lands will be in a peculiar manner benefited; beyond this, their situation is the same as that of the rest of the community. The consideration for the excess of the cost of the improvement over the enhancement of the property, within the operation of this Act, is the public benefit: how, then, upon any principle of taxation, can this portion of the expense be thrown exclusively upon certain individuals? The expenditure of this portion of the cost of the work can only be justified on the ground of benefit to the public. I am aware of no principle which will permit the expenses incurred in conferring such

benefit upon the public, to be laid in the form of a tax upon certain persons, who are designated, not indeed by name, but by their description as the owners of certain lands. A legislative Act authorizing the building of a public bridge, and directing the expenses to be assessed on A, B, and C, such persons not being in any way peculiarly benefited by such structure, would not be an act of taxation, but a condemnation of so much of the money of the persons designated, to a public use. And, precisely in the same way, would an exaction of the cost of these works embraced in the Act before us, so far as such cost exceeded the benefit to the lands improved, be an assumption of the money of a few individuals for an end purely public. Nor should it be overlooked, that if the scheme embraced in this Act should be put in operation, and the expenses should exceed or equal the value of the land in its reclaimed condition, the inevitable result would be, that the public would acquire the benefits contemplated by the rescue of the land from its present idleness, but the owner of the land would lose his entire property. Every consideration of equity stands opposed to the admission of such a rule of taxation. Nor do I consider it any answer to this last objection to suggest that there is no probability that the expenses of this improvement will equal the improved value of the land to be affected by it. It is clear, that the cost of the work and the value of the land in its altered condition, are not easy of estimation; it is certain, many enterprises of a similar character have proved abortive, and have brought great losses upon their projectors; and it is enough, therefore, to say, that the property owner cannot, without his consent, be made a party in the hazards of such an enterprise. If the assessment to which he is subjected had been restricted so as not to exceed the benefits received by him, he would have run no risk, because he could not have suffered any loss; but as this law is framed, his land may be taken from him, if the expenses of the project require the sacrifice. This, as has been already stated, would be, in my opinion, equivalent to a condemnation of the land, without compensation, for the public benefit, and as this may result from the natural operation of the statute, I am compelled to conclude that it is unconstitutional and void."

In *The State et al.* v. *Mayor of Newark et al.*, 37 N. J. Law, 415 (1874), Beasley, C. J., for the court, said: "The writ in this case has brought before the court the proceedings in the assessment of the expenses incurred in re-paving the road-bed of a portion of one of the public streets in the city of Newark. The cost of this work has been imposed in accordance with the direction of the legislative Act authorizing these improvements, in the proportion of two-thirds of such cost on the owners of the lots fronting on the line of the section of the street thus re-paved, and the remaining third on the city treasury.

"It thus appears that the statute in question undertakes to fix, at the

mere will of the legislature, the ratio of expense to be put upon the owner of the property along the line of the improvement; and the question is, whether such an Act is valid. The inquiry thus involved has, of late, been so exhaustively discussed in a crowd of judicial decisions, that I do not feel inclined to do more than so far to refer to general principles as may be necessary to explain clearly what I conceive to have been heretofore decided by this court.

"The doctrine that it is competent for the legislature to direct the expense of opening, paving, or improving a public street, or at least some part of such expense, to be put as a special burden on the property in the neighborhood of such improvement, cannot, at this day, be drawn in question. There is nothing in the Constitution of this State that requires that all the property in the State, or in any particular subdivision of the State, must be embraced in the operation of every law levying a tax. That the effect of such laws may not extend beyond certain prescribed limits, is perfectly indisputable. It is upon this principle that taxes raised in counties, townships, and cities, are vindicated. But while it is thus clear that the burden of a particular tax may be placed exclusively on any political district to whose benefit such tax is to enure, it seems to me it is equally clear that, when such burden is sought to be imposed on particular lands, not in themselves constituting a political subdivision of the State, we at once approach the line which is the boundary between acts of taxation and acts of confiscation. I think it impossible to assert, with the least show of reason, that the legislative right to select the subject of taxation is not a limited right. For it would seem much more in accordance with correct theory to maintain, that the power of selection of the property to be taxed cannot be contracted to narrower bounds than the political district within which it is to operate, than that such power is entirely illimitable. If such prerogative has no trammel or circumscription, then it follows that the entire burden of one of these public improvements can be placed, by the force of the legislative will, on the property of a few enumerated citizens, or even on that of a single citizen. In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the law-making power to concentrate the burden of a tax upon specified property, does not exist. If a statute should direct a certain street in a city to be paved, and the expense of such paving to be assessed on the houses standing at the four corners of such street, this would not be an act of taxation, and it is presumed that no one would assert it to be such. If this cannot be maintained, then it follows that it is conceded that the legislative power in question is not completely arbitrary. It has its limit; and the only inquiry is, where that limit is to be placed.

"This question was considered, and, as it was supposed, was definitely settled by this court in the case of *The Tide Water Company* v.

Coster, reported in 3 C. E. Green, 519. The principle sanctioned by that decision was, that the cost of a public improvement might be imposed on particularized property, to the extent to which such property was exceptionally benefited; and that any special burden beyond that measure was illegal. It was upon this principle that the case was rested. The rule thus adopted stands upon the idea that it establishes a standard by which, with at least an approach to precision, an act of taxation may be distinguished from an act of confiscation. So far as the particularized property is specifically benefited, an exaction to that extent will not be a condemnation of property to the public use, because an equivalent is returned; and this is the ground on which the abnormal burden put upon the land-owner is justified. Speaking on this subject, Chief Justice Green says: 'The theory upon which such assessments are sustained as a legitimate exercise of the taxing powers is, that the party assessed is locally and peculiarly benefited over and above the ordinary benefit which, as one of the community, he receives in all public improvements, to the precise extent of the assessment.' *State* v. *City of Newark*, 3 Dutcher, 190. It follows, then, that these local assessments are justifiable, on the ground above, that the locality is especially to be benefited by the outlay of the money to be raised. Unless this is the case, no reason can be assigned why the tax is not general. An assessment laid on property along a city street for an improvement made in another street, in a distant part of the same city, would be universally condemned, both on moral and legal grounds. And yet there is no difference between such an extortion and the requisition upon a land-owner to pay for a public improvement over and above the exceptive benefit received by him. It is true that the power of taxing is one of the high and indispensable prerogatives of the government, and it can be only in cases free from all doubt that its exercise can be declared by the courts to be illegal. But such a case, if it can ever arise, is certainly presented when property is specified, out of which a public improvement is to be paid for in excess of the value specially imparted to it by such improvement. As to such excess, I cannot distinguish an Act exacting its payment from the exercise of the power of eminent domain. In case of taxation the citizen pays his quota of the common burden: when his land is sequestered for the public use, he contributes more than such quota, and this is the distinction between the effect of the exercise of the taxing power and that of eminent domain. When, then, the overplus beyond benefits from these local improvements, is laid upon a few land-owners, such citizens, with respect to such overplus, are required to defray more than their share of the public outlay, and the coercive Act is not within the proper scope of the power to tax. And as it does not seem practicable to define the area upon which a tax can be legitimately laid, and beyond which it cannot be legitimately extended, and as there is, as has been shown, necessarily a limit to the power of selection in such instances, the principle stated in the case cited is, perhaps,

the only one that can be devised whereby to graduate the power. Consequently, when the improvement, as in the present instance, is primarily for the public welfare, and is only incidentally for the benefit of the land-owner, the rule thus established ought to be rigidly applied and adhered to.

"With the doctrine thus expounded, the case of *The State, Sigler, pros.* v. *Fuller*, 5 Vroom, 227, is not in harmony. This was an assessment for the improvement of a sidewalk, and in that feature differed from the present one, which is for the improvement of the road-bed. I think the difference is a substantial one. A sidewalk has, always in the laws and usages of this State, been regarded as an appendage to, and a part of, the premises to which it is attached, and is so essential to the beneficial use of such premises, that its improvement may well be regarded as a burden belonging to the ownership of the land, and the order or requisition for such an improvement as a police regulation. On this ground I conceive it to be quite legitimate to direct it to be put in order at the sole expense of the owner of the property to which it is subservient and indispensable. But in the reported case there was another circumstance which illegalized the proceedings. A part of the expense of constructing the sidewalk on one side of the street was thrown on the owners of the other side of the same street. The portion of the burden thus transferred was one-sixth of the expense, and it was directed to that extent to be imposed irrespective of the amount of any ascertained benefit conferred. This brought the case within the prohibition inherent in the rule laid down in the Tide-Water case, so that the proceedings should have been set aside. The suggestion that in this class of cases it will be presumed that the benefits equal the burden imposed until the contrary is shown, cannot prevail. If well founded, it would have led to a different result in the Tide-Water case. The only safe rule is that the statute authorizing the assessment shall itself fix, either in terms or by fair implication, the legal standard to which such assessment must be made to conform. In no other way can property be adequately protected." [1]

[1] Compare *White* v. *People*, 94 Ill 604; *Ill. Cent. R. R. Co.* v. *Decatur*, 147 U. S. 190, 207 (1893), s. c. *infra*, p. 1310; *Spencer* v. *Merchant*, 125 U. S. p. 345 (1887).

In *State* v. *Mayor, &c. of Paterson*, 42 N. J. Law, 615, 617 (1880), the Court of Errors and Appeals (BEASLEY, C. J.), said: "The only objection of any account urged against this statute is, that it confines the assessment for damages and benefits to lands fronting on that part of the street which had been graded. It exempts from a liability to render an equivalent for the benefits arising from the improvement, all other property in the vicinity, no matter how much it may have been benefited. The contention is, that this law, therefore, arbitrarily designates a tax area of its own, which does not coincide with any political district, or subdivision of such district, and that it does not embrace the whole of the class of land-owners whose property is enhanced in value, but only a portion of such class.

"I think this law is clearly subject to these imputations. It is plain that it sets off a small portion of the territory of that city, and subjects it to this particular imposition, and if, consequently, we are to regard these assessments which are made against

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H. W. Paine and *C. E. Hubbard*, for the petitioners. *J. W. Hammond*, for the respondent.

the land-owner for benefits conferred upon his property by this class of public works, as ordinary exercises of the taxing power, I confess I do not see how they are to be vindicated. In *State, Baldwin, pros.* v. *Fuller*, 10 Vroom, 576; 11 Id. 615, it was explicitly decided, first in the Supreme Court and then in this court, that the legislature could not, of its own will, and without being justified for so doing, from the nature of things, lay off any particular portion of territory for the purpose of putting a peculiar tax upon it. Such an act was pronounced to be not a legitimate act of taxation, looking at it in the light of general legal principles. That decision was the product of legal rules correctly applied, and should not, in any degree, be disturbed.

"But still the question presses, are these assessments to be treated and regulated by the same rules that confine and trammel legislation in its ordinary uses? And upon full consideration, my conclusion is, that they are not to be so regarded, and that the power in such instances exercised is *sui generis*. The right of the public to improve a man's property against his will, and to make him pay the expense, calling it a tax, has always seemed to me a kind of procedure very dissimilar from ordinary acts of legislation. But such exercises of authority, however abnormal they may seem when tested by theory, have too long prevailed, both in this State and elsewhere, to be now called in question. The existence of the legislative power, in this province, has been settled by long usage and oft-repeated judicial recognition. And in many instances, and for a long period of time, it has been put in force in the form that is now in this case exclaimed against, for assessments confined to the lands fronting on the improved street are not novelties, but have always been a part of this exceptional system. So, likewise, such partial impositions have been, from time to time, at least tacitly assented to by the courts in the State, and various assessments made under laws containing this feature have been sustained by this court of last resort. And it is likewise impossible to forget the fact that there is at present much of the legislation of the State largely affecting municipal interests of great magnitude, which has grown up by reason of such apparent judicial sanction. In this state of affairs, it seems to me that the practice now in question must be taken to be a recognized part of that ancient and inveterate plan which has been resorted to in taxing the land-owner for the special benefit that a public improvement of this kind has imparted to his property. Viewing it in this light, it cannot, at this late day, be discarded.

"With respect to the other exceptions to these proceedings and this Act, I have found nothing in them of such weight as to require any discussion at my hands. On these subjects, I concur in the views presented in the Supreme Court."

And so *State* v. *Mayor of Bayonne*, 29 Atl. Rep 713 (N. J. Ct. of App., Feb. 1894); *Beaumont* v. *Wilkes Barre*, 142 Pa. 198 (1891) Compare *State* v. *Brill*, 59 N. W. Rep. 989 (Minn., July, 1894).

Hammett v. *Phil.*, 65 Pa. 146 (1870), in a case of re-paving a street, holds local assessments unconstitutional, while sustaining them if limited to laying the original paving. SHARSWOOD, J., for the court: "It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments." But see the learned and full dissenting opinion of READ, J., at p. 157. The case was affirmed in *Harrisburgh* v. *Segelbaum*, 151 Pa. 172 (1892). — ED.

[1] The statement of facts is omitted. — ED.

COLT, J. The St. of 1863, c. 191, authorizes the mayor and aldermen of the city of Cambridge to assess upon the abutters in just proportions the expense of the edge-stones and covering materials for sidewalks constructed under their order. Assessments have been made under this Act, and the plaintiffs, in a petition for a writ of *certiorari*, object to their validity, and ask that the city may be prevented from collecting them.

It is alleged that the Act is unconstitutional. 1. Because no right of appeal to a jury is given to a party aggrieved by the doings of the mayor and aldermen. But in cases like this, there is no right of appeal secured by the Constitution. The purpose of the Act is to provide for certain local improvements in public streets, the expense of which shall be partly borne by those immediately interested and whose estates are benefited thereby. It has been repeatedly held by this court that this is a mode of taxation which the legislature may well adopt. It is clearly distinguishable from the exercise of the right of eminent domain, and does not, like that, require that a right of appeal to a jury should be secured. *Jones* v. *Aldermen of Boston*, 104 Mass. 461, 467; *Salem Turnpike* v. *Essex*, 100 Mass. 282, 287; *Goddard, petitioner*, 16 Pick. 504.

2. As an exercise of the power of taxation, the Act is objected to as unconstitutional, because the rule of proportion to be followed in making assessments has not been fixed by the legislature. The Act provides that a definite portion of the expense of the improvement, namely, the cost of the edge-stones and covering materials, "shall be assessed upon the abutters in just proportions," deducting from the assessment all sums which may have been previously paid to the city by the tax-payer for previous improvements. This plainly requires that the assessment be laid equally upon the abutting estates, which, from the nature of the work, must be immediately benefited. The limits of the locality subject to the burden are fixed by the Act with sole reference to these special benefits, and a rule is given by which the entire expense is divided between the abutters and the city. The rule of apportionment is uniform throughout the taxing district, and sufficiently approaches equality. The principle of taxation here adopted has been repeatedly applied by the legislature with reference to sidewalks and other local improvements, and under the decisions of this court the power is not open to constitutional objection. *Lowell* v. *Hadley*, 8 Met. 180; *Springfield* v. *Gay*, 12 Allen, 612; *Goddard, pet'r, supra; Salem Turnpike* v. *Essex, supra; Haverhill Bridge* v. *County Commissioners*, 103 Mass. 120; *Dow* v. *Wakefield*, 103 Mass. 267; *Carter* v. *Cambridge Bridge*, 104 Mass. 236; *Dorgan* v. *Boston*, 12 Allen, 223, 235, 240; *Jones* v. *Boston*, 104 Mass. 461, 467.

3. It is finally objected that the mayor and aldermen, under the power given them, did not in fact assess the abutters in just proportions. The case is reserved upon petition and answer and upon the facts disclosed. We cannot say, as matter of law, that the principle

adopted by the board was not in compliance with the requirements of the Act, or that under it the assessment was made in unjust proportion.

Petition dismissed.[1]

In *Ill. Cent. R. R. Co.* v. *Decatur*, 147 U. S. 190 (1893), on error to the Supreme Court of Illinois, Brewer, J. for the court, said: "The single question in this case is, whether this special tax for a local improvement is within the exemption from taxation granted to the railroad company by section 22 of the Act of 1851.

"Between taxes, or general taxes, as they are sometimes called by way of distinction, which are the exactions placed upon the citizen for the support of the government, paid to the State as a State, the consideration of which is protection by the State, and special taxes or special assessments, which are imposed upon property within a limited area for the payment for a local improvement supposed to enhance the value of all property within that area, there is a broad and clear line of distinction, although both of them are properly called taxes, and the proceedings for their collection are by the same officers and by substantially similar methods. Taxes proper, or general taxes, proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all. 'The public revenues are a portion that each subject gives of his property in order to secure or enjoy the remainder.' Montesq. Spirit of the Laws, book 13, c. 1; *Loan Association* v. *Topeka*, 20 Wall. 655, 664; Opinions of Judges, 58 Maine, 591; *Hanson* v. *Vernon*, 27 Iowa, 28, 47; *Judd* v. *Driver*, 1 Kans. 455, 462; *Philadelphia Association* v. *Wood*, 39 Penn. St. 73, 82; *Exchange Bank* v. *Hines*, 3 Ohio St. 1, 10.

"On the other hand, special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay for the improvement. In *Wright* v. *Boston*, 9 Cush. 233, 241, Chief Justice Shaw said: 'When certain persons are so placed as to have a common interest among themselves, but in common with the rest of the community, laws may justly be made, providing that, under suitable and equitable regulations, those common interests shall be so managed, that those who enjoy the benefits shall equally bear the burden.' In *McGonigle* v. *Alleghany City*, 44 Penn. St. 118, 121, is this declaration: 'All these municipal taxes for improvement of streets, rest, for their final reason, upon the

[1] And so *White* v. *The People*, 94 Ill. 604 (1880), holding that the legislature may authorize the entire cost of a side-walk to be assessed on the abutters, and that thereafter the question of the relation of the cost to the special benefit is not open. — Ed

enhancement of private properties.' In *Litchfield* v. *Vernon*, 41 N. Y. 123, 133, it was stated that the principle is, 'that the territory subjected thereto would be benefited by the work and change in question.' . . .

"These distinctions have been recognized and stated by the courts of almost every State in the Union, and a collection of the cases may be found in any of the leading text-books on taxation. Founded on this distinction is a rule of very general acceptance, — that an exemption from taxation is to be taken as an exemption simply from the burden of ordinary taxes, taxes proper, and does not relieve from the obligation to pay special assessments. Thus in an early case, *In the Matter of the Mayor, &c. of New York*, 11 Johns. 77, 80, under a statute which provided that no church or place of public worship 'should be taxed by any law of this State,' the court observed: 'The word '*taxes*' means burdens, charges or impositions put or set upon persons or property for public uses, and this is the definition which Lord Coke gives to the word *talliage* (2 Inst. 532), and Lord Holt, in Carth. 438, gives the same definition, in substance, of the word *tax*. The legislature intended, by that exemption, to relieve religious and literary institutions from these public burdens, and the same exemption was extended to the real estate of any minister, not exceeding in value fifteen hundred dollars. But to pay for the opening of a street, in a *ratio* to the 'benefit or advantage' derived from it, is no burden. It is no talliage or tax within the meaning of the exemption, and has no claim upon the public benevolence. Why should not the real estate of a minister, as well as of other persons, pay for such an improvement in proportion as it is benefited? There is no inconvenience or hardship in it, and the maxim of law that *qui sentit commodum debet sentire onus*, is perfectly consistent with the interests and dictates of science and religion.' . . .

"Indeed, the rule has been so frequently enforced that, as a general proposition, it may be considered as thoroughly established in this country. It is unnecessary to refer to the cases generally. It may be well, however, to notice those from Illinois. . . . Nor is this a mere arbitrary distinction created by the courts, but one resting on strong and obvious reasons. A grant of exemption is never to be considered as a mere gratuity — a simple gift from the legislature. No such intent to throw away the revenues of the State, or to create arbitrary discrimi nations between the holders of property, can be imputed. A consideration is presumed to exist. The recipient of the exemption may be supposed to be doing part of the work which the State would otherwise be under obligations to do. A college, or an academy, furnishes education to the young, which it is a part of the State's duty to furnish. The State is bound to provide highways for its citizens, and a railroad company in part discharges that obligation. Or the recipient may be doing a work which adds to the material prosperity or elevates the moral character of the people; manufactories have been exempted, but only in the belief that thereby large industries will be created and

the material prosperity increased; churches and charitable institutions, because they tend to a better order of society. Or it may be that a sum, in gross or annual instalments, is received in lieu of taxes. But in every case there is the implied fact of some consideration passing for the grant of exemption. But those considerations as a rule pass to the public generally, and do not work the enhancement of the value of any particular area of property. So when the consideration is received by the public as a whole, the exemption should be and is of that which otherwise would pass to such public, to wit, general taxes.

"Another matter is this: In a general way it may be said that the probable amount of future taxes can be estimated. While of course no mathematical certainty exists, yet there is a reasonable uniformity in the expenses of the government, so that there can be in advance an approximation of what is given when an exemption from taxation is granted, if only taxes proper are within the grant. But when you enter the domain of special assessments there is no basis for estimating in advance what may be the amount of such assessments. Who can tell what the growth of the population will be in the vicinity of the exempted property? Will there be only a little village or a large city? Will the local improvements which the business interests of that vicinity demand be trifling in amount, or very large? What may be the improvements which the necessities of the case demand? Nothing can be more indefinite and uncertain than these matters; and it is not to be expected that the legislature would grant an exemption of such unknown magnitude with no corresponding return of consideration therefor.

"And, again, as special assessments proceed upon the theory that the property charged therewith is enhanced in value by the improvement, the enhancement of value being the consideration for the charge, upon what principles of justice can one tract within the area of the property enhanced in value be released from sharing in the expense of such improvement? Is there any way in which it returns to the balance of the property within that area any equivalent for a release from a share in the burden? Whatever may be the supposed consideration to the public for an exemption from general taxation, does it return to the property within the area any larger equivalent with the improvement than without it? If it confers a benefit upon the public, whether the general public or that near at hand, a benefit which justifies an exemption from taxation, does it confer any additional benefit upon the limited area by reason of sharing in the enhanced value springing from the improvement? Obviously not. The local improvement has no relation to or effect upon that which the exempted property gives to the public as consideration for its exemption; hence, there is manifest inequity in relieving it from a share of the cost of the improvement. So when the rule is laid down that the exemption from taxation only applies to taxes proper it is not a mere arbitrary rule, but one founded upon principles of natural justice.

"But it is said that it is within the competency of the legislature, hav-

ing full control over the matter of general taxation and special assessments, to exempt any particular property from the burden of both, and that it is not the province of the courts, when such entire exemption has been made, to attempt to limit or qualify it upon their own ideas of natural justice. Thus in the case of *Harvard College* v. *Boston*, 104 Mass. 470, an assessment for altering a street was held within the language of the college charter exempting the property 'from all civil impositions, taxes, and rates.' See also the following authorities: *Brightman* v. *Kirner*, 22 Wisc. 54; *Southern Railroad Co.* v. *Jackson*, 38 Miss. 334: *New Jersey* v. *Newark*, 3 Dutch. (27 N. J. Law) 185; *Erie* v. *First Universalist Church*, 105 Penn. St. 278; *Olive Cemetery Co.* v. *Philadelphia*, 93 Penn. St. 129; *Richmond* v. *Richmond & Danville Railroad*, 21 Gratt. 604. This is undoubtedly true. So we turn to the language employed in granting this exemption to see what the legislature intended. . . .

"But, finally, it is urged that if this exemption does not include special assessments, the Constitution of Illinois of 1870 recognizes a distinction between special taxes and special assessments, and that in this case the charges are special taxes rather than special assessments, and therefore to be included within the exemption of the charter. Section 2 of article 9 of the Constitution of 1848, which was in force at the time of the charter of the railroad company, is as follows: 'The general assembly shall provide for levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to his or her property.' Section 5 of the same article contained this as to local taxation: 'The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same;' while in section 11 of article 3 was the ordinary provision that no property should be taken or applied to public use without just compensation. And under that Constitution it was ruled, in the case of *Chicago* v. *Larned*, 34 Ill. 203, that 'an assessment for improvements made on the basis of the frontage of lots upon the street to be improved is invalid, containing neither the element of equality nor uniformity if assessed under the taxing powers, and equally invalid if in the exercise of the right of eminent domain, no compensation being provided.' In quite an elaborate opinion the court held substantially that special assessments could only be imposed in proportion to the benefits actually received by the property upon which they were charged, and that in the absence of an ascertainment of such special benefits the expense must be borne by the entire property of the city. This decision was reaffirmed in *Ottawa* v. *Spencer*, 40 Ill. 211. Subsequently, and in 1870, a new Constitution was adopted, section 9 of article 9 of which is as follows: "The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special

taxation of contiguous property or otherwise. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform, in respect to persons and property, within the jurisdiction of the body imposing the same." And this came before the Supreme Court in the case of *White* v. *The People, ex rel.*, 94 Ill. 604, and it was held that the city council had power to charge the cost of a sidewalk upon the lots touching it, in proportion to their frontage thereon; that whether or not the special tax exceeded the actual benefit to the lots taxed, was not material; that it may be supposed to be based upon a presumed equivalent; and that where the proper authorities determined the frontage to be the proper measure of benefits, this determination could be neither disputed nor disproved, and the cases in 34 and 40 Illinois, *supra*, were held to be inapplicable. This decision has been reaffirmed in *Craw* v. *Tolono*, 96 Ill. 255; *Enos* v. *Springfield*, 113 Ill. 65; *Sterling* v. *Galt*, 117 Ill. 11; *Springfield* v. *Green*, 120 Ill. 269.

"But the difference between the two Constitutions is simply in the mode of ascertaining the benefits, and does not change the essential fact that a charge like the one here in controversy is for the cost of a local improvement, and is charged upon the contiguous property upon the theory that it is benefited thereby. This is the interpretation put upon the matter by the Supreme Court of Illinois. In *White* v. *People*, 94 Ill. 605, 613, it was said: 'Whether or not the special tax exceeds the actual benefit to the lot, is not material. It may be supposed to be based on a presumed equivalent. The city council have determined the frontage to be the proper measure of probable benefits. That is generally considered as a very reasonable measure of benefits in the case of such an improvement.' So also in *Craw* v. *Tolono*, *supra*, it is said: 'Special taxation as spoken of in our Constitution is based upon the supposed benefit to the contiguous property, and differs from special assessments only in the mode of ascertaining the benefits. In the case of special taxation, the imposition of the tax by the corporate authorities is of itself a determination that the benefits to the contiguous property will be as great as the burden of the expense of the improvement, and that such benefits will be so nearly limited, or confined in their effect, to contiguous property, that no serious injustice will be done by imposing the whole expense upon such property.' And in *Sterling* v. *Galt*, *supra*, in which the difference between special assessment and special taxation was noticed, it was held that the whole of the burden in case of special taxation was imposed upon the contiguous property upon the hypothesis that the benefits will be equal to the burden.

"We do not suppose that the company had by its charter any contract with the State that the matter of special benefit resulting from a local improvement should be ascertained and determined only in the then existing way. There was nothing in the terms of that contract to prevent the State from committing the final determination of the question

of benefits to the city council rather than leaving the matter of ascertainment to a jury. And whether the charges are called special taxes or special assessments, and by whatever tribunal or by whatever mode the question of benefits may be determined, the fact remains that the charges are for a local improvement, and cast upon the contiguous property, upon the assumption that it has received a benefit from such improvement, which benefit justifies the charge. The charges here are not taxes proper, are not contributions to the State or to the city for the purpose of enabling either to carry on its general administration of affairs, but are a charge only and specially for the cost for a local improvement, supposed to have resulted in an enhancement of the value of the railroad company's property. It is not in lieu of such charges that the company pays annually the stipulated per cent of its gross revenues into the State treasury.

"We see no error in the rulings of the Supreme Court of Illinois, and its judgment is *Affirmed.*" [1]

HYLTON *v.* THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1796.

[3 *Dall.* 171; 1 *Curtis's Decisions*, 150.[2]]

THIS was a writ of error to the Circuit Court of the United States for the district of Virginia. The question raised, and all the facts necessary to be adverted to, appear in the opinions of the members of the court. The cause was argued by the *Attorney-General* and *Hamilton*, in support of the tax, and by *Campbell*, district attorney for the district of Virginia, and *Ingersoll*, the attorney-general of Pennsylvania, in opposition to it.

The court delivered their opinions *seriatim*, in the following terms.[3]

CHASE, J. By the case stated, only one question is submitted to the opinion of this court: Whether the law of Congress of the 5th of June, 1794 (1 U. S. St. at Large, 373), entitled, "An Act to lay duties upon carriages for the conveyance of persons," is unconstitutional and void? . . .

[1] Compare *Speer* v. *Mayor, &c. of Athens*, 85 Geo. 49 (1890); *Mayor, &c. of Birmingham* v. *Klein*, 89 Ala. 461 (1889); *Winona & St. P. R. R. Co.* v. *Watertown*, 44 N. W. Rep. 1072 (So Dak. 1890); *Munson* v. *Bd. Com'rs Atchafalaya Dist.*, 43 La. 15 (1891); *McAleer et al.* v. *Hill*, 27 Pac. Rep. (Wash. 1891); *Denver et al.* v. *Knowles*, 17 Col. 204 (1892), overruling *Palmer* v. *Way*, 6 Col. 106. Compare a cautious intermediate answer of the judges to the legislature, in *In re House Resolutions*, 15 Col. 598 (1891); s. c. 26 Pac. Rep. 323. — ED.

[2] The case is taken from Curtis's Decisions. — ED.

[3] The Chief Justice, ELLSWORTH, was sworn into office in the morning; but not having heard the whole of the argument, he declined taking any part in the decision of this cause.

The Constitution evidently contemplated no taxes as direct taxes, but only such as Congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed must ever determine the application of the rule.

If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say that the Constitution intended such tax should be laid by that rule.

It appears to me that a tax on carriages cannot be laid by the rule of apportionment, without very great inequality and injustice. For example, suppose two States equal in census, to pay eight thousand dollars each, by a tax on carriages of eight dollars on every carriage, and in one State there are one hundred carriages, and in the other one thousand. The owners of carriages in one State would pay ten times the tax of owners in the other. A, in one State, would pay for his carriage eight dollars; but B, in the other State, would pay for his carriage, eighty dollars.

It was argued that a tax on carriages was a direct tax, and might be laid according to the rule of apportionment, and, as I understood, in this manner: Congress, after determining on the gross sum to be raised, was to apportion it according to the census, and then lay it in one State on carriages, in another on horses, in a third on tobacco, in a fourth on rice; and so on. I admit that this mode might be adopted to raise a certain sum in each State, according to the census, but it would not be a tax on carriages, but on a number of specific articles; and it seems to me that it would be liable to the same objection of abuse and oppression, as a selection of any one article in all the States.

I think an annual tax on carriages for the conveyance of persons, may be considered as within the power granted to Congress to lay duties. The term duty is the most comprehensive next to the generical term tax; and practically in Great Britain, whence we take our general ideas of taxes, duties, imposts, excises, customs, &c., embraces taxes on stamps, tolls for passage, &c., &c., and is not confined to taxes on importation only.

It seems to me that a tax on expense is an indirect tax; and I think an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable commodity, and such annual tax on it is on the expense of the owner.

I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation or poll tax, simply without regard to property, profession, or any other circumstance; and a tax on land. I doubt whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax.

As I do not think the tax on carriages is a direct tax, it is unneces-

sary at this time for me to determine whether this court constitutionally possesses the power to declare an Act of Congress void, on the ground of its being made contrary to, and in violation of the Constitution; but if the court have such power, I am free to declare, that I will never exercise it but in a very clear case.

I am for affirming the judgment of the Circuit Court.

PATERSON, J. . . . What are direct taxes within the meaning of the Constitution? The Constitution declares that a capitation tax is a direct tax; and both in theory and practice, a tax on land is deemed to be a direct tax. In this way, the terms direct taxes, and capitation and other direct tax, are satisfied. It is not necessary to determine, whether a tax on the product of land be a direct or indirect tax. Perhaps the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes part of it, or else the provision made against taxing exports would be easily eluded. Land, independently of its produce, is of no value. When the produce is converted into a manufacture it assumes a new shape; its nature is altered, its original state is changed, it becomes quite another subject, and will be differently considered. Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point. If Congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the States in the Union, then perhaps the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears, by the practice of some of the States, to have been considered as a direct tax. Whether it be so under the Constitution of the United States is a matter of some difficulty; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt that the principal, I will not say the only objects, that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land. Local considerations, and the particular circumstances and relative situation of the States, naturally lead to this view of the subject. The provision was made in favor of the Southern States. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled and not very productive. A majority of the States had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The Southern States, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other States. Congress in such case might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure; so much a head in the first instance, and so much an acre in the second. To guard them against imposition, in these particulars, was the reason of introducing the clause in the Constitution which directs that representatives and direct taxes shall be apportioned among the States according to their respective numbers. . . .

I shall close the discourse with reading a passage or two from Smith's Wealth of Nations.

"The impossibility of taxing people in proportion to their revenue by any capitation, seems to have given occasion to the invention of taxes upon consumable commodities; the State not knowing how to tax directly and proportionably the revenue of its subjects, endeavors to tax it indirectly by taxing their expense, which it is supposed in most cases will be nearly in proportion to their revenue. Their expense is taxed by taxing the consumable commodities upon which it is laid out." Vol. iii. 331.

"Consumable commodities, whether necessaries or luxuries, may be taxed in two different ways; the consumer may either pay an annual sum on account of his using or consuming goods of a certain kind, or the goods may be taxed while they remain in the hands of the dealer, and before they are delivered to the consumer. The consumable goods, which last a considerable time before they are consumed altogether, are most properly taxed in the one way; those of which the consumption is immediate, or more speedy, in the other; the coach tax and plate tax are examples of the former method of imposing; the greater part of the other duties of excise and customs, of the latter." Vol. iii. p. 341.

I am, therefore, of opinion that the judgment rendered in the Circuit Court of Virginia ought to be affirmed.

IREDELL, J. I agree in opinion with my brothers, who have already expressed theirs, that the tax in question is agreeable to the Constitution; and the reasons which have satisfied me can be delivered in a very few words, since I think the Constitution itself affords a clear guide to decide the controversy.

The Congress possess the power of taxing all taxable objects, without limitation, with the particular exception of a duty on exports.

There are two restrictions only on the exercise of this authority —

1. All direct taxes must be apportioned. 2. All duties, imposts, and excises must be uniform.

If the carriage tax be a direct tax, within the meaning of the Constitution, it must be apportioned. If it be a duty, impost, or excise, within the meaning of the Constitution, it must be uniform.

If it can be considered as a tax, neither direct within the meaning of the Constitution, nor comprehended within the term duty, impost, or excise; there is no provision in the Constitution one way or another, and then it must be left to such an operation of the power, as if the authority to lay taxes had been given generally in all instances, without saying whether they should be apportioned or uniform; and in that case, I should presume, the tax ought to be uniform; because the present Constitution was particularly intended to affect individuals, and not States, except in particular cases specified; and this is the leading distinction between the Articles of Confederation and the present Constitution.

As all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned.

If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the Constitution.

That this tax cannot be apportioned is evident. Suppose ten dollars contemplated as a tax on each chariot, or post chaise, in the United States, and the number of both in all the United States be computed at one hundred and five, the number of representatives in Congress, — this would produce in the whole one thousand and fifty dollars; the share of Virginia, being 19–105 parts, would be one hundred and ninety dollars; the share of Connecticut, being 7–105 parts, would be seventy dollars; then suppose Virginia had fifty carriages, Connecticut two, the share of Virginia being one hundred and ninety dollars, this must of course be collected from the owners of carriages, and there would therefore be collected from each carriage three dollars and eighty cents; the share of Connecticut being seventy dollars, each carriage would pay thirty-five dollars.

If any State had no carriages, there could be no apportionment at all. This mode is too manifestly absurd to be supported, and has not even been attempted in debate. But two expedients have been proposed of a very extraordinary nature to evade the difficulty.

1. To raise the money a tax on carriages would produce, not by laying a tax on each carriage uniformly, but by selecting different articles in different States, so that the amount paid in each State may be equal to the sum due upon a principle of apportionment. One State might pay by a tax on carriages, another by a tax on slaves, &c.

I should have thought this merely an exercise of ingenuity, if it had not been pressed with some earnestness; and as this was done by gentlemen of high respectability in their profession, it deserves a serious answer, though it is very difficult to give such a one. 1. This is not an apportionment, of a tax on carriages, but of the money a tax on carriages might be supposed to produce, which is quite a different thing. 2. It admits that Congress cannot lay an uniform tax on all carriages in the Union, in any mode, but that they may on carriages in one or more States. They may therefore lay a tax on carriages in fourteen States, but not in the fifteenth. 3. If Congress, according to this new decree, may select carriages as a proper object, in one or more States, but omit them in others, I presume they may omit them in all, and select other articles.

Suppose, then, a tax on carriages would produce $100,000, and a tax on horses a like sum, $100,000, and $100,000 were to be apportioned according to that mode; gentlemen might amuse themselves with calling this a tax on carriages, or a tax on horses, while not a single carriage, nor a single horse was taxed throughout the Union.

4. Such an arbitrary method of taxing different States differently, is a suggestion altogether new, and would lead, if practised, to such dangerous consequences that it will require very powerful arguments to show that that method of taxing would be in any manner compatible with the Constitution, with which at present, I deem it utterly

irreconcilable, it being altogether destructive of the notion of a common interest, upon which the very principles of the Constitution are founded, so far as the condition of the United States will admit.

The second expedient proposed was, that of taxing carriages, among other things, in a general assessment. This amounts to saying that Congress may lay a tax on carriages, but that they may not do it unless they blend it with other subjects of taxation. For this, no reason or authority has been given, and in addition to other suggestions offered by the counsel on that side, affords an irrefragable proof, that when positions plainly so untenable are offered to counteract the principle contended for by the opposite counsel, the principle itself is a right one; for, no one can doubt, that if better reasons could have been offered, they would not have escaped the sagacity and learning of the gentlemen who offered them.

There is no necessity or propriety in determining what is, or is not a direct or indirect tax in all cases.

Some difficulties may occur which we do not at present foresee. Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil, something capable of apportionment under all such circumstances.

A land or a poll tax may be considered of this description.

The latter is to be considered so particularly under the present Constitution, on account of the slaves in the Southern States, who give a ratio in the representation in the proportion of three to five.

Either of these is capable of apportionment. In regard to other articles, there may possibly be considerable doubt.

It is sufficient, on the present occasion, for the court to be satisfied that this is not a direct tax contemplated by the Constitution, in order to affirm the present judgment; since, if it cannot be apportioned, it must necessarily be uniform.

I am clearly of opinion this is not a direct tax in the sense of the Constitution, and, therefore, that the judgment ought to be affirmed.

[WILSON, J., gave a short concurring opinion. CUSHING, J., not having heard the arguments, excused himself.]

BY THE COURT. Let the judgment of the Circuit Court be affirmed.[1]

[1] See *Loughborough* v. *Blake*, 5 Wheat. 317. — ED.

SPRINGER *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1880.

[102 *U. S.* 586.[1]]

[ERROR to the Circuit Court of the United States for the Southern District of Illinois. Action of ejectment brought by the United States to recover land, levied upon and sold to the United States for the amount of an income tax due from Springer. The case came up on exceptions.] *Mr. William M. Springer*, for the plaintiff in error. *Mr. Assistant Attorney-General Smith*, *contra*.

MR. JUSTICE SWAYNE, after stating the facts, delivered the opinion of the court.

The central and controlling question in this case is whether the tax which was levied on the income, gains, and profits of the plaintiff in error, as set forth in the record, and by pretended virtue of the Acts of Congress and parts of Acts therein mentioned, is a direct tax. . . . If it was, not having been laid according to the requirements of the Constitution, it must be admitted that the laws imposing it, and the proceedings taken under them by the assessor and collector for its imposition and collection, were all void.

Many of the provisions of the Articles of Confederation of 1777 were embodied in the existing organic law. They provided for a common treasury and the mode of supplying it with funds. The latter was by requisitions upon the several States. The delays and difficulties in procuring the compliance of the States, it is known, was one of the causes that led to the adoption of the present Constitution. This clause of the articles throws no light on the question we are called upon to consider. Nor does the journal of the proceedings of the constitutional convention of 1787 contain anything of much value relating to the subject.

It appears that on the 11th of July, in that year, there was a debate of some warmth involving the topic of slavery. On the day following, Gouverneur Morris, of New York, submitted a proposition "that taxation shall be in proportion to representation." It is further recorded in this day's proceedings, that Mr. Morris having so varied his motion by inserting the word "direct," it passed *nem. con.*, as follows: "Provided always that direct taxes ought to be proportioned to representation." 2 Madison Papers, by Gilpin, pp. 1079–1081.

On the 24th of the same month, Mr. Morris said that "he hoped the committee would strike out the whole clause. . . . He had only meant it as a bridge to assist us over a gulf; having passed the gulf, the bridge may be removed. He thought the principle laid down with so much strictness liable to strong objections." Id. 1197. The gulf was the share of representation claimed by the Southern States on

[1] The statement of facts is omitted. — ED.

account of their slave population. But the bridge remained. The builder could not remove it, much as he desired to do so. All parties seem thereafter to have avoided the subject. With one or two immaterial exceptions, not necessary to be noted, it does not appear that it was again adverted to in any way. It was silently incorporated into the draft of the Constitution as that instrument was finally adopted.

It does not appear that an attempt was made by any one to define the exact meaning of the language employed.

In the twenty-first number of the "Federalist," Alexander Hamilton, speaking of taxes generally, said: "Those of the direct kind, which principally relate to land and buildings, may admit of a rule of apportionment. Either the value of the land, or the number of the people, may serve as a standard." The thirty-sixth number of that work, by the same author, is devoted to the subject of internal taxes. It is there said, "They may be subdivided into those of the direct and those of the indirect kind." In this connection land-taxes and poll-taxes are discussed. The former are commended and the latter are condemned. Nothing is said of any other direct tax. In neither case is there a definition given or attempted of the phrase "direct tax."

The very elaborate researches of the plaintiff in error have furnished us with nothing from the debates of the State conventions, by whom the Constitution was adopted, which gives us any aid. Hence we may safely assume that no such material exists in that direction, though it is known that Virginia proposed to Congress an amendment relating to the subject, and that Massachusetts, South Carolina, New York, and North Carolina expressed strong disapprobation of the power given to impose such burdens. 1 Tucker's Blackstone, pt. 1, app., 235.

Perhaps the two most authoritative persons in the convention touching the Constitution were Hamilton and Madison. The latter, in a letter of May 11, 1794, speaking of the tax which was adjudicated upon in *Hylton* v. *United States* (3 Dall. 171), said, "The tax on carriages succeeded in spite of the Constitution by a majority of twenty, the advocates of the principle being reinforced by the adversaries of luxury." 2 Mad. Writings (pub. by Congress), p. 14. In another letter, of the 7th of February, 1796, referring to the case of *Hylton* v. *United States*, then pending, he remarked: "There never was a question on which my mind was better satisfied, and yet I have very little expectation that it will be viewed in the same light by the court that it is by me." Id. 77. Whence the despondency thus expressed is unexplained.

Hamilton left behind him a series of legal briefs, and among them one entitled "Carriage Tax." See vol. vii. p. 848, of his works. This paper was evidently prepared with a view to the Hylton case, in which he appeared as one of the counsel for the United States. In it he says: "What is the distinction between direct and indirect taxes? It is a matter of regret that terms so uncertain and vague in so import-

ant a point are to be found in the Constitution. We shall seek in vain for any antecedent settled legal meaning to the respective terms. There is none. We shall be as much at a loss to find any disposition of either which can satisfactorily determine the point." There being many carriages in some of the States, and very few in others, he points out the preposterous consequences if such a tax be laid and collected on the principle of apportionment instead of the rule of uniformity. He insists that if the tax there in question was a direct tax, so would be a tax on ships, according to their tonnage. He suggests that the boundary line between direct and indirect taxes be settled by "a species of arbitration," and that direct taxes be held to be only "capitation or poll taxes, and taxes on lands and buildings, and 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."

The tax here in question falls within neither of these categories. It is not a tax on the "whole . . . personal estate" of the individual, but only on his income, gains, and profits during a year, which may have been but a small part of his personal estate, and in most cases would have been so. This classification lends no support to the argument of the plaintiff in error.

The Constitution went into operation on the 4th of March, 1789.

It is important to look into the legislation of Congress touching the subject since that time. The following summary will suffice for our purpose. We shall refer to the several Acts of Congress to be examined, according to their sequence in dates. In all of them the aggregate amount required to be collected was apportioned among the several States.

The Act of July 14, 1798, c. 75, 1 Stat. 53. This Act imposed a tax upon real estate and a capitation tax upon slaves.

The Act of Aug. 2, 1813, c. 37, 3 Id. 53. By this Act the tax was imposed upon real estate and slaves, according to their respective values in money.

The Act of Jan. 19, 1815, c. 21, Id. 164. This Act imposed the tax upon the same descriptions of property, and in like manner as the preceding Act.

The Act of Feb. 27, 1815, c. 60, Id. 216, applied to the District of Columbia the provisions of the Act of Jan. 19, 1815.

The Act of March 5, 1816, c. 24, Id. 255, repealed the two preceding Acts, and re-enacted their provisions to enforce the collection of the smaller amount of tax thereby prescribed.

The Act of Aug. 5, 1861, c. 45, 12 Id. 294, required the tax to be levied wholly on real estate.

The Act of June 7, 1862, c. 98, Id. 422, and the Act of Feb. 6, 1863, c. 21, Id. 640, both relate only to the collection, in insurrectionary districts, of the direct tax imposed by the Act of Aug. 5, 1861, and need not, therefore, be more particularly noticed.

It will thus be seen that whenever the government has imposed a tax which it recognized as a direct tax, it has never been applied to any objects but real estate and slaves. The latter application may be accounted for upon two grounds: 1. In some of the States slaves were regarded as real estate (1 Hurd, Slavery, 239; *Veazie Bank* v. *Fenno*, 8 Wall. 533); and, 2. Such an extension of the tax lessened the burden upon the real estate where slavery existed, while the result to the national treasury was the same, whether the slaves were omitted or included. The wishes of the South were, therefore, allowed to prevail. We are not aware that the question of the validity of such a tax was ever presented for adjudication. Slavery having passed away, it cannot hereafter arise. It does not appear that any tax like the one here in question was ever regarded or treated by Congress as a direct tax. This uniform practical construction of the Constitution touching so important a point, through so long a period, by the legislative and executive departments of the government, though not conclusive, is a consideration of great weight.

There are four adjudications by this court to be considered. They have an important, if not a conclusive, application to the case in hand. . . . [Here comes a consideration of the cases of *Hylton* v. *U. S.*, 3 Dall. 171; *Pac. Ins. Co.* v. *Soule*, 7 Wall. 433; *Veazie Bk.* v. *Fenno*, 8 Wall. 533; and *Scholey* v. *Rew*, 23 Wall. 331.]

All these cases are undistinguishable in principle from the case now before us, and they are decisive against the plaintiff in error.

The question, what is a direct tax, is one exclusively in American jurisprudence. The text-writers of the country are in entire accord upon the subject. Mr. Justice Story says all taxes are usually divided into two classes, — those which are direct and those which are indirect, — and that "under the former denomination are included taxes on land or real property, and, under the latter, taxes on consumption." 1 Const. sect. 950.

Chancellor Kent, speaking of the case of *Hylton* v. *United States*, says: "The better opinion seemed to be that the direct taxes contemplated by the Constitution were only two; *viz.*, a capitation or poll tax and a tax on land." 1 Com. 257. See also Cooley, Taxation, p. 5, note 2; Pomeroy, Const. Law, 157; Sharswood's Blackstone, 308, note; Rawle, Const. 30; Sergeant, Const. 305. We are not aware that any writer, since *Hylton* v. *United States* was decided, has expressed a view of the subject different from that of these authors.

Our conclusions are, that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty. Pomeroy, Const. Law, 177; *Pacific Insurance Co.* v. *Soule*, and *Scholey v. Rew*, *supra*. Against the considerations, in one scale, in favor of these propositions, what has been placed in the other, as a counterpoise? Our answer is, certainly nothing of such weight, in our judg-

ment, as to require any special reply. The numerous citations from the writings of foreign political economists, made by the plaintiff in error, are sufficiently answered by Hamilton in his brief, before referred to. *Judgment affirmed.*[1]

[1] See *U. S.* v. *La.* 123 U. S. 32 (1887).

"The phrase 'direct taxation' appears to have been introduced in the Convention of 1787 by Gouverneur Morris, on July 12,[1] when he made the motion, which was carried, 'that direct taxation ought to be proportioned to representation.' The convention, perhaps, had no clear opinion as to the precise meaning of the words here used;[2] but it is plain that Morris had in mind some well-marked distinction between direct and indirect taxes. He had proposed at first simply that 'taxation shall be in proportion to representation.' To this it was objected that, although just, this plan might be embarrassing and 'might drive the legislature to the plan of requisitions;' and Morris thereupon, admitting that objections were possible, 'supposed they would be removed by restraining the rule to direct taxation. With regard to indirect taxes on exports and imports and on consumption, the rule would be inapplicable.' Wilson also saw no way of carrying Morris's plan into execution, 'unless restrained to direct taxation;' and Morris then modified his motion, with the result that the phrase 'direct taxes' passed into the Constitution.[3] It is clear that in Morris's understanding, and in Wilson's as well, none but direct taxes could be levied by an apportionment among the States, the others named requiring to be laid by a general rate.

"From what source, then, did Morris and Wilson derive this classification, which set down as direct certain taxes having this convenient characteristic of being readily apportioned among the States? The answer to this question is, no doubt, to be found in Hamilton's suggestion that the writings of the French economists of the eighteenth century were the source.[4] The doctrine that agriculture is the only productive employment, and that the net product from land, to be found in the hands of the landowner, is the only fund from which taxation can draw without impoverishing society, led them to class taxes habitually as direct, when laid immediately upon the landowner, and as indirect, when laid upon somebody else, but in their opinion destined to be borne by the land-owner ultimately. This distinction between direct and indirect taxation, resting upon the supposed method of incidence upon a single class of persons, is fully developed and used by Quesnay, Mercier de la Rivière, Dupont de Nemours, and Turgot. It was a necessary result of their reasoning, became familiar in all the discussions of the school in France, and, we can hardly doubt, was carried to the knowledge of readers in political science in other countries, during the short-lived pre-eminence of the Physiocrats.[5] As for the kinds of taxes to be classed as direct, there was not complete agreement. Necessarily, taxes upon land or its returns were set down as direct taxes, and so too, taxes upon commodities, or consumption, were called indirect. Taxes upon persons, however, do not appear to be regarded by Quesnay, Dupont de Nemours, or Mercier de la Rivière as direct. The writer last-named,

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[1] The use of the same expression in what purports to be the draft of a Constitution offered by Mr. Pinckney, May 29, need not be considered, in view of the plainly garbled text of that document. Elliot, Debates, v. 130, 578.

[2] Thus, on August 20, when the report of the Committee of Detail was under discussion, "Mr. King asked what was the precise meaning of direct taxation. No one answered." Madison's Debates, in Elliot, v. 451.

[3] Elliot, v. 302.

[4] See his brief as counsel for the United States in the Carriage Tax case, *Hylton* v. *United States*, Hamilton's Works, vii. 845.

[5] Adam Smith did not adopt their use of direct and indirect, because he rejected the reasoning on which it rested; and he does not appear to have formally classified taxes under these heads upon any other principle, although he occasionally uses the terms "direct," "directly," and their opposites, with a near approach to their modern use.

after saying that the fund for taxation is in the hands of the land-owner, and that to draw from it otherwise than directly is a subversion of the natural order of society, lays down the principle that 'la forme de l'impôt est indirecte lorsqu'il est établi ou sur les personnes-mêmes ou sur les choses commerciables.'[1] In Turgot's writings, however, we find taxes upon persons occasionally classed as direct. Thus, in his 'Plan d'un Mémoire sur les Impositions,'[2] he says of the forms of taxation : —

"'Il n'y en a que trois possibles : —

"'La directe sur les fonds.

"'La directe sur les personnes, qui devient un impôt sur l'exploitation.

"'L'imposition indirecte, ou sur les consommations.'

"And in the fragment which we have of his 'Comparaison de l'Impôt sur le Revenu des Propriétaires et de l'Impôt sur les Consommations,'[3] a memoir prepared for the use of Franklin, a careful analysis of the same purport is made, although the point of formal classification is not reached. Of all writers upon economics in 1787,[4] Turgot was perhaps the one most likely to have the ear of American readers; and, of Americans, Gouverneur Morris and James Wilson were as likely as any to give him their attention. The former had already formed that familiar acquaintance with French literature and politics which made his singular career in Paris possible a few years later, and Wilson had been from 1779 to 1783 accredited as advocate general of the French nation in the United States. There was, then, an easy and a probable French source for the meaning which they both attached to the phrase introduced by Morris.

"It is to be observed, also, that there were some well-known precedents for levying by apportionment such taxes as those which Morris and Wilson probably had in mind. The French *taille réelle*, a tax on the income of real property, was laid by apportioning a fixed sum among the provinces and requiring from each its quota, as has been the practice in levying its substitute, the *impôt foncier*, ever since 1790. The *capitation* was also levied in France, before the Revolution, in the same manner. The English land tax, established under William III., had for ninety years presented an example of apportionment among counties and other subdivisions, leaving the rate for each locality to be settled at the point necessary to give the due quota. Other contemporary examples could easily be cited, but these are enough for the present purpose, being necessarily familiar in this country in 1787, and likely to have a strong influence.[5]

"The meaning of the phrase 'direct taxation,' as to which Rufus King vainly sought for light, was judicially considered in the well-known Carriage Tax case, *Hylton v. United States*, in 1796. The case had been heard in the Circuit Court by Wilson, who was then one of the associate justices of the Supreme Court; and, when his judgment in the lower court was affirmed by the full bench, he contented himself with a bare statement of assent, so that we lose what would have been the most interesting and perhaps the most important opinion of all. The judgment of the court, declaring that a tax upon carriages is not a direct tax within the meaning of the Constitution, was supported by considerations which showed a strong disposition to limit the definition of direct taxes so as to include only capitation and land taxes. Mr. Justice Paterson, indeed, suggested personal property by general valuation as a possible additional

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[1] L'Ordre Naturel des Sociétés Politiques, in Daire's Physiocrates, 474. For Quesnay's use of the terms in question, see Daire, i. 83, 127; and for Dupont de Nemours' Ibid., ii. 354–358.

[2] Daire, i. 394; and see also 396.

[3] Daire, i. 409.

[4] Dupont de Nemours published his Mémoires sur la Vie et les Ouvrages de M. Turgot (16mo, 2 parts, pp. 156 and 216), in Philadelphia and Paris, in 1782, the year after Turgot's death. See Hildeburn, Issues of the Press in Pennsylvania.

[5] For the *taille* and *capitation*, see Pizard, La France en 1789, 257; De Parieu, Traité de l'Impôt, i. 224, 153. The Act of 1763 apportioning the English land tax is given in full in Ruffhead's Statutes at Large, ix. 78. The text of the Acts of William III. is found in the Rolls edition of the Statutes. See also Dowell, History of Taxation and Taxes in England, iii. 94–97.

STATE TONNAGE TAX CASES.

SUPREME COURT OF THE UNITED STATES. 1870.

[12 *Wall.* 204.]

ERROR to the Supreme Court of Alabama.

These were two cases, which, though coming in different forms, involved one and the same point only; and at the bar — where the counsel directed attention to the principle involved, separated from the accidents of the case — were discussed together as presenting "precisely the same question." The matter was thus: —

The Constitution ordains that "no State shall without the consent of Congress lay any duty of tonnage." With this provision in force as superior law, the State of Alabama passed, on the 22d of February, 1866, a revenue law. By this law, the rate of taxation for property generally was the one half of one per cent; but "on all steamboats, vessels, and other water crafts plying in the navigable waters of the State," the Act levied a tax at "the rate of $1 per ton of the registered tonnage thereof," which it declared should "be assessed and collected at the port where such vessels are registered, if practicable; otherwise at any other port or landing within the State where such vessel may be."

The tax collector was directed by the Act to demand, in each year, of the person in charge of the vessel, if the taxes had been paid. If a

subject of direct taxation, the practicability of apportionment having already been accepted as a test of the proper meaning of the term; but he thought the question difficult, and added that he never entertained a doubt that the principal — he would not say the only — objects contemplated by the framers of the Constitution were a capitation tax and a tax on land. Wolcott, in his report upon 'Direct Taxes,' in December, 1796,[1] took no notice of the decision by the Supreme Court a few months before, but, for reasons of expediency, concluded that the objects of direct taxation should be limited to lands, houses, and slaves; and they accordingly were thus limited by Congress in the Acts of 1798, under which the first direct tax was levied. When the question came before the Supreme Court again in the case of *Veazie Bank* v. *Fenno*, 8 Wall. 533, Chief Justice Chase referred, with some doubt, to Paterson's suggestion as to a tax on personal property by general valuation, but remarked that, in the practical construction of the Constitution by Congress, direct taxes had been limited to land and capitation taxes, and that this construction was entitled to great consideration in the absence of anything adverse to it in the discussions of the Federal Convention or of the State conventions which ratified the Constitution. Finally, when the whole subject was reviewed in the case of *Springer* v. *United States*, Mr. Justice Swayne, giving the opinion of the court, declared it to be their conclusion 'that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate.' The judicial interpretation of the phrase, 'direct taxes,' is well settled, therefore, and in close accordance with the usage found in the writings of the French economists of the last century." — *The Direct Tax of* 1861, by Professor Charles F. Dunbar, 3 Quart. Journ. Econ. 436 (1889). See also 1 Story, Const. U. S. s. 642. — ED.

[1] State Papers on Finance, i. 414.

receipt for the same was not produced, he was to immediately assess the same according to tonnage, and if such tax was not paid on demand he was to seize the boat, &c., and, after notice, proceed and sell the same for payment of the tax, &c., and pay the surplus into the county treasury for the use of the owner. If the vessel could not be seized, the collector was to make the amount of the tax out of the real and personal estate of the owner, &c.

Under this Act, one Lott, tax collector of the State of Alabama, demanded of Cox, the owner of the "Dorrance," a steamer of 321 tons, and valued at $5,000, and of several other steamers, certain sums as taxes; and under an Act of 1867, identical in language with the one of 1866, just quoted, demanded from the Trade Company of Mobile certain sums on like vessels owned by them; the tax in all the cases being proportioned to the registered tonnage of the vessel.

The steamboats, the subject of the tax, were owned exclusively by citizens of the State of Alabama, and were engaged in the navigation of the Alabama, Bigbee, and Mobile rivers, carrying freight and passengers between Mobile and other points of said rivers, altogether within the limits of that State. These waters were navigable from the sea for vessels of "ten and more tons' burden;" and it was not denied that there were ports of delivery on them above the highest points to which these boats plied. The owners of the boats were not assessed for any other tax on them than the one here claimed. The boats were enrolled and licensed for the coasting trade. Though running, therefore, between points altogether within the limits of the State of Alabama, the boats were, as it seemed (see Act of July 18th, 1866, § 28, 14 Stat. at Large, 185), of that sort on which Congress lays a tonnage duty.

Cox, under compulsion and protest, paid the tax demanded of him, and then brought *assumpsit* in one of the inferior State courts of Alabama, to get back the money. The Trade Company refused to pay, and filed a bill in a like court, to enjoin the collector from proceeding to collect. The ground of resistance to the tax in each case was this, that being laid in proportion to the tonnage of the vessel, the tax was laid in a form and manner which the State was prohibited by the already quoted section of the Constitution from adopting. The right of the State to lay a tax on vessels according to their value and as property was not denied, but on the contrary conceded.[1] Judgment being given in each case against the validity of the tax, the matter was taken to the Supreme Court of Alabama, which decided that it was lawful. To review that judgment the case was now here.

[1] It is barely necessary to note that an additional ground of defence to the tax was taken, in the fact that by the Act of Congress admitting Alabama into the Union, it is declared, "that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State, and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State." This ground not being passed upon by this court, need not be adverted to further.

Messrs. J. A. Campbell and *P. Hamilton*, for the plaintiffs in error. *Mr. P. Phillips*, *contra.*

Mr. Justice Clifford delivered the judgment of the court, giving an opinion in each of the cases.

I. In the first case. — . . . Congress has prescribed the rules of admeasurement and computation for estimating the tonnage of American ships and vessels. 13 Stat. at Large, 70; Id. 444.

Viewed in the light of those enactments, the word tonnage, as applied to American ships and vessels, must be held to mean their entire internal cubical capacity, or contents of the ship or vessel expressed in tons of one hundred cubical feet each, as estimated and ascertained by those rules of admeasurement and of computation. *Alexander* v. *Railroad*, 3 Strobhart, 598. . . .

Taxes levied by a State upon ships and vessels owned by the citizens of the State as property, based on a valuation of the same as property, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a State upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument 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 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. *Gibbons* v. *Ogden*, 9 Wheaton, 202; *Sinnot* v. *Davenport*, 22 Howard, 238; *Foster* v. *Davenport*, Id. 245; *Perry* v. *Torrence*, 8 Ohio, 524.

Annual taxes upon property in ships and vessels are continually laid, and their validity was never doubted or called in question, but if the States, without the consent of Congress, tax ships or vessels as instruments of commerce, by a tonnage duty, or indirectly by imposing the tax upon the master or crew, they assume a jurisdiction which they do not possess, as every such act falls directly within the prohibition of the Constitution. *Passenger Cases*, 7 Howard, 447, 481. . . .

Tonnage duties are as much taxes as duties on imports or exports, and the prohibition of the Constitution extends as fully to such duties if levied by the States as to duties on imports or exports, and for reasons quite as strong as those which induced the framers of the Constitution to withdraw imports and exports from State taxation. Measures, however, scarcely distinguishable from each other may flow from distinct grants of power, as, for example, Congress does not possess the power to regulate the purely internal commerce of the States, but Congress may enroll and license ships and vessels to sail from one port to another in the same State; and it is clear that such ships and vessels are deemed ships and vessels of the United States, and that as such they are entitled to the privileges of ships and vessels em-

ployed in the coasting trade. 1 Stat. at Large, 287; Id. 305; 3 Kent (11th ed.), 203. . . .

Steamboats, as well as sailing ships and vessels, are required to be enrolled and licensed for the coasting trade, and the record shows that all the steamboats taxed in this case had conformed to all the regulations of Congress in that regard, that they were duly enrolled and licensed for the coasting trade and were engaged in the transportation of passengers and freight within the limits of the State, upon waters navigable from the sea by vessels of ten or more tons burden.

Tonnage duties, to a greater or less extent, have been imposed by Congress ever since the Federal government was organized under the Constitution to the present time. They have usually been exacted when the ship or vessel entered the port, and have been collected in a manner not substantially different from that prescribed in the Act of the State Legislature under consideration. Undisputed authority exists in Congress to impose such duties, and it is not pretended that any consent has ever been given by Congress to the State to exercise any such power. If the tax levied is a duty of tonnage, it is conceded that it is illegal, and it is difficult to see how the concession could be avoided, as the prohibition is express, but the attempt is made to show that the legislature, in enacting the law imposing the tax, merely referred to the registered tonnage of the steamboats "as a way or mode to determine and ascertain the tax to be assessed on the steamboats, and to furnish a rule or rate to govern the assessors in the performance of their duties." Suppose that could be admitted, it would not have much tendency to strengthen the argument for the defendant, as the suggestion concedes what is obvious from the schedule, that the taxes are levied without any regard to the value of the steamboats. But the proposition involved in the suggestion cannot be admitted, as, by the very terms of the Act, the tax is levied on the steamboats wholly irrespective of the value of the vessels as property, and solely and exclusively on the basis of their cubical contents as ascertained by the rules of admeasurement and computation prescribed by the Act of Congress.

By the terms of the law the taxation prescribed is "at the rate of one dollar per ton of the registered tonnage thereof," and the ninetieth section of the Act provides that the tax collector must, each year, demand of the person in charge of the steamboat whether the taxes have been paid, and if the person in charge fails to produce a receipt therefor by a tax collector, authorized to collect such taxes, the collector having the list must at once proceed to assess the same, and if the tax is not paid on demand he must seize such steamboat, &c., and after twenty days' notice, as therein prescribed, shall sell the same, or so much thereof as will pay the taxes and expenses for keeping and costs. Sess. Acts, 1866, pp. 7, 31.

Legislative enactments, where the language is unambiguous, cannot be changed by construction, nor can the language be divested of its plain and obvious meaning. Taxes levied under an enactment which

directs that a tax shall be imposed on steamboats at the rate of one dollar per ton of the registered tonnage thereof, and that the same shall be assessed and collected at the port where such steamboats are registered, cannot, in the judgment of this court, be held to be a tax on the steamboat as property. On the contrary, the tax is just what the language imports, a duty of tonnage, which is made even plainer when it comes to be considered that the steamboats are not to be taxed at all unless they are "plying in the navigable waters of the State," showing to a demonstration that it is as instruments of commerce and not as property that they are required to contribute to the revenues of the State.

Such a provision is much more clearly within the prohibition in question than the one involved in a recent case decided by this court, in which it was held that a statute of a State enacting that the wardens of a port were entitled to demand and receive, in addition to other fees, the sum of five dollars for every vessel arriving at the port, whether called on to perform any service or not, was both a regulation of commerce and a duty of tonnage, and that as such it was unconstitutional and void. *Steamship Co.* v. *Port Wardens*, 6 Wallace, 34.

Speaking of the same prohibition, the Chief Justice said in that case that those words in their most obvious and general sense describe a duty proportioned to the tonnage of the vessel — a certain rate on each ton — which is exactly what is directed by the provision in the Tax Act before the court, but he added that it seems plain, if the Constitution be taken in that restricted sense, it would not fully accomplish the intent of the framers, as the prohibition upon the States against levying duties on imports or exports would be ineffectual if it did not also extend to duties on the ships which serve as the vehicles of conveyance, which was doubtless intended by the prohibition of any duty of tonnage. "It was not only a *pro rata* tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty." Assume the rule to be as there laid down, and all must agree that "the levy of the tax in question is expressly prohibited, as the schedule shows that it is exactly proportioned to the registered tonnage of the steamboats plying in the navigable waters of the State." . . .

Taxes in aid of the inspection laws of a State, under special circumstances, have been upheld as necessary to promote the interests of commerce and the security of navigation. *Cooley* v. *Port Wardens*, 12 Howard, 314. Laws of that character are upheld as contemplating benefits and advantages to commerce and navigation, and as altogether distinct from imposts and duties on imports and exports and duties of tonnage. Usage, it is said, has sanctioned such laws where Congress has not legislated, but it is clear that such laws bear no relation to the Act in question, as the Act under consideration is emphatically an Act to raise revenue to replenish the treasury of the State and for no other

purpose, . . . without any corresponding or equivalent benefit or advantage to the vessels taxed or to the ship-owners, and consequently it cannot be upheld by virtue of the rules applied in the construction of laws regulating pilot dues and port charges. *State* v. *Charleston*, 4 Rich. S. C. 286; *Benedict* v. *Vanderbilt*, 1 Robt. N. Y. 200.

Attempt was made in the case of *Alexander* v. *Railroad* [3 Strob. 598], to show that the form of levying the tax was simply a mode of assessing the vessels as property, but the argument did not prevail, nor can it in this case, as the amount of the tax is measured by the tonnage of the steamboats and not by their value as property.

Reference is made to the case of the *Towboat Company* v. *Bordelon*, 7 Louisiana An. 195, as asserting the opposite rule, but the court is of a different opinion, as the tax in that case was levied, not upon the boat, but upon the capital of the company owning the boat, and the court in delivering their opinion say the capital of the company is property, and the Constitution of the State requires an equal and uniform tax to be imposed upon it with the other property of the State for the support of government.

For these reasons the court is of opinion that the State law levying the taxes in this case is unconstitutional and void, that the judgment of the State Court is erroneous and that it must be reversed, and having come to that conclusion, the court does not find it necessary to determine the other question.

Judgment reversed with costs, and the cause remanded for further proceedings in conformity to the opinion of the court.

II. In the second case. — . . . The court is of the opinion that the tax in this case is a duty of tonnage, and that the law imposing it is plainly unconstitutional and void. Taxes, as the law provides, must be assessed by the assessor in each county on and from the following subjects and at the following rates, to wit: "On all steamboats, &c., plying in the navigable waters of the State, at the rate of one dollar per ton of the registered tonnage thereof," which must be assessed and collected at the port where such steamboats are registered, &c. Revised Code, 169. Copied as the provision is from the enactment of the previous year, it is obvious that it must receive the same construction, and as the tax is one dollar per ton, it is too plain for argument that the amount of the tax depends upon the carrying capacity of the steamboat and not upon her value as property, as the experience of every one shows that a small steamer, new and well built, may be of much greater value than a large one, badly built or in need of extensive repairs. Separate lists are made for the county and school taxes, but the two combined amount exactly to one dollar per ton, as in the levy for the State tax, and the court is of the opinion that the case falls within the same rule as the case just decided.

Evidently the word tonnage in commercial designation means the number of tons burden the ship or vessel will carry, as estimated and ascertained by the official admeasurement and computation prescribed

by the public authority. Regulations upon the subject are enacted by Parliament in the parent country and by Congress in this country, as appears by several Acts of Congress. 1 Stat. at Large, 305; 13 Id. 444. Tonnage, says a writer of experience, 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 which are levied upon shipping might be levied according to the size of the vessel, or rather in proportion to her capability of carrying burden. Hence the term, as applied to a ship, has become almost synonymous with that of size. Homan's Com. and Nav., Tonnage. Apply that interpretation to the word tonnage as used in the Tax Act under consideration, and it is as clear as anything can be in legislation that the tax imposed by that provision is a tonnage tax, or duty of tonnage, as the phrase is in the Constitution.

State authority to tax ships and vessels, it is supposed by the respondent, extends to all cases where the ship or vessel is not employed in foreign commerce or in commerce between ports or places in different States. He concedes that the States cannot levy a duty of tonnage on ships or vessels if the ship or vessel is employed in foreign commerce or in commerce "among the States," but he denies that the prohibition extends to ships or vessels employed in commerce between ports and places in the same State, and that is the leading error in the opinion of the Supreme Court of the State. Founded upon that mistake the proposition is that all taxes are taxes on property, although levied on ships and vessels duly enrolled and licensed, if the ship or vessel is not employed in foreign commerce or in commerce among the States.

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 or licensing ships or vessels to be employed in the coasting trade. 1 Stat. at Large, 205; Id. 287.

Such a rule as that assumed by the respondent would incorporate into the Constitution an exception which it does not contain. Had the prohibition in terms applied only to ships and vessels employed in foreign commerce or in commerce among the States, his construction would be right, but courts of justice cannot add any new provision to the fundamental law, and, if not, it seems clear to a demonstration that the construction assumed by the respondent is erroneous.

Decree reversed, and the cause remanded for further proceedings in conformity to the opinion of this court.[1]

[1] In *Peete* v. *Morgan*, 19 Wall. 581 (1873) a statute of Texas of 1870 required every vessel arriving at the quarantine station of any town on the coast of the State to pay $5 for the first hundred tons and one and a half cents for each additional ton. Assuming this to be intended to defray the expenses of quarantine regulations, the court (DAVIS, J.) held it to be unconstitutional.

In *Huse* v. *Glover*, 119 U. S. 543, 549 (1886), the question was as to the right of

VEAZIE BANK *v.* FENNO.

SUPREME COURT OF THE UNITED STATES. 1869.

[8 *Wall.* 533.]

ON certificate of division for the Circuit Court for Maine.

The Constitution ordains that: "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 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."

It also ordains that:

"Direct taxes shall be apportioned among the several States . . . according to their respective numbers."

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

"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."

With these provisions in force as fundamental law, Congress passed, July 13th, 1866, 14 Stat. at Large, 146, an Act, the second clause of the 9th section of which enacts:

"That every national banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association, used for circulation and paid out by them after the 1st day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the commissioner of internal revenue." Under this

Illinois to collect tolls on vessels passing through the improved waterway of the Illinois River. In upholding this, the court (FIELD, J.) said: "Nor is there anything in the objection that the rates of toll are prescribed by the commissioners according to the tonnage of the vessels, and the amount of freight carried by them through the locks. This is simply a mode of fixing the rate according to the size of the vessel and the amount of property it carries, and in no sense is a duty of tonnage within the prohibition of the Constitution A duty of tonnage within the meaning of the Constitution is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country; and the prohibition was designed to prevent the States from imposing hindrances of this kind to commerce carried on by vessels."

Compare *Cannon* v. *N. O.*, 20 Wall. 577; *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Transp. Co.* v. *Wheeling*, 99 U. S. 273; *Packet Co.* v. *St. Louis*, 100 U. S. 423; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Transp. Co.* v. *Parkersburg*, 107 U. S. 691. — ED.

Act a tax of ten per cent was assessed upon the Veazie Bank, for its bank notes issued for circulation, after the day named in the Act. The Veazie Bank was a corporation chartered by the State of Maine, with authority to issue bank notes for circulation, and the notes on which the tax imposed by the Act was collected, were issued under this authority. There was nothing in the case showing that the bank sustained any relation to the State as a financial agent, or that its authority to issue notes was conferred or exercised with any special reference to other than private interests.

The bank declined to pay the tax, alleging it to be unconstitutional, and the collector of internal revenue, one Fenno, was proceeding to make a distraint in order to collect it, with penalty and costs, when, in order to prevent this, the bank paid it under protest. An unsuccessful claim having been made on the commissioner of internal revenue for reimbursement, suit was brought by the bank against the collector, in the court below.

The case was presented to that court upon an agreed statement of facts, and, upon a prayer for instructions to the jury, the judges found themselves opposed in opinion on three questions, the first of which — the two others differing from it in form only, and not needing to be recited — was this: "Whether the second clause of the 9th section of the Act of Congress of the 13th of July, 1866, under which the tax in this case was levied and collected, is a valid and constitutional law."

Reverdy Johnson and *Caleb Cushing*, for the plaintiffs. *E. R. Hoar*, Attorney-General of the United States, for the defendant.

The Chief Justice delivered the opinion of the court.

The necessity of adequate provision for the financial exigencies created by the late rebellion, suggested to the administrative and legislative departments of the government important changes in the systems of currency and taxation which had hitherto prevailed. These changes, more or less distinctly shown in administrative recommendations, took form and substance in legislative Acts. We have now to consider, within a limited range, those which relate to circulating notes and the taxation of circulation.

At the beginning of the rebellion the circulating medium consisted almost entirely of bank notes issued by numerous independent corporations variously organized under State legislation, of various degrees of credit, and very unequal resources, administered often with great, and not unfrequently, with little skill, prudence, and integrity. The Acts of Congress, then in force, prohibiting the receipt or disbursement, in the transactions of the national government, of anything except gold and silver, and the laws of the States requiring the redemption of bank notes in coin on demand, prevented the disappearance of gold and silver from circulation. There was, then, no national currency except coin; there was no general (see the Act of December 27th, 1854, to suppress small notes in the District of Columbia. 10 Stat. at Large, 599) regulation of any other by national legislation;

and no national taxation was imposed in any form on the State bank circulation.

The first Act authorizing the emission of notes by the Treasury Department for circulation was that of July 17th, 1861. 12 Stat. at Large, 259. The notes issued under this Act were treasury notes, payable on demand in coin. The amount authorized by it was $50,000,000, and was increased by the Act of February 12th, 1862 (Id. 338), to $60,000,000.

On the 31st of December, 1861, the State banks suspended specie payment. Until this time the expenses of the war had been paid in coin, or in the demand notes just referred to; and for some time afterwards, they continued to be paid in these notes, which, if not redeemed in coin, were received as coin in the payment of duties.

Subsequently, on the 25th of February, 1862 (Id. 345), a new policy became necessary in consequence of the suspension and of the condition of the country, and was adopted. The notes hitherto issued, as has just been stated, were called treasury notes, and were payable on demand in coin. The Act now passed authorized the issue of bills for circulation under the name of United States notes, made payable to bearer, but not expressed to be payable on demand, to the amount of $150,000,000; and this amount was increased by subsequent Acts to $450,000,000, of which $50,000,000 were to be held in reserve, and only to be issued for a special purpose, and under special directions as to their withdrawal from circulation. Act of July 11th, 1862, Id. 532; Act of March 3d, 1863, Id. 710. These notes, until after the close of the war, were always convertible into, or receivable at par for bonds payable in coin, and bearing coin interest, at a rate not less than five per cent, and the Acts by which they were authorized, declared them to be lawful money and a legal tender. This currency, issued directly by the government for the disbursement of the war and other expenditures, could not, obviously, be a proper object of taxation.

But on the 25th of February, 1863, the Act authorizing national banking associations (Act of March 3d, 1863, 12 Stat. at Large, 670) was passed, in which, for the first time during many years, Congress recognized the expediency and duty of imposing a tax upon currency. By this Act a tax of two per cent annually was imposed on the circulation of the associations authorized by it. Soon after, by the Act of March 3d, 1863 (Id. 712), a similar but lighter tax of one per cent annually was imposed on the circulation of State banks in certain proportions to their capital, and of two per cent on the excess; and the tax on the national associations was reduced to the same rates.

Both Acts also imposed taxes on capital and deposits, which need not be noticed here.

At a later date, by the Act of June 3d, 1864 (13 Id. 111), which was substituted for the Act of February 25th, 1863, authorizing national banking associations, the rate of tax on circulation was continued and applied to the whole amount of it, and the shares of their

stockholders were also subjected to taxation by the States; and a few days afterwards, by the Act of June 30th, 1864 (Id. 277), to provide ways and means for the support of the government, the tax on the circulation of the State banks was also continued at the same annual rate of one per cent, as before, but payment was required in monthly instalments of one-twelfth of one per cent, with monthly reports from each State bank of the amount in circulation.

It can hardly be doubted that the object of this provision was to inform the proper authorities of the exact amount of paper money in circulation, with a view to its regulation by law.

The first step taken by Congress in that direction was by the Act of July 17, 1862 (Act of March 3d, 1863, 12 Stat. at Large, 592), prohibiting the issue and circulation of notes under one dollar by any person or corporation. The Act just referred to was the next, and it was followed some months later by the Act of March 3d, 1865, amendatory of the prior internal revenue Acts, the sixth section of which provides, "that every national banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of the notes of any State bank, or State banking association, paid out by them after the 1st day of July, 1866." 13 Id. 484.

The same provision was re-enacted, with a more extended application, on the 13th of July, 1866, in these words: "Every national banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association used for circulation, and paid out by them after the first day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the commissioner of internal revenue." 14 Id. 146.

The constitutionality of this last provision is now drawn in question, and this brief statement of the recent legislation of Congress has been made for the purpose of placing in a clear light its scope and bearing, especially as developed in the provisions just cited. It will be seen that when the policy of taxing bank circulation was first adopted in 1863, Congress was inclined to discriminate for, rather than against, the circulation of the State banks; but that when the country had been sufficiently furnished with a national currency by the issues of United States notes and of national bank notes, the discrimination was turned, and very decidedly turned, in the opposite direction.

The general question now before us is, whether or not the tax of ten per cent, imposed on State banks or national banks paying out the notes of individuals or State banks used for circulation, is repugnant to the Constitution of the United States.

In support of the position that the Act of Congress, so far as it provides for the levy and collection of this tax, is repugnant to the Constitution, two propositions have been argued with much force and earnestness. The first is that the tax in question is a direct tax, and has not been apportioned among the States agreeably to the Constitu-

tion. The second is that the Act imposing the tax impairs a franchise granted by the State, and that Congress has no power to pass any law with that intent or effect.

The first of these propositions will be first examined. . . .

It may be safely assumed, therefore, as the unanimous judgment of the court, that a tax on carriages is not a direct tax. And it may further be taken as established upon the testimony of Paterson, that the words direct taxes, as used in the Constitution, comprehended only capitation taxes, and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States.

It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of *Pacific Insurance Company* v. *Soule*, 7 Wall. 434, held not to be a direct tax.

Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect? We do not say that there may not be such a tax. It may be admitted 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. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

But in the case before us the object of taxation is not the franchise of the bank, but property created, or contracts made and issued under the franchise, or power to issue bank bills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit

to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue.

It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.

But there is another answer which vindicates equally the wisdom and the power of Congress.

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. The three questions certified from the Circuit Court of the District of Maine must, therefore, be answered

Affirmatively.[1]

[NELSON, J., for himself and DAVIS, J., gave a dissenting opinion.]

M'CULLOCH *v.* THE STATE OF MARYLAND.

SUPREME COURT OF THE UNITED STATES. 1819.

[4 *Wheat.* 316.]

[THE statement of facts and the first part of the opinion are given, *supra*, 271. The rest of the opinion, beginning on p. 425 of 4 Wheaton's Reports, here follows.]

MARSHALL, C. J. . . . 2. Whether the State of Maryland may, without violating the Constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded — if it may restrain a State from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely re-

[1] Affirmed in *Nat. Bank* v. *U. S.*, 101 U. S. 1 (1879). In *The Head Money Cases*, 112 U. S. 580, 596 (1884), MILLER, J., for the court, said: "In the case of *Veazie Bank* v. *Fenno*, 8 Wall. 533, 549, the enormous tax of eight [*sic*] per cent per annum on the circulation of State banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created, namely, the legal-tender notes and the notes of the national banks. It was not subject, therefore, to the rules which would invalidate an ordinary tax, pure and simple." Compare 1 Hare, Am. Const. Law, 294, 295, 474. — ED.

pugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever, surpassed, have been displayed.

The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the Constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by, the Constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution.

The argument on the part of the State of Maryland, is, not that the

States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Constitution leaves them this right in the confidence that they will not abuse it.

Before we proceed to examine this argument, and to subject it to the test of the Constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the States. It is admitted 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. 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.

The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the States. They are given by all, for the benefit of all — and upon theory, should be subjected to that government only which belongs to all.

It may be objected to this definition, that the power of taxation is not confined to the people and property of a State. It may be exercised upon every object brought within its jurisdiction.

This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive 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 proposition may almost be pronounced self-evident.

The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them.

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 con-

fer 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 of a State 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. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it 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.

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective States, consistently with a fair construction of the Constitution?

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word "confidence." Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused

This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the State of Maryland contends, to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.

If the States 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 the papers of the custom-house; 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 was not intended by the American people. They did not design to make their government dependent on the States.

Gentlemen say, they do not claim the right to extend State taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the 10th section of the 1st article of the Constitution; that, with respect to everything else, the power of the States is supreme, and admits of no control. If this be true, the distinction between property and other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the States be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the general government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

In the course of the argument, the "Federalist" has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the Constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and, to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. The subject of those numbers, from which passages have been cited, is the unlimited power of taxation which is vested in the general government. The objection to this unlimited power, which the argument seeks to remove,

is stated with fulness and clearness. It is "that an indefinite power of taxation in the latter (the government of the Union) might, and probably would, in time, deprive the former (the government of the States) of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it; the national government might at any time abolish the taxes imposed for State objects, upon the pretence of an interference with its own. It might allege a necessity for doing this, in order to give efficacy to the national revenues; and thus all the resources of taxation might, by degrees, become the subjects of Federal monopoly, to the entire exclusion and destruction of the State governments."

The objections to the Constitution which are noticed in these numbers, were to the undefined power of the government to tax, not to the incidental privilege of exempting its own measures from State taxation. The consequences apprehended from this undefined power were, that it would absorb all the objects of taxation, "to the exclusion and destruction of the State governments." The arguments of the "Federalist" are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of State taxation. Arguments urged against these objections, and these apprehensions, are to be understood as relating to the points they mean to prove. Had the authors of those excellent essays been asked, whether they contended for that construction of the Constitution, which would place within the reach of the States those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit, that their answer must have been in the negative.

It has also been insisted, that, as the power of taxation in the general and State governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the States, will equally sustain the right of the States to tax banks chartered by the general government.

But the two cases are not on the same reason. The people of all the States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The

difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole — between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

But if the full application of this argument could be admitted, it might bring into question the right of Congress to tax the State banks, and could not prove the right of the States to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.[1]

WESTON ET AL. *v.* THE CITY COUNCIL OF CHARLESTON.

SUPREME COURT OF THE UNITED STATES. 1829.

[2 *Pet.* 449.]

THIS was a writ of error to the Constitutional Court of South Carolina.

On the 20th of February, 1823, the City Council of Charleston passed "an ordinance to raise supplies for the use of the city of Charleston, for the year 1823." The ordinance provides "that the following species of property, owned and possessed within the limits of the city of Charleston, shall be subject to taxation in the manner, and at the

[1] The court, having been asked in *Osborn* v. *U. S. Bank*, 9 Wheat 738, 859 (1824), to allow a re-argument of this general question, did so, and thereupon affirmed the previous decision. — ED.

rate, and conformably to the provisions hereinafter specified; that is to say, all personal estate, consisting of bonds, notes, insurance stock, six and seven per cent stock of the United States, or other obligations upon which interest has been or will be received during the year, over and above the interest which has been paid (funded stock of this State, and stock of the incorporated banks of this State and the United States Bank excepted) twenty-five cents upon every hundred dollars."

In the Court of Common Pleas for the Charleston district, the plaintiffs in error, in May, 1823, filed a suggestion for a prohibition, as owners of United States stock, against the City Council of Charleston, to restrain them from levying under the ordinances, on six and seven per cent stock of the United States and the tax imposed under the ordinance; on the ground that the ordinance, so far as it imposes a tax on the stock of the United States, is contrary to the Constitution of the United States.

The prohibition having been granted, the City Council applied to the Constitutional Court, the highest court of law in the State, to reverse the order, on the ground that the ordinance was not repugnant to the Constitution of the United States; and the proceedings in the case having been removed to the said court, the said court in May Term, 1823, by a majority of their judges (four being in favor of the constitutionality of the ordinance, and three against it), decided that the said ordinance did not violate the Constitution of the United States, in imposing a tax upon the holders of United States stock. From this decision the relators appealed by writ of error to the Supreme Court of the United States. The error assigned in this court was: that the judgment of the Constitutional Court was erroneous, in that it decided the ordinance of the City Council of Charleston not to be repugnant to the Constitution of the United States.

The case was argued by *Mr. Hayne*, for the plaintiffs in error; and by *Mr. Cruger* and *Mr. Legaré*, for the defendants.

Marshall, C. J. . . . This brings us to the main question. Is the stock issued for loans made to the government of the United States liable to be taxed by States and corporations?

Congress has power "to borrow money on the credit of the United States." The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract, while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract.

If the States and corporations throughout the Union possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?

But it is unnecessary to pursue this principle through its diversified

application to all the contracts, and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our republic. In war, when the honor, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigencies, the urgent demands of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make these anticipations, "to borrow money on the credit of the United States." Can anything be more dangerous, or more injurious, than the admission of a principle which authorizes every State and every corporation in the Union which possesses the right of taxation, to burden the exercise of this power at their discretion?

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. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend; may be burdened, impeded, if not arrested, by any of the organized parts of the confederacy.

In a society formed like ours, with one supreme government for national purposes, and numerous State governments for other purposes, in many respects independent, and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a State, and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise, is undoubtedly among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land in its application to the cases of individuals. This duty has more than once devolved on this court. In the performance of it we have considered it as a necessary consequence from the supremacy of the government of the whole, that its action in the exercise of its legitimate powers, should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a State cannot rightfully be so exercised as to impede and obstruct the free course of those measures which the government of the States united may rightfully adopt.

This subject was brought before the court in the case of *M'Culloch* v. *The State of Maryland*, 4 Wheaton, 316, when it was thoroughly argued and deliberately considered. The question decided in that case bears a near resemblance to that which is involved in this. It was

discussed at the bar in all its relations, and examined by the court with its utmost attention. We will not repeat the reasoning which conducted us to the conclusion thus formed, but that conclusion was that "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." "The sovereignty of a State extends to everything 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."

The court said in that case, that "the States have no power by taxation, or otherwise, to 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."

We retain the opinions which were then expressed. A contract made by the government in the exercise of its power, 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 ought, therefore, on the principles settled in the case of *M'Culloch* v. *The State of Maryland*, to be exempt from State taxation, and consequently from being taxed by corporations deriving their power from States.

It is admitted that the power of the government to borrow money cannot be directly opposed, and that any law directly obstructing its operation would be void; but a distinction is taken between direct opposition and those measures which may consequentially affect it; that is, that a law prohibiting loans to the United States would be void, but a tax on them to any amount is allowable.

It is, we think, impossible not to perceive the intimate connection which exists between these two modes of acting on the subject.

It is not the want of original power in an independent sovereign State, to prohibit loans to a foreign government, which restrains the legislature from direct opposition to those made by the United States. The restraint is imposed by our Constitution. The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised.

The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a

sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

It is admitted by the counsel for the defendants, that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States.

The distinction is, we think, apparent. When lands are sold, no connection remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country with no implied exemption from common burdens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it may then assume is not questioned. The connection between the borrower and the lender is dissolved. It is no burden on loans, it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government, stands, we think, on very different principles from a tax on lands which the government has sold.

"The Federalist" has been quoted in the argument, and an eloquent and well-merited eulogy has been bestowed on the great statesman who is supposed to be the author of the number from which the quotation was made. This high authority was also relied upon in the case of *M'Culloch* v. *The State of Maryland*, and was considered by the court. Without repeating what was then said, we refer to it as exhibiting our view of the sentiments expressed on this subject by the authors of that work.

It has been supposed that a tax on stock comes within the exceptions stated in the case of *M'Culloch* v. *The State of Maryland*. We do not think so. The Bank of the United States is an instrument essential to the fiscal operations of the government, and the power which might be exercised to its destruction was denied. But property acquired by that corporation in a State was supposed to be placed in the same condition with property acquired by an individual.

The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution.

We are, therefore, of opinion that the judgment of the Constitutional Court of the State of South Carolina, reversing the order made by the Court of Common Pleas, awarding a prohibition to the City Council of Charleston, to restrain them from levying a tax imposed on six and seven per cent stock of the United States, under an ordinance to raise supplies to the use of the city of Charleston for the year 1823, is erroneous in this; that the said Constitutional Court adjudged

that the said ordinance was not repugnant to the Constitution of the United States; whereas, this court is of opinion that such repugnancy does exist. We are, therefore, of opinion that the said judgment ought to be reversed and annulled, and the cause remanded to the Constitutional Court for the State of South Carolina, that farther proceedings may be had therein according to law.[1]

[JOHNSON, J., and THOMPSON, J., gave dissenting opinions, to the effect that the tax was good as being a general tax on incomes, and that there was no sufficient reason for holding the income from United States securities exempt.]

[1] And so *The Banks* v. *The Mayor*, 7 Wall. 16 (1868). In *Bank* v. *Supervisors*, Id. 26 (1868), the same question arose in relation to the legal-tender notes of the United States. CHASE, C. J., for the court, said: "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." — ED.

DOBBINS *v.* THE COMMISSIONERS OF ERIE COUNTY.

SUPREME COURT OF THE UNITED STATES. 1842.

[16 *Pet.* 435.]

IN error to the Supreme Court of Pennsylvania.

In the Court of Common Pleas of Erie County, the plaintiff in error instituted an action against the commissioners of Erie County, the purpose of which was to have a decision on the right asserted by the commissioners of the county to assess and collect taxes on the office of the plaintiff, a citizen, and residing in Erie County, Pennsylvania, a captain of the United States revenue cutter.

The following case was stated and submitted to the court; either party to have the right to prosecute a writ of error.

"The plaintiff is and has been for the last eight years an officer of the United States, to wit, captain of the United States revenue cutter service; and ever since his appointment has been in service in command of the United States revenue cutter Erie, on the Erie station. He has been rated and assessed with county taxes for the last three years, to wit, 1835, 1836, and 1837, as such officer of the United States, for his office, as such, valued at five hundred dollars; which taxes, so rated and assessed and paid by the plaintiff, amount to the sum of ten dollars and seventy-five cents.

"The question submitted to the court is, whether the plaintiff is liable to be rated and assessed for his office under the United States for county rates and levies; if he is, then judgment to be entered for the defendants; if not, then judgment to be entered for the plaintiff for the sum of ten dollars and seventy-five cents."

The Court of Common Pleas gave judgment for the plaintiff, and the case was removed to the Supreme Court of Pennsylvania; in which court the judgment was reversed, and a judgment was entered for the commissioners of Erie County. The plaintiff, Daniel Dobbins, prosecuted this writ of error.

The case was submitted to the court by *Mr. Galbraith*, for the plaintiff, and by *Mr. Penrose*, for the defendants, on printed arguments.

MR. JUSTICE WAYNE delivered the opinion of the court. . . .

The assessment was made by the commissioners of Erie County under the Act of Pennsylvania of the 15th April, 1834. It is believed to be the only instance of a tax being rated in that State upon the office of an officer of the United States. It has, however, received the sanction of the Supreme Court. If it can be lawfully done, it cannot be doubted that similar assessments will be made under that law, upon all other officers of the United States, in Pennsylvania. The language of the court is, "the case is put on the power and right to impose the tax. In other words, is this a legitimate subject of taxation? Perhaps this

may, in some measure, depend on, whether, within the true meaning of the Acts, it is the office itself, or the emoluments of the office which are made the subjects of taxation." In the preceding extract we gave the language of the court. The law is, that an account shall be taken of "all offices and posts of profit." The next section makes it the duty of the assessors "to rate all offices and posts of profit, professions, trades, and occupations, at their discretion, having a due regard to the profits arising therefrom."

The emoluments of the office, then, are taxable, and not the office. But, whether it be one or the other, we cannot perceive how a tax upon either conduces to comprehend within the terms of the Act, the office or the compensation of an officer of the United States. It will not do to say, as it was said in argument, that though the language of the Act may import that offices and posts of profit were taxable, that it was the citizen who holds the office whom the law intended to tax, and that it was a burden he was bound to bear in return for the privileges enjoyed, and the protection received from government; and, then, that the liability to pay the tax was a personal charge, because the person upon whom it was assessed was a taxable person.

The first answer to be given to these suggestions, is, that the tax is to be levied upon a valuation of the income of the office. But, besides the obligation upon persons to pay taxes, is mistaken, and the sense in which a tax is a personal charge, is misunderstood. The foundation of the obligation to pay taxes, is not the privileges enjoyed or the protection given to a citizen by government, though the payment of taxes gives a right to protection. Both are enjoyed, as well by those members of a State who do not, because they are not able to pay taxes, as by those who are able, and do pay them. Married women and children have privileges and protection, but they are not assessed, unless they have goods or property separate from the heads of families. The necessity of money for the support of States in times of peace or war, fixes the obligation upon their citizens to pay such taxes as may be imposed by lawful authority. And the only sense in which a tax is a personal charge, is, that it is assessed upon personal estate, and the profits of labor and industry. It is called a personal charge, to distinguish such a tax from the tax upon lands and tenements, which are enforced without any regard to the persons who are the owners. Taxes are never assessed, unless it be a capitation tax, upon persons as persons, but upon them on account of their goods, and the profits made upon professions, trades, and occupations. They are so imposed, because public revenue can only be supplied by assessments upon the goods of individuals — "comprehending under the word 'goods,' all the estate and effects which every one hath, of whatsoever sort they be. Taxes regard the persons of men only because of their goods." The goods then are taxed and not the person. But those who are to pay the tax are taxable persons, because they are under an obligation to contribute from their means to the necessities

of the State. The obligation, however, only becomes a charge upon the person in consequence of the power in the State to enforce the payment of taxes by coercion. This power extends to the sequestration of the goods, and the imprisonment of the delinquent. A tax, according to the object upon which it is laid, may be a personal charge; but that is a very different thing from its becoming a charge upon the person, in consequence of the coercion which may be provided by law to enforce the payment.

We have been more particular in noticing this argument, because it enabled us to put the point upon which it was intended to bear upon right principles. Besides, as it was drawn from the statutes of Pennsylvania, it implied the supposition that her legislature, in these enactments upon taxation, had disregarded those principles. But this is not so. If the occasion was a proper one for this court to do it, we might easily show that the Act throughout, was framed upon an enlightened recognition by the legislators of that State, of all the principles upon which taxes are imposed. The only difficulty in the Act has arisen from the terms directing assessments to be made upon all offices and posts of profit, without restricting the assessments to offices and posts of profit held under the sovereignty of that State; and not excluding them from being made upon offices and posts of profit of another sovereignty — the United States.

The case being now cleared of other objections, except such as relate to the unconstitutionality of the tax, we will consider the real and only question in it; that is, "whether the plaintiff is liable to be rated and assessed for his office under the United States, for county rates and levies?" It is not necessary for the decision of this question, that the power of taxation in the States, and in the United States, under the Constitution of the latter, should be minutely discussed.

Taxation is a sacred right, essential to the existence of government; an incident of sovereignty. The right of legislation is coextensive with the incident, to attach it upon all persons and property within the jurisdiction of a State. But in our system there are limitations upon that right. There is a concurrent right of legislation in the States and the United States, except as both are restrained by the Constitution of the United States. Both are restrained upon this subject, by express prohibitions in the Constitution. And the States, by such as are necessarily implied when the exercise of the right by a State conflicts with the perfect execution of another sovereign power, delegated to the United States. That occurs when taxation by a State acts upon the instruments, emoluments, and persons, which the United States may use and employ as necessary and proper means to execute their sovereign powers. The government of the United States is supreme within its sphere of action. The means necessary and proper to carry into effect the powers in the Constitution are in Congress. Taxation is a sovereign power in a State; but the collection of revenue by imposts upon imported goods, and the regulation of commerce, are

also sovereign powers in the United States. Let us apply then the principles just stated, and the powers mentioned to the case in judgment, and see what will be the result.

Congress has power to lay and collect taxes, duties, imposts, &c., and to regulate commerce with foreign nations and among the several States, and with the Indian tribes. Neither can be done without legislation. A complicated machinery of forms, instruments, and persons must be established; revenue districts were to be designated; collectors, naval officers, surveyors, inspectors, appraisers, weighers, measurers, and gaugers must be employed; "the better to secure the collection of duties on goods and on the tonnage of vessels," revenue cutters, and officers to command them are necessary. The latter are declared to be officers of the customs, and they have large powers and authority. All of this is legislation by Congress to execute sovereign powers. They are the means necessary to an allowed end: the end, the great objects which the Constitution was intended to secure to the States in their character of a nation. Is the officer, as such, less a means to carry into effect these great objects than the vessel which he commands, the instruments which are used to navigate her, or than the guns put on board to enforce obedience to the law? These inanimate objects, it is admitted, cannot be taxed by a State, because they are means. Is not the officer more so, who gives use and efficacy to the whole? Is not compensation the means by which his services are procured and retained? It is true it becomes his when he has earned it. If it can be taxed by a State as compensation, will not Congress have to graduate its amount, with reference to its reduction by the tax? Could Congress use an uncontrolled discretion in fixing the amount of compensation, as it would do without the interference of such a tax? The execution of a national power by way of compensation to officers, can in no way be subordinate to the action of the State Legislatures upon the same subject. It would destroy also all uniformity of compensation for the same service, as the taxes by the States would be different. To allow such a right of taxation to be in the States, would also in effect be to give the States a revenue out of the revenue of the United States, to which they are not constitutionally entitled, either directly or indirectly: neither by their own action, nor by that of Congress. The revenue of the United States is intended by the Constitution, to pay the debts, and provide for the common defence and general welfare of the United States; to be expended, in particulars, in carrying into effect the laws made to execute all the express powers, "and all other powers vested by the Constitution in the government of the United States." But the unconstitutionality of such taxation by a State as that now before us may be safely put — though it is not the only ground — upon its interference with the constitutional means which have been legislated by the government of the United States to carry into effect its powers to lay and collect taxes, duties, imposts, &c., and to regulate commerce. In our view, it presents a case of as

strong interference as was presented by the tax imposed by Maryland, in the case of M'Culloch, 4 Wheat. 316; and the tax by the City Council of Charleston, in Weston's case, 2 Peters, 449: in both of which it was decided by this court, that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers

But we have said that the ground upon which we have just put the unconstitutionality of the tax in the case before us, is not the sole ground upon which our conclusion can be maintained. We will now state another ground; and we do so because it is applicable to exempt the salaries of all officers of the United States from taxation by the States.

The powers of the national government can only be executed by officers whose services must be compensated by Congress. The allowance is in its discretion. The presumption is that the compensation given by law is no more than the services are worth, and only such in amount as will secure from the officer the diligent performance of his duties. "The officers execute their offices for the public good. This implies their right of reaping from thence the recompense the services they may render may deserve;" without that recompense being in any way lessened, except by the sovereign power from whom the officer derives his appointment, or by another sovereign power to whom the first has delegated the right of taxation over all the objects of taxation, in common with itself, for the benefit of both. And no diminution in the recompense of an officer is just and lawful, unless it be prospective, or by way of taxation by the sovereignty who has a power to impose it; and which is intended to bear equally upon all according to their estate.

The compensation of an officer of the United States is fixed by a law made by Congress. It is in its exclusive discretion to determine what shall be given. It exercises the discretion and fixes the amount, and confers upon the officer the right to receive it when it has been earned. Does not a tax then by a State upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entireness? It certainly has such an effect; and any law of a State imposing such a tax cannot be constitutional, because it conflicts with a law of Congress made in pursuance of the Constitution, and which makes it the supreme law of the land.

We are, therefore, of opinion, that the judgment of the Supreme Court of Pennsylvania, reversing the judgment of the Court of Common Pleas of Erie County, declaring the plaintiff was not liable to be rated and assessed for county rates and levies for his office under the United States, is erroneous; in this — that the said Supreme Court adjudged that the Act of Pennsylvania embracing all offices and posts of profit, comprehending offices of the United States, was not repugnant to the Constitution and laws of the United States; whereas this court is of opinion that such repugnancy does exist. We are, there-

fore, of opinion that the said judgment ought to be reversed and annulled; and the cause remanded to the said Supreme Court of Pennsylvania, in and for the western district, with directions to affirm the judgment of the Court of Common Pleas of Erie County.[1]

In *Bank of Commerce* v. *New York City*, 2 Black, 620 (1862), the capital of the plaintiff was chiefly invested in "stocks, bonds, and securities" of the United States. Nelson, J., for the court, said: "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." *Held*, that the case was within the principle of *Weston* v. *Charleston*.

In the *Bank Tax Case*, 2 Wall. 200 (1864), under a New York statute of 1863, passed just after the decision in *Bank of Commerce* v. *N. Y. City*, banks in that State whose capital was invested in bonds of the United States were taxed "on a valuation equal to the amount of their capital stock paid in or secured to be paid in." Nelson, J., for the court, in holding the case to be substantially the same as *Bank of Commerce* v. *N. Y. City*, said: "Now, where the capital of the banks is required or authorized by the law to be invested in stocks, and, among others, in United States stock, under their charters or articles of association, and this capital thus invested is made the basis of taxation of the institutions, there is great difficulty in saying that it is not the stock thus constituting the corpus or body of the capital that is taxed. It is not easy to separate the property in which the capital is invested from the capital itself. It requires some refinement to separate the two thus intimately blended together. The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution. It is the foundation of its credit in the business community. The legislature well knew the peculiar system under which these institutions were incorporated, and the working of it; and when providing for a tax on their capital at a valuation, they could not but have intended a tax upon the property in which the capital had been

[1] Compare *U. S* v. *R. R. Co.*, 17 Wall. 322; *Melcher* v. *Boston*, 9 Met. 73. — Ed.

invested. We have seen that such is the practical effect of the tax, and we think it would be doing injustice to the intelligence of the legislature to hold that such was not their intent in the enactment of the law." [1]

VAN ALLEN *v.* THE ASSESSORS.

SUPREME COURT OF THE UNITED STATES. 1865.

[3 *Wall.* 573.]

THIS was a suit involving the question of right, on the part of States, to tax shares in the national banking associations created under the Act of Congress of June, 1864. . . . [The statement of facts is omitted.]

Numerous counsel appeared in the matter; some in this immediate case, others in other cases just like it from the other places. Among them *Mr. Evarts*, *Mr. Sedgwick*, *Mr. Tremaine*, *Messrs. Edmonds* and *Miller*, argued against the right of the States to tax, and *Mr. Kernan*, *Mr. A. J. Parker*, and *Mr. Reynolds* in favor of it. . . .

MR. JUSTICE NELSON delivered the opinion of the court.

The decree of the Court of Appeals, from which this case comes to us, must be reversed, on the ground that the enabling Act of the State of New York, passed March 9, 1865, does not conform to the limitations prescribed by the Forty-First Section of the Act of Congress, passed June 3, 1864, organizing the national banks, and providing for their taxation.[2] The defect is this: one of the limitations in the Act of Congress is, "that the tax so imposed under the laws of any State upon the shares of the associations authorized by this Act, shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located." The enabling Act of the State contains no such limitation. The banks of the State are taxed upon their capital; and although the Act provides that the tax on the shares of the national banks shall not exceed the par value, yet, inasmuch as the capital of the State banks may consist of the bonds of the United States, which are exempt from State taxation, it is easy to see that this tax on the capital is not an equivalent for a tax on the shares of the stockholders.

This is an unimportant question, however, as the defect may be readily remedied by the State legislature.

[1] See *Manhattan Co.* v. *Blake*, 148 U. S. 412 (1892). — ED.

[2] "That shares of stock in a national bank are not subject to taxation without the consent of Congress is conceded. *M'Culloch* v. *Md.*, 4 Wheat. 316; *Osborn* v *Bk U. S.*, 9 Wheat. 738; *Weston* v. *Charleston*, 2 Pet. 449; *People* v. *Weaver*, 100 U S 539." — BREWER, J., for the court, in *Talbott* v. *Silver Bow County*, 139 U. S. 438, 440 (1891), — a case where the unsuccessful contention was that the permission of Congress did not cover the Territories. — ED.

The main and important question involved, and the one which has been argued at great length and with eminent ability, is, whether the State possesses the power to authorize the taxation of the shares of these national banks in the hands of stockholders, whose capital is wholly vested in stock and bonds of the United States?

The court are of opinion that this power is possessed by the State, and that it is due to the several cases which have been so fully and satisfactorily argued before us at this term, as well as to the public interest involved, that the question should be finally disposed of. I shall proceed, therefore, to state, as briefly as practicable, the grounds and reasons that have led to their judgment in the case.

The first Act providing for the organization of these national banks, passed 25th February, 1863, contained no provision concerning State taxation of these shares; but Congress reserved the right by the last section at any time "to amend, alter, or repeal the Act." The present Act of 1864 is a re-enactment of the prior statute, with some material amendments, of which the section concerning State taxation is one.

It will be readily perceived, on adverting to the Act, that the powers and privileges conferred by it upon these associations are very great powers and privileges; — founded upon a new use and application of these government bonds, especially the privilege of issuing notes to circulate in the community as money, to the amount of ninety per centum of the bonds deposited with the treasurer; thereby nearly doubling their amount for all the operations and business purposes of the bank. This currency furnishes means and facilities for conducting the operations of the associations, which, if used wisely and skilfully, cannot but result in great advantages and profits to all the members of the association — the shareholders of the bank.

In the granting of chartered rights and privileges by government, especially if of great value to the corporators, certain burdens are usually, if not generally, imposed as conditions of the grant. Accordingly we find them in this charter. They are very few, but distinctly stated.

They are, first, a duty of one-half of one per centum each half-year, upon the average amount of its notes in circulation; second, a duty of one-quarter of one per centum each half-year upon the average amount of its deposits; third, a duty of one-quarter of one per centum each half-year on the average amount of its capital stock beyond the amount invested in United States bonds; and fourth, a State tax upon the shares of the association held by the stockholders, not greater than assessed on other moneyed capital in the State, nor to exceed the rate on shares of stock of State banks. These are the only burdens annexed to the enjoyment of the great chartered rights and privileges that we find in this Act of Congress; and no objection is made to either of them except the last, — the limited State taxation.

Although it has been suggested, yet it can hardly be said to have been argued, that the provision in the Act of Congress concerning the taxation of the shares by the State is unconstitutional. The sugges-

tion is, that it is a tax by the State upon the bonds of the government which constitute the capital of the bank, and which this court has heretofore decided to be illegal. But this suggestion is scarcely well founded; for were we to admit, for the sake of the argument, this to be a tax of the bonds or capital stock of the bank, it is but a tax upon the new uses and new privileges conferred by the charter of the association; it is but a condition annexed to the enjoyment of this new use and new application of the bonds; and if Congress possessed the power to grant these new rights and new privileges, which none of the learned counsel has denied, and which the whole argument assumes, then we do not see but the power to annex the conditions is equally clear and indisputable. The question involved is altogether a different one from that decided in the previous bank cases, and stands upon different considerations. The State tax, under this Act of Congress, involves no question as to the pledged faith of the government. The tax is the condition for the new rights and privileges conferred upon these associations.

But, in addition to this view, the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of the *Queen* v. *Arnoud*, 9 Adolphus and Ellis, New Series, 806. The question related to the registry of a ship owned by a corporation. Lord Denman observed: "It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in no legal sense are the individual members the owners."

The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the Act of Congress has left subject to taxation by the States, under the limitations prescribed, as will be seen on referring to it. That Act provides as follows:

"That nothing in this Act shall be construed to prevent all the shares of any of the said associations, held by any person or body corporate, from being included in the valuation of personal property of such person or corporation in the assessment of taxes imposed by and

under State authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State; provided further, that the tax so imposed under the laws of any State, upon the shares of the associations, authorized by this Act, shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located: provided, also, that nothing in this Act shall exempt the real estate of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real estate is taxed." (§ 41.)

It is said that Congress possesses no power to confer upon a State authority to be exercised which has been exclusively delegated to that body by the Constitution, and, consequently, that it cannot confer upon a State the sovereign right of taxation; nor is a State competent to receive a grant of any such power from Congress. We agree to this. But as it respects a subject-matter over which Congress and the States may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the States, there is no doubt Congress may withhold the exercise of that authority and leave the States free to act. An example of this relation existing between the Federal and State governments is found in the pilot-laws of the States, and the health and quarantine laws. The power of taxation under the Constitution as a general rule, and as has been repeatedly recognized in adjudged cases in this court, is a concurrent power. The qualifications of the rule are the exclusion of the States from the taxation of the means and instruments employed in the exercise of the functions of the Federal Government.

The remaining question is, has Congress legislated in respect to these associations, so as to leave the shares of the stockholders subject to State taxation?

We have already referred to the main provision of the Act of Congress on this subject . . .; and in another section of the Act (40) it is declared "that the president and cashier of every such association shall cause to be kept, at all times, a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted, and such list shall be subject to the inspection of all shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business hours of each day," &c.

These two provisions — the one declaring that nothing in the Act shall be construed to prevent the shares from being included in the valuation of the personal property, &c., in the assessment of taxes imposed by State authority; and the other providing for the keeping of the list of the names and residences of the shareholders, among other things, for the inspection of the officers authorized to assess the State taxes — not only recognize, in express terms, the sovereign right of the State to tax, but prescribe regulations and duties to these associa-

tions, with a view to disembarrass the officers of the State engaged in the exercise of this right. Nothing, it would seem, could be made plainer, or more direct and comprehensive on the subject. The language of the several provisions is so explicit and positive as scarcely to call for judicial construction.

Then, as to the shares, and what is intended by the use of the term? The language of the Act is equally explicit and decisive. . . .

Now, in view of these several provisions in which the term shares, and shareholders, are mentioned, and the clear and obvious meaning of the term in the connection in which it is found, namely, the whole of the interest in the shares and of the shareholders; when the statute provides, that nothing in this Act shall be construed to prevent all the shares in any of the said associations, &c., from being included in the valuation of the personal property of any person or corporation in the assessment of taxes imposed by State authority, &c., can there be a doubt but that the term "shares," as used in this connection, means the same interest as when used in the other portions of the Act? Take, for examples, the use of the term in the certificate of the numbers of shares in the articles of association, in the division of the capital stock into shares of one hundred dollars each; in the personal liability clause, which subjects the shareholder to an amount, and, in addition, to the amount invested in such shares; in the election of directors, and in deciding all questions at meetings of the stockholders, each share is entitled to one vote; in regulations of the payments of the shares subscribed; and, finally, in the list of shares kept for the inspection of the State assessors. In all these instances, it is manifest that the term as used means the entire interest of the shareholder; and it would be singular, if in the use of the term in the connection of State taxation, Congress intended a totally different meaning, without any indication of such intent.

This is an answer to the argument that the term, as used here, means only the interest of the shareholder as representing the portion of the capital, if any, not invested in the bonds of the government, and that the State assessors must institute an inquiry into the investment of the capital of the bank, and ascertain what portion is invested in these bonds, and make a discrimination in the assessment of the shares. If Congress had intended any such discrimination, it would have been an easy matter to have said so. Certainly, so grave and important a change in the use of this term, if so intended, would not have been left to judicial construction.

Upon the whole, after the maturest consideration which we have been able to give to this case, we are satisfied that the States possess the power to tax the whole of the interest of the shareholder in the shares held by him in these associations, within the limit prescribed by the Act authorizing their organization. But, for the reasons stated in the forepart of the opinion, the judgment must be reversed and the case

remitted to the Court of Appeals of the State of New York, with directions to enter judgment for the plaintiffs in error, with costs.

CHASE, C. J., for himself and WAYNE and SWAYNE, JJ., gave an opinion concurring in the reversal of the judgment below on the first ground named in the opinion of the court, but dissenting on the main points discussed.[1]

[1] *Van Allen* v. *The Assessors* was affirmed in *People* v. *Com'rs*, 4 Wall. 244 (1866) (with the same dissent), — the court, NELSON, J., remarking of *Van Allen* v. *The Assessors*, "That case was one of a large class of cases which were very thoroughly argued, and received at the time the most careful consideration of the court."

Compare *Soc. for Savings* v. *Coite*, 6 Wall. 594; *Prov. Inst.* v. *Mass.*, Id. 611; *Ham. Co.* v. *Mass.*, Id. 632; *Conn. Mut. L. Ins. Co.* v. *Com'th*, 133 Mass. 161; *Merc. Bk.* v. *N. Y.*, 121 U. S. 138 (1886).

In *Nat. Bk.* v. *Com'th*, 9 Wall. 353 (1869), where a tax (held to be a tax upon the shares of stock-holders) was laid under a law of Kentucky, which required that "the cashier of a bank whose stock is taxed shall on [&c.] pay into the treasury the amount of tax due," the court (MILLER, J.) said: "But it is strongly urged that it is to be deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders. Whether the State has the right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is anything else than a tax on these shares. It has been the practice of many of the States for a long time to require of its corporations, thus to pay the tax levied on their shareholders. It is the common, if not the only, mode of doing this in all the New England States, and in several of them the portion of this tax which should properly go as the shareholder's contribution to local or municipal taxation is thus collected by the State of the bank and paid over to the local municipal authorities. In the case of shareholders not residing in the State, it is the only mode in which the State can reach their shares for taxation. We are, therefore, of opinion that the law of Kentucky is a tax upon the shares of the stockholder. If the State cannot require of the bank to pay the tax on the shares of its stock it must be because the Constitution of the United States, or some Act of Congress, forbids it. There is certainly no express provision of the Constitution on the subject.

"But it is argued that the banks, being instrumentalities of the Federal government, by which some of its important operations are conducted, cannot be subjected to such State legislation. It is certainly true that the Bank of the United States and its capital were held to be exempt from State taxation on the ground here stated, and this principle, laid down in the case of *M'Culloch* v. *The State of Maryland*, has been repeatedly affirmed by the court. But the doctrine has its foundation in the proposition that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation. The most important agents of the Federal government are its officers, but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a Federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is sub-

CRANDALL *v.* STATE OF NEVADA.

SUPREME COURT OF THE UNITED STATES. 1867.

[6 *Wall.* 35.]

ERROR to the Supreme Court of Nevada.

In 1865, the Legislature of Nevada enacted that "there shall be levied and collected a capitation tax of one dollar upon every person leaving the State by any railroad, stage-coach, or other vehicle engaged or employed in the business of transporting passengers for hire," and that the proprietors, owners, and corporations so engaged should pay the said tax of one dollar for each and every person so conveyed or transported from the State. For the purpose of collecting the tax, another section required from persons engaged in such business, or their agents, a report every month, under oath, of the number of pas-

ject to all the laws of the State which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal government authorizes the tax.

"If the State of Kentucky had a claim against a stockholder of the bank who was a non-resident of the State, it could undoubtedly collect the claim by legal proceeding, in which the bank could be attached or garnisheed, and made to pay the debt out of the means of its shareholder under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the State on the bank shares. It is no greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it, and it in no manner hinders it from performing all the duties of financial agent of the government.

"A very nice criticism of the proviso to the 41st section of the National Bank Act, which permits the States to tax the shares of such bank, is made to us to show that the tax must be collected of the shareholder directly, and that the mode we have been considering is by implication forbidden. But we are of opinion that while Congress intended to limit State taxation to the shares of the bank, as distinguished from its capital, and to provide against a discrimination in taxing such bank shares unfavorable to them, as compared with the shares of other corporations, and with other moneyed capital, it did not intend to prescribe to the States the mode in which the tax should be collected. The mode under consideration is the one which Congress itself has adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares, resident or non-resident; and, as we have already stated, it is the mode which experience has justified in the New England States as the most convenient and proper, in regard to the numerous wealthy corporations of those States. It is not to be readily inferred, therefore, that Congress intended to prohibit this mode of collecting a tax which they expressly permitted the States to levy."

Compare *Boston* v. *Beale*, 51 Fed. Rep. 306. — ED.

sengers so transported, and the payment of the tax to the sheriff or other proper officer.

With the statute in existence, Crandall, who was the agent of a stage company engaged in carrying passengers through the State of Nevada, was arrested for refusing to report the number of passengers that had been carried by the coaches of his company, and for refusing to pay the tax of one dollar imposed on each passenger by the law of that State. He pleaded that the law of the State under which he was prosecuted was void, because it was in conflict with the Constitution of the United States; and his plea being overruled, the case came into the Supreme Court of the State. That court — considering that the tax laid was not an impost on "exports," nor an interference with the power of Congress "to regulate commerce among the several States" — decided against the right thus set up under the Federal Constitution. Its judgment was now here for review. No counsel appeared for the plaintiff in error, Crandall, nor was any brief filed in his behalf.

Mr. P. Phillips, who filed a brief for *Mr. T. J. D. Fuller*, for the State of Nevada.

Mr. Justice Miller delivered the opinion of the court.

The question for the first time presented to the court by this record is one of importance. The proposition to be considered is the right of a State to levy a tax upon persons residing in the State who may wish to get out of it, and upon persons not residing in it who may have occasion to pass through it.

It is to be regretted that such a question should be submitted to our consideration, with neither brief nor argument on the part of plaintiff in error. But our regret is diminished by the reflection, that the principles which must govern its determination have been the subject of much consideration in cases heretofore decided by this court.

It is claimed by counsel for the State that the tax thus levied is not a tax upon the passenger, but upon the business of the carrier who transports him.

If the Act were much more skilfully drawn to sustain this hypothesis than it is, we should be very reluctant to admit that any form of words, which had the effect to compel every person travelling through the country by the common and usual modes of public conveyance to pay a specific sum to the State, was not a tax upon the right thus exercised. The statute before us is not, however, embarrassed by any nice difficulties of this character. The language which we have just quoted is, that there shall be levied and collected a capitation tax upon every person leaving the State by any railroad or stage-coach; and the remaining provisions of the Act, which refer to this tax, only provide a mode of collecting it. The officers and agents of the railroad companies, and the proprietors of the stage-coaches are made responsible for this, and so become the collectors of the tax.

We shall have occasion to refer hereafter somewhat in detail, to the

opinions of the judges of this court in *The Passenger Cases* (7 How. 283), in which there were wide differences on several points involved in the case before us. In the case from New York then under consideration, the statute provided that the health commissioner should be entitled to demand and receive from the master of every vessel that should arrive in the port of New York, from a foreign port, one dollar and fifty cents for every cabin passenger, and one dollar for each steerage passenger, and from each coasting vessel, twenty-five cents for every person on board. That statute does not use language so strong as the Nevada statute, indicative of a personal tax on the passenger, but merely taxes the master of the vessel according to the number of his passengers; but the court held it to be a tax upon the passenger, and that the master was the agent of the State for its collection. Chief Justice Taney, while he differed from the majority of the court, and held the law to be valid, said of the tax levied by the analogous statute of Massachusetts, that "its payment is the condition upon which the State permits the alien passenger to come on shore and mingle with its citizens, and to reside among them. It is demanded of the captain; and not from every separate passenger, for convenience of collection. But the burden evidently falls upon the passenger, and he, in fact, pays it, either in the enhanced price of his passage or directly to the captain before he is allowed to embark for the voyage. The nature of the transaction, and the ordinary course of business, show that this must be so."

Having determined that the statute of Nevada imposes a tax upon the passenger for the privilege of leaving the State, or passing through it by the ordinary mode of passenger travel, we proceed to inquire if it is for that reason in conflict with the Constitution of the United States.

In the argument of the counsel for the defendant in error, and in the opinion of the Supreme Court of Nevada, which is found in the record, it is assumed that this question must be decided by an exclusive reference to two provisions of the Constitution, namely: that which forbids any State, without the consent of Congress, to lay any imposts or duties on imports or exports, and that which confers on Congress the power to regulate commerce with foreign nations and among the several States. The question as thus narrowed is not free from difficulties. . . .

But we do not concede that the question before us is to be determined by the two clauses of the Constitution which we have been examining.

The people of these United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. Here sits its legislature, composed of senators and representatives, from the States and from the people of the States. Here resides the President, directing, through thousands of agents, the execution of the laws over all this vast country. Here is the seat of the supreme judicial power of the nation, to which all its

citizens have a right to resort to claim justice at its hands. Here are the great executive departments, administering the offices of the mails, of the public lands, of the collection and distribution of the public revenues, and of our foreign relations. These are all established and conducted under the admitted powers of the Federal government. That government has a right to call to this point any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered. The government, also, has its offices of secondary importance in all other parts of the country. On the sea-coasts and on the rivers it has its ports of entry. In the interior it has its land offices, its revenue offices, and its sub-treasuries. In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established.

The Federal power has a right to declare and prosecute wars, and, as a necessary incident, to raise and transport troops through and over the territory of any State of the Union.

If this right is dependent in any sense, however limited, upon the pleasure of a State, the government itself may be overthrown by an obstruction to its exercise. Much the largest part of the transportation of troops during the late rebellion was by railroads, and largely through States whose people were hostile to the Union. If the tax levied by Nevada on railroad passengers had been the law of Tennessee, enlarged to meet the wishes of her people, the treasury of the United States could not have paid the tax necessary to enable its armies to pass through her territory.

But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or 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 a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.

The views here advanced are neither novel nor unsupported by authority. The question of the taxing power of the States, as its exercise has affected the functions of the Federal government, has been repeatedly considered by this court, and the right of the States in this mode to impede or embarrass the constitutional operations of that government, or the rights which its citizens hold under it, has been uniformly denied. . . . [Here the court considers the cases of *M'Culloch* v. *Md.*,

4 Wheat. 316; *Brown* v. *Md.*, 12 Wheat. 419; *Weston* v. *Charleston*, 2 Pet. 449.]

In all these cases, the opponents of the taxes levied by the States were able to place their opposition on no express provision of the Constitution, except in that of *Brown* v. *Maryland*. But in all the other cases, and in that case also, the court distinctly placed the invalidity of the State taxes on the ground that they interfered with an authority of the Federal government, which was itself only to be sustained as necessary and proper to the exercise of some other power expressly granted.

In *The Passenger Cases*, to which reference has already been made, Justice Grier, with whom Justice Catron concurred, makes this one of the four propositions on which they held the tax void in those cases. Judge Wayne expresses his assent to Judge Grier's views; and perhaps this ground received the concurrence of more of the members of the court who constituted the majority than any other. But the principles here laid down may be found more clearly stated in the dissenting opinion of the Chief Justice in those cases, and with more direct pertinency to the case now before us than anywhere else. After expressing his views fully in favor of the validity of the tax, which he said had exclusive reference to foreigners, so far as those cases were concerned, he proceeds to say, for the purpose of preventing misapprehension, that so far as the tax affected American citizens it could not in his opinion be maintained. He then adds: "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 in 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. And a tax imposed by a State, for entering its territories or harbors, is inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it."

Although these remarks are found in a dissenting opinion, they do not relate to the matter on which the dissent was founded. They accord with the inferences which we have already drawn from the Constitution itself, and from the decisions of this court in exposition of that instrument. Those principles, as we have already stated them in this opinion, must govern the present case. . . .

Judgment reversed, and the case remanded to the Supreme Court of the State of Nevada, with directions to discharge the plaintiff in error from custody.

[Mr. Justice Clifford, for himself and Chief Justice Chase, gave a short opinion, concurring in the result, but dissenting from the "principal reasons."[1]]

THOMSON *v.* PACIFIC RAILROAD.

Supreme Court of the United States. 1869.

[9 *Wall.* 579.]

On certificate of division in opinion between the judges of the Circuit Court for the District of Kansas. The case was this:

The Union Pacific Railway Company, Eastern Division, was originally incorporated in 1855, by the Legislature of the Territory of Kansas, as the Leavenworth, Pawnee, and Western Railroad Company, with authority to construct the road from the west bank of the Missouri to the western boundary of the Territory. Subsequently, in 1862, under an Act of the State of Kansas, it assumed its present name, with authority to unite or consolidate with any other company or companies organized, or to be organized, under the laws of the United States, or of any State or Territory.

Some months later, the Union Pacific Railroad Company was incorporated by Congress, with power (conferred by the original Act of 1862 and various amendatory Acts) to construct a railroad and telegraph westward through the territory of the United States, from the hundredth meridian east of Greenwich, to connect with the Central Pacific Railway Company, incorporated by the State of California, and so to form, in connection with eastern roads, a continuous line from ocean to ocean. Several other railroad companies, already incorporated by Missouri and Iowa, as well as the company just mentioned, chartered by Kansas, were authorized to construct roads through the national territory, so as to join the Union Pacific road on the hundredth meridian; and to all these roads large grants of land were made, and large subsidies engaged on the security of a second mortgage, upon the condition of paying, at maturity, the bonds advanced by way of subsidy, and of rendering certain services to the government in the transmission of messages, and in the transportation of mails, troops, munitions, and other property, at reasonable rates of compensation.

But neither by the original Act, nor by any amendment, did Congress undertake to incorporate any railroad company, or authorize the construction of any railroad within the limits of any State, without the consent of the State concerned. And this was as true of the Union Pacific Railway Company, Eastern Division, as of any other of the roads aided by Congress. Whatever was done by Congress in reference to this last-named road, was done not merely with the consent,

[1] Compare *Woodruff* v. *Parham*, 8 Wall. 123, 140 (1868). — Ed.

but upon the solicitation, of the State of Kansas. The corporation, however, remained a State corporation, though entitled to certain benefits, and subject to certain duties under the legislation of Congress.

In this state of things, and the Legislature of Kansas having passed a law laying certain taxes upon the property of the company, one Thomson and numerous other persons filed a bill in the Circuit Court of the United States for the District of Kansas, against the Union Pacific Railway Company, Eastern Division, and three persons, whom the bill named, treasurers, respectively, of Douglass, Wyandotte, and Jefferson counties, in the State of Kansas. The bill stated that the complainants were stockholders in the railway company; that under an Act of the Legislature of Kansas certain taxes had been imposed on the railroad and telegraph property of the company, which the treasurers of the counties named were proceeding to collect; that the property of the company was mortgaged to the United States; that the company was bound to perform certain duties, and ultimately to pay five per cent of its net earnings to the United States; that the company would be greatly hindered and embarrassed in the performance of its obligations and duties to the United States, if the taxes imposed should be collected; and that, to some extent, taxes of the same description had been already paid by the company, to the prejudice of the just rights of the complainants and of the securities of the United States. Upon this case the complainants prayed an injunction to restrain the company from paying, and the other defendants from collecting, the taxes assessed; and a temporary injunction was allowed by the district judge.

The answer of the company admitted the allegations of the bill. The answers of the three county treasurers admitted the assessment of the taxes under the laws of Kansas, but denied that such taxes had been imposed with any view to impede or embarrass the railway company, and insisted that the property of the company only bore its due proportion of the taxes levied upon all property in the State of Kansas, and that no discrimination was made against the company in the matter of taxation.

To these answers no replication was put in; but an agreed statement of facts was filed, which recited sundry resolutions of the Kansas Legislature, urging upon Congress legislation in aid of the railway company; and admitted that the property of the company was liable, under the laws of Kansas, to be taxed for State, county, and municipal purposes; that the taxes complained of had been assessed in conformity with the statutes of the State; that the company had executed a first mortgage prior in lien to the debt to the United States, and that a table of earnings and expenditures for 1867–68, appended to the agreed statement, was correct.

Upon these pleadings and this agreed statement the question arose, whether the property of the railway company described in the bill was subject to the tax which the statutes of Kansas authorized to be levied

on all other property, not specially exempted, for State, county, and municipal purposes. And upon this question the judges of the Circuit Court were divided in opinion, and certified it for decision here.

Mr. Hoar, Attorney-General, and *Mr. Usher*, for the complainant. A brief was also submitted against the right of the States to tax, by *Mr. J. H. Storr*, of counsel for the Central Pacific Railroad of California, and of the Western Pacific Railroad Company. *Mr. Banks*, for the defendants; a brief of *Mr. Thatcher* being filed.

The Chief Justice delivered the opinion of the court.

In this case the court has no concern with any of the connected roads which form, or are destined to form, links in the great chain of transcontinental railway. We have only to consider the liabilities and rights of the Union Pacific Railroad Company in respect to taxation under State legislation. Argument has been heard on behalf of some of the connected corporations, only because of their interest in the question, by reason of their similar situation and circumstances in reference to like legislation.

The counsel for the complainants have justly said that the question certified here for decision is one of very grave importance.

It was suggested, rather than argued, by one of them, that the property of the State is exempt by the State Constitution from taxation; and that the State, having reserved to itself in the charter the right to purchase the road at the end of fifty years at a valuation then to be made, upon two years' notice to the company, has, therefore, a property in the road which cannot be taxed. But it is too plain for argument that the interest thus reserved is too remote and too contingent to be regarded as within the meaning of the exemption.

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.

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 with 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 Peters, 467); certificates of indebtedness issued for money or supplies (*The Banks* v. *The Mayor*, 7 Wallace, 24); bills of credit issued for circulation (*Bank* v. *Supervisors*, Id. 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*, Id. 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 interpreted. *National Bank* v. *Commonwealth* [9 Wall.], 353; *Lionberger* v. *Rouse* [9 Wall.], 468.

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 Wallace, 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.

FIFIELD *v.* CLOSE.

SUPREME COURT OF MICHIGAN. 1867.

[15 *Mich.* 505.]

ERROR to Oakland Circuit. This was an action of trespass, commenced before a justice of the peace. There was no appearance on the return day, and judgment was rendered for plaintiff for one hundred dollars' damages and costs. The case was removed by *certiorari* to the Circuit Court, on the ground that the summons issued by the justice of the peace was void, because no United States revenue stamp was attached thereto. The Circuit Court reversed the judgment of the said justice of the peace.

M. E. Crofoot, for plaintiff in error. *O. F. Wisner*, for defendant in error.

CAMPBELL, J. There is but one question raised in this case, and that is, whether the stamp tax on legal process in State courts is valid. The power of Congress to impose such a charge, as a condition upon litigation, is denied by the plaintiff in error, as inconsistent with the control which the Constitution of the United States guarantees to the State authorities over all such matters as have been left by that instrument under local regulation. The question is one of much importance, inasmuch as it involves fundamental principles bearing upon the nature and attributes of both local and general governments.

In order to comprehend the full meaning of the inquiry, it will be well to consider how far this power of taxation may be carried, if it exists, and what consequences it will draw after it. For, while consequences cannot alter the law, they may be of the utmost value in aiding us to discover what the law is, in reference to such constitutional questions as refer to the nature of our institutions, and the distribution of the various functions of government.

If this power exists, it is derivable from the specific power vested in Congress "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, § 8. It is very well settled that such a tax as is involved in this cause is not a direct tax, within the sense of the Constitution, and, therefore, need not be distributed by the rule of population. — *Hylton* v. *United States*, 3 Dall. 171. The Constitu-

tion imposes no limit on any but direct taxes, beyond the requirement that they "shall be uniform throughout the United States." — Art. 1, § 8. There is, therefore, no limit upon the power of Congress (if it can levy these taxes at all), to select any objects within the taxing power, and draw from them any amount of uniform contributions which it may see fit to require. The power to tax any specific thing is unlimited, or it is entirely wanting. There are no bounds within which the discretionary action must be confined. The legislature levying the tax is the sole and ultimate judge of the expediency or necessity of requiring it, and of the extent to which it shall be charged upon any class of taxable articles. And where a legislature acts within the line of its constitutional powers, the motives of its action can never be judicially reviewed, nor can courts in any way determine the propriety of its enactments. Its expressed will disposes of all questions of reason or policy.

Having this unqualified discretionary power to tax to any extent whatever is taxable, that power may easily be extended far enough to destroy anything on which burdens may be imposed, by making those burdens so heavy as to become prohibitory. It is within the experience of most countries that duties may become prohibitory, and where taxes are chargeable specifically, so that particular objects may be taxed at pleasure, the same result may easily be reached by specific impositions upon domestic interests. The argument that such prohibitory action is improbable, has no force whatever in determining the existence or non-existence of the power. There is no legitimate power possessed by any legislature which it may not lawfully carry to an extreme, where extreme action is deemed expedient by the majority of the members. And where a power of destruction has been conferred, it is always possible that it may be exercised, although it may be very improbable. Where a constitution does not limit the action of such an assembly, it must be assumed that the people do not regard a right or institution as important enough to be removed from the control of their representatives. And when those representatives make up their minds that policy requires the abrogation of any system over which they have complete authority, they cannot be held legally incompetent to abolish it. The principle that an unrestrained right to tax involves in law a right to destroy by taxation, has been recognized from the beginning by our courts. It is the foundation of all of those decisions which have been made by the Supreme Court of the United States, asserting the immunity from State interference of the United States government, and its various offices and instrumentalities. In some of the tax cases, the danger of destruction to the agencies of the government was more than theoretical, and the design of the obnoxious legislation was to defeat the measures which Congress had determined on for the public interest. And, therefore, in holding that the general government, and its various agencies and machinery, are exempt from State taxation, the Supreme Court expressly rested their decisions upon the assumption that the

power to tax involves the power to control and to destroy. — *Mc Culloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank of the United States*, 9 Id. 733; *Weston* v. *City Council of Charleston*, 2 Peters, 449; *People of New York* v. *Commissioners of Taxes*, 2 Black, 620; *Bank Tax Case*, 2 Wallace, 200; *Van Allen* v. *The Assessors*, 3 Id. 573; *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435. A similar principle has led to the protection from State interference of all privileges lawfully granted by the United States. — *Hays* v. *Pacific Mail Steamship Company*, 17 How. 596; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 283; *Sinnott* v. *Davenport*, 22 Id. 227.

If Congress has the right to impose a duty or tax upon suits in courts of the States, it follows, as an inevitable conclusion, that such restrictions may be laid upon these proceedings as to put an end to the entire action of those courts, and, for all practical purposes, to produce the same results as if they were abolished. And the question we are called upon to decide is, therefore, whether Congress has power to put an end to the exercise of the judicial power of the States.

Presented in this form, the inquiry involves little short of absurdity. It is one of the cardinal principles of political science that no government can exist without a judicial system. It is the only peaceable means of enforcing private rights, and of protecting the community or the citizen from violence and fraud. A State without courts to enforce its own laws, is an impossibility. And if Congress can destroy or control the State judiciary, it can utterly abrogate the State itself.

No one would contend that the system of government established by the Constitution of the United States can possibly permit of any diminution by the general government of any of the functions which are left under State control. The judicial powers, like the other powers of the Union, are enumerated. They do not cover any considerable number of those subjects which concern the ordinary interests of the people. They punish no ordinary local crimes against the peace and good order of society, committed within the States, and they can entertain jurisdiction of no ordinary litigation between members of the same community. Congress cannot enable the courts of the United States to entertain any except what — as compared with ordinary interests — must be regarded as exceptional cases. The great mass of common-law rights and remedies, asserted by one citizen against his neighbor, are beyond their reach. Our whole system is based upon the principle that local affairs must be administered by State authority, unless where peculiar circumstances have led to the establishment of definite exceptions, resting on special reasons of public policy. The same supreme power which established the departments of the general government, determined that the local governments should also exist for their own purposes, and made it impossible to protect the people in their common interests without them. Each of these several agencies is confined to its own sphere, and all are strictly subordinate to the Constitution which limits them, and independent of other agencies, except as thereby

made dependent. There is nothing in the Constitution which can be made to admit of any interference by Congress with the secure existence of any State authority within its lawful bounds. And any such interference by the indirect means of taxation, is quite as much beyond the power of the national legislature, as if the interference were direct and extreme.

We are not, therefore, at liberty to give weight either to the moderate amount of the tax, or to the solicitude manifested by Congress to exempt those cases more immediately concerning the State as a community. We are bound, of course, not to decide against the validity of any law, unless we are forced into a clear conviction of its conflicting with the Constitution. But the uniform decisions of the United States Supreme Court against the validity of any taxes which would destroy those immunities which are secured by the Constitution, seem to leave no room for doubt concerning the case before us. The courts of Indiana and Wisconsin have arrived at the same result. — *Warren* v. *Paul*, 22 Ind. 276; *Jones* v. *Keep*, 19 Wis. 369. The interference is not remote, but direct, and prevents any action whatever by the courts of justice in private suits, until the tax is paid. It makes this payment a condition of jurisdiction.

The stamp could not lawfully be required, and the decision of the court below, dismissing the case, and annulling the judgment for want of it, was erroneous, and should be reversed, with costs.

Christiancy, J., and Cooley, J., concurred. Martin, Ch. J., concurred in the result.

THE COLLECTOR *v.* DAY.

Supreme Court of the United States. 1870.

[11 *Wall.* 113.]

Error to the Circuit Court for the District of Massachusetts; the case being thus: . . .

Congress, by certain statutes passed in 1864, '5, '6, and '7 (Statutes of the 30th of June, 1864, c. 173, § 116, 13 Stat. at Large, 281; of the 3d of March, 1865, c. 78, § 1; Id. 479; of the 13th of July, 1866, c. 184, § 9; 14 Id. 137; and of the 2d of March, 1867, c. 169, § 13; Id. 477), enacted that "There shall be levied, collected, and paid annually upon the gains, profits, and income of every person residing in the United States, . . . whether derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or from any other source whatever, a tax of 5 per centum on the amount so derived, over $1,000."

Under these statutes, one Buffington, collector of the internal revenue of the United States for the district, assessed the sum of $61.50 upon the salary, in the years 1866 and 1867, of J. M. Day, as judge of the Court of Probate and Insolvency for the county of Barnstable, State of Massachusetts. The salary was fixed by law, and payable out of the treasury of the State. Day paid the tax under protest, and brought the action below to recover it. The case was submitted to the court below on an agreed statement of facts, upon which judgment was rendered for the plaintiff. The defendant brought the case here for review; the question being, of course, whether the United States can lawfully impose a tax upon the income of an individual derived from a salary paid him by a State as a judicial officer of that State.

Mr. Akerman, Attorney-General, and *Mr. John C. Ropes* (with a brief of *Mr. Ropes*), for the collector, plaintiff in error. *Mr. Dwight Foster*, *contra*.

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 Peters, 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 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 Wheaton, 316, and *Weston* v. *Charleston*, 2 Peters, 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." . . .

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 Wallace, 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 Wallace, 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.*

Mr. Justice Bradley, dissenting.

I dissent from the opinion of the court in this case, because it seems to me that the general government has the same power of taxing the income of officers of the State governments as it has of taxing that of its own officers. It is the common government of all alike;

and every citizen is presumed to trust his own government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the State government. I cannot accede to the doctrine that the general government is to be regarded as in any sense foreign or antagonistic to the State governments, their officers, or people; nor can I agree that a presumption can be admitted that the general government will act in a manner hostile to the existence or functions of the State governments, which are constituent parts of the system or body politic forming the basis on which the general government is founded. The taxation by the State governments of the instruments employed by the general government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation. In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult of control. Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? If a State incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation? How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as any one can be to any interference by the general government with the just powers of the State governments. But no concession of any of the just powers of the general government can easily be recalled. I, therefore, consider it my duty to at least record my dissent when such concession appears to be made. An extended discussion of the subject would answer no useful purpose.

RAILROAD COMPANY *v.* PENISTON.

SUPREME COURT OF THE UNITED STATES. 1873.

[18 *Wall* 5.]

APPEAL from the Circuit Court for the District of Nebraska; the case being thus:

By Act of Congress of July 1st, 1862 (12 Stat. at Large, 489), entitled "An Act to aid in the Construction of a Railroad and Telegraph Line from the Mississippi River to the Pacific Ocean, and to secure the Government the Use of the same for Postal, Military, and other Purposes," Congress incorporated certain individuals, their associates

and successors, as the "Union Pacific Railroad Company," with authority to build a continuous railroad and telegraph from a point on the one hundredth meridian to the western boundary of Nevada Territory. The Act fixed the amount of the capital stock and shares, and declared that "the stockholders should constitute said body politic and corporate." The government had no stock in the road, though through the President of the United States it was to appoint two directors, not stockholders, out of fifteen, which the charter provided for as the number to be appointed in all. Annual reports were to be made to the Secretary of the Treasury. The Act granted to the company the right of way through the public lands, and "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and the public stores thereon," made to it an extensive grant of lands, and provided for the issuing of patents therefor. And for the same purposes the United States agreed to, and did issue its 6 per cent bonds, payable in thirty years, to the company, to the amount of $16,000 per mile, for each section of forty miles; which bonds the original Act declared "shall, *ipso facto*, constitute a first mortgage on the whole of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind," and made specific provision as to proceedings on the failure of the company to redeem the bonds. By an Act of July 2d, 1864 (13 Stat. at Large, 356), this was changed, and the company authorized to issue its "first mortgage bonds to an amount not exceeding the bonds of the United States," and the lien of the bonds of the United States was declared to be subordinate to the bonds so issued by the company, with the exception relating to the transportation of despatches, troops, mails, &c., for the government.

The grants to the company were declared by the original Act to be made upon condition that the company shall (1) pay the bonds of the United States at maturity; (2) keep their line and road in repair and use; (3) "transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government," &c., giving the government the preference at fair and reasonable rates of compensation, not exceeding those charged to private individuals, the amount thus earned to be applied in payment of the bonds, as well as 5 per cent of the net earnings of the road after its completion.

By the seventeenth section of the same Act it was provided that if the road, when finished, should for any unreasonable time be permitted to remain out of repair, or unfit for use, Congress should have authority to put the same in repair and use, and from the income of the road reimburse the government for expenditures thus caused.

The eighteenth section provided that when the net earnings of the road should exceed 10 per cent of its cost, Congress might reduce, fix, and regulate rates of fare thereon, and declared that "the better

to accomplish the object of this Act, to wit, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure the government at all times (but particularly in times of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this Act."

The Act also contained provisions that so far as the public and government were concerned, the railroad and branches should be worked as one connected and continuous line.

There was no provision, in any Act of Congress relating to this company, respecting the taxation of it or its property by the States through which its roads might run.

The road was completed and put in operation in May, 1869, and with the Central Pacific Railroad formed a continuous line from the Missouri River and the Eastern States to California and the Pacific, thus uniting the extremities of the country. At the time of granting the charter, the territory over which this line was projected all belonged to the United States. But Nevada was admitted into the Union as a State in 1864, and Nebraska in 1867, and the road, as constructed, crosses the latter State in its whole breadth, from east to west. . . .

The authorities of Lincoln County, in the State of Nebraska, under a revenue law of the State, passed on the same 15th of February, 1869, laid a tax upon the property of the railroad company, embraced within the taxation, upon the valuation of $16,000 per mile, for a length of one hundred and seventy-six miles.[1] The property of the company thus rated and taxed consisted of its road-bed, depots, wood-stations, water-stations, and other realty; telegraph-poles, telegraph-wires, bridges, boats, books, papers, office furniture and fixtures, money and credits, movable property, engines, &c. . . .

In this state of things, one Peniston, treasurer of Lincoln County, being about to collect the tax laid, the Union Pacific Railroad Company filed a bill in the Circuit Court of the United States in the District of Nebraska against him, to restrain his doing so. . . .

The cause was heard upon pleadings and agreed proofs, and the Circuit Court refused to restrain the collection of the tax against the one hundred and seventy-six miles of the road, holding the same to have been lawfully imposed, and the property of the company to be open to State taxation. . . .

Mr. W. M. Evarts, for the appellant. *Mr. J. M. Woolworth*, *contra*.

Mr. Justice Strong. . . There are, we admit, certain subjects of taxation which are withdrawn from the power of the States, not by

[1] The tax was, in fact, laid on two hundred and forty-six miles; but, as it was admitted by the defendant that there was seventy miles of excessive computation, the only question here was as to the tax on the remaining one hundred and seventy-six miles.

any direct or express provision of the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the national government is legitimately exercised within the States. While it is true that government cannot exercise its power of taxation so as to destroy the State governments, or embarrass their lawful action, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the national government. The Constitution contemplates that none of those powers may be restrained by State legislation. But it is often a difficult question whether a tax imposed by a State does in fact invade the domain of the general government, or interfere with its operations to such an extent, or in such a manner as to render it unwarranted. It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, coexistent with the national government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise.

These observations are directly applicable to the case before us. It is insisted on behalf of the plaintiffs that the tax of which they complain has been laid upon an agent of the general government constituted and organized as an instrument to carry into effect the powers vested in that government by the Constitution, and it is claimed that such an agency is not subject to State taxation. That the Union Pacific Railroad Company was created to subserve, in part at least, the lawful purposes of the national government; that it was authorized to construct and maintain a railroad and telegraph line along the prescribed route, and that grants were made to it, and privileges conferred upon it, upon condition that it should at all times transmit despatches over its telegraph line, and transport mails, troops, and munitions of war, supplies and public stores, upon the railroad for the government, whenever required to do so by any department thereof, and that the government should at all times have the preference in the use of the same for all the purposes aforesaid, must be conceded. Such are the plain provisions of its charter. So it was provided that in case of the refusal or failure of the company to redeem the bonds advanced to it by the government, or any part of them, when lawfully required by the Secretary of the Treasury, the road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the company by the United States which

at the time of the default should remain in the ownership of the company, might be taken possession of by the Secretary of the Treasury for the use and benefit of the United States. The charter also contains other provisions looking to a supervision and control of the road and telegraph line, with the avowed purpose of securing to the government the use and benefit thereof for postal and military purposes. It is unnecessary to mention these in detail. They all look to a purpose of Congress to secure an agency competent and under obligation to perform certain offices for the general government. Notwithstanding this, the railroad and the telegraph line are neither in whole nor in part the property of the government. The ownership is in the complainants, a private corporation, though existing for the performance of public duties. The government owns none of its stock, and though it may appoint two of the directors, the right thus to appoint is plainly reserved for the sole purpose of enabling the enforcement of the engagements which the company assumed, the engagements to which we have already alluded.

Admitting, then, fully, as we do, that the company is an agent of the general government, designed to be employed, and actually employed, in the legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from State taxation?

In *Thomson* v. *The Union Pacific Railway Company* (9 Wall. 579), after much consideration, we held that the property of that company was not exempt from State taxation, though their railroad was part of a system of roads constructed under the direction and authority of the United States, and largely for the uses and purposes of the general government. . . . There is no difference which can be pointed out between the nature, extent, or purposes of their agency and those of the corporation complainants in the present case. Yet, as we have said, a State tax upon the property of the company, its road-bed, rolling-stock, and personalty in general, was ruled by this court not to be in conflict with the Federal Constitution. It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service. So are steamboats, horses, stage-coaches, foundries, ship-yards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents

of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States it is manifest the State governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that State taxation of such property is impliedly prohibited.

It is, however, insisted that the case of *Thomson* 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 Wheaton, 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 Peters, 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.

Nothing, we think, in the past decisions of this court is inconsistent with the opinions we now hold. *McCulloch* v. *The State of Maryland* and *Osborn* v. *Bank of the United States* (9 Wheaton, 738) are much relied upon by the appellants, but an examination of what was decided in those cases will reveal that they are in full harmony with the doctrine that the property of an agent of the general government may be subjected to State taxation. In the former of those cases the tax held unconstitutional was laid upon the notes of the bank. The institution was prohibited from issuing notes at all except upon stamped paper furnished by the State, and to be paid for on delivery, the stamp upon each note being proportioned to its denomination. The tax, therefore, was not upon any property of the bank, but

upon one of its operations, in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in its nature and effect, from a tax on the property of the bank. No wonder, then, that it was held illegal. But even in that case the court carefully limited the effect of the decision. It does not extend, said the Chief Justice, to a tax paid by the real property of the bank, in common with the other real property in the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in the institution, in common with the other property of the same description throughout the State. But this is a tax on the operations of the bank and is, consequently, a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional. Here is a clear distinction made between a tax upon the property of a government agent and a tax upon the operations of the agent acting for the government.

In *Osborn* v. *The Bank* the tax held unconstitutional was a tax upon the existence of the bank — upon its right to transact business within the State of Ohio. It was, as it was intended to be, a direct impediment in the way of those Acts which Congress, for national purposes, had authorized the bank to perform. For this reason the power of the State to direct it was denied, but at the same time it was declared by the court that the local property of the bank might be taxed, and, as in *McCulloch* v. *Maryland*, a difference was pointed out between a tax upon its property and one upon its action. In noticing an alleged resemblance between the bank and a government contractor, Chief Justice Marshall said: "Can a contractor for supplying a military post with provisions be restrained from making purchases within a State, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not heard these questions answered in the affirmative. It is true the property of the contractor may be taxed; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under State control." This distinction, so clearly drawn in the earlier decisions, between a tax on the property of a governmental agent, and a tax upon the action of such agent, or upon his right to be, has ever since been recognized. All State taxation which does not impair the agent's efficiency in the discharge of his duties to the government has been sustained when challenged, and a tax upon his property generally has not been regarded as beyond the power of a State to impose. In *National Bank* v. *The Commonwealth of Kentucky* (9 Wallace, 353), when the right to tax national banks was under consideration, it was asserted by us that the doctrine cannot be maintained that banks, or other corporations or instrumentalities of the government, are to be wholly withdrawn from the operation of State legislation. Yet it was

conceded that the agencies of the Federal government are uncontrollable by State legislation, so far as it may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government.

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 *Thomson* v. *Union Pacific*. It is not imposed upon the 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 despatches, 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.

It remains only to notice one other position taken by the complainants. It is that if the Act of the State under which the tax was laid be constitutional in its application to their property within Lincoln County, the property outside of Lincoln County is not lawfully taxable by the authorities of that county under the laws of the State. To this we are unable to give our assent. By the statutes of Nebraska the unorganized territory west of Lincoln County, and the unorganized county of Cheyenne, are attached to the county of Lincoln for judicial and revenue purposes. The authorities of that county, therefore, were the proper authorities to levy the tax upon the property thus placed under their charge for revenue purposes.

The decree of the Circuit Court is affirmed

[Swayne, J., gave a brief concurring opinion. Bradley, Field, and Hunt, JJ., dissented, Bradley, J., giving an opinion, in which Field, J., concurred.]

In *West. Un. Tel. Co.* v. *Mass.*, 125 U. S. 530 (1887), on appeal from the United States Circuit Court for Massachusetts, Miller, J., for the court, said: "The main ground on which the telegraph company resisted the payment of the tax alleged to be due, and on which prob-

ably the case was removed from the State court into the Circuit Court of the United States, is that it is a violation of the rights conferred on the company by the Act of July 24, 1866, now Title LXV., §§ 5263 to 5269 of the Revised Statutes. The defendant alleges that it had accepted the provisions of that law, and filed a notification of such acceptance with the Postmaster-General of the United States, June 8, 1867. The argument is, therefore, that by virtue of § 5263 the company has a right to exercise its functions of telegraphing over so much of its lines as is connected with the military and post roads of the United States which have been declared to be such by law, without being subject to taxation therefor by the State authorities. That section reads as follows: —

"'SEC. 5263. Any telegraph company now organized, or which may hereafter be organized under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph 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 law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads.'

"It is urged that this section, upon its acceptance by this corporation or any of like character, confers a right to do the business of telegraphing which is transacted over the lines so constructed over or along such post-roads, without liability to taxation by the State. The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statute above recited cannot be taxed by a State, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that Commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein.

"The telegraph company, which is the defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the State of New York. It owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy, to the laws of the State under which it is organized. But the privilege of running the lines of its wires '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, . . . and over,

under, or across the navigable streams or waters of the United States,' is granted to it by the Act of Congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal government, carries with it any exemption from the ordinary burdens of taxation.

"While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support. . . . [Here follows a statement of *Tel. Co.* v. *Texas*, 105 U. S. 460.] If the principle now contended for be sound, every railroad in the country should be exempt from taxation because they have all been declared to be post-roads; and the same reasoning would apply with equal force to every bridge and navigable stream throughout the land. . . . [Here follows a statement of *R. R. Co.* v. *Peniston*, 18 Wall. 5; *Thomson* v. *Pac. R. R. Co.*, 9 Wall. 579, and *Nat. Bk.* v. *Com.*, 9 Wall. 353.] The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by § 5263 of the Revised Statutes, or by the commerce clause of the Constitution.

"It is urged against this tax that in ascertaining the value of the stock no deduction is made on account of the value of real estate and machinery situated and subject to local taxation outside of the Commonwealth of Massachusetts. The report of Examiner Fiske, to whom the matter was referred to find the facts, states that the amount of the value of said real estate outside of its jurisdiction was not clearly shown, but it did appear that the cost of land and buildings belonging to the company and entirely without that State was over three millions of dollars. In the statement of the treasurer of the company it is said that the value of real estate owned by the company within the State of Massachusetts was nothing. Since the corporation was only taxed for that proportion of its shares of capital stock which was sup-

posed to be taxable in that State on the calculation above referred to, and since no real estate of the corporation was owned or taxed within its limits, we do not see why any deduction should be made from the proportion of the capital stock which is taxed by its authorities. But if this were otherwise we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed; and even in this case, which comes from the Circuit Court and not from that of the State, we think it should appear that the corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this statute of Massachusetts is intended to govern the taxation of all corporations therein, and doing business within its territory, whether organized under its own laws or those of some other State, and since the principle is one which we cannot pronounce to be an unfair or an unjust one, we do not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result.

"It is very clear to us, when we consider the limited territorial extent of Massachusetts, and the proportion of the length of the lines of this company in that State to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not unfavorable to the corporation, and that the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily, or as a fair argument from the facts stated in the case, that there was injustice in the assessment for taxation.

"The result of these views is, that the tax assessed against the plaintiff in error is a valid tax; that the judgment of the court below, 'that the sum claimed by the plaintiff (below) to be due for taxes, to wit, $10,618.46, be paid to said State by said corporation, with interest thereon,' is without error, and so much of said judgment is hereby affirmed.

"The decree or judgment, however, proceeds and awards an injunction against the company. . . .

"The effect of this injunction, if obeyed, is to utterly suspend the business of the telegraph company, and defeat all its operations within the State of Massachusetts. The Act of Congress says that the company accepting its provisions 'shall have the right to construct, maintain and operate lines of telegraph 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.' It is found in this case that 2334.55 miles of the company's lines, out of 2833.05 on which this tax is assessed, are along and over such post-roads, and of course

the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the State.

"If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done. The injunction in this case, though ordered by a Circuit Court of the United States, is only granted by virtue of section 54 of chapter 13 of the Public Statutes of Massachusetts. If this statute is void, as we think it is, so far as it prescribes this injunction as a remedy to enforce the collection of its taxes by the decree of the court awarding it, the injunction is erroneous.

"In holding this portion of section 54 of chapter 13 of the Massachusetts statutes to be void as applicable to this case, we do not deprive the State of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment — executions, sequestration, and any other appropriate remedy in chancery." [1]

In *California* v. *Central Pacific R. R. Co.*, 127 U. S. 1, 38 (1888), six cases, affecting three different railroads as defendants, were considered together. The defendants denied the constitutionality of certain taxation under the laws of California, and, among other defences, set up that they enjoyed franchises conferred by the United States, not taxable without the assent of Congress. In holding the assessments void, the court (Bradley, J.), said: "If we turn to the Acts of Congress referred to by the court, we shall find that franchises of the most important character were conferred on this company. Originally, the Central Pacific Railroad Company of California had only power to construct a railroad from Sacramento to the eastern boundary of the State. Congress, by the Act of 1862, authorized the company (in the words of the Act) 'to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this Act for the construction of said railroad and telegraph line first mentioned [the Union Pacific], and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California.' Sec. 9. In the following section it was enacted, that, after the completion of its road to the eastern boundary of California, the Central Pacific might unite upon equal terms with the Union Pacific Railroad Company in constructing so much of said railroad and telegraph line and branch railroads and telegraph lines through the Territories, from the State of California to the Missouri River, as should then remain to be constructed, on the same terms and conditions as provided in rela-

[1] See Miller, J., in *Ratterman* v. *W. U. Tel. Co.*, 127 U. S. 411, 426; *Cleveland, &c. Ry. Co.* v *Backus*, 154 U. S. 439; *Com.* v. *Stand. Oil Co.*, 101 Pa. 119 (1882). — Ed.

tion to the Union Pacific Railroad Company. Thus, without referring to the other franchises and privileges conferred upon this company, the fundamental franchise was given by the Acts of 1862 and the subsequent Acts, to construct a railroad from the Pacific Ocean across the State of California and the Federal Territories until it should meet the Union Pacific; which it did meet at Ogden in the Territory of Utah. 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. The present company has it by transfer from, and consolidation of, the original companies, by which its existence and capacities were constituted. Such consolidation was authorized by the 16th section of the Act of Congress of July 1st, 1862, and the 16th section of the Act of July 2d, 1864, taken in connection with the 2d section of the Act of March 3d, 1865, referred to in the findings of the court. The last named Act ratified the transfer by the Central Pacific to the Western Pacific of a portion of its road extending from San José to Sacramento, and conferred upon the latter company all the privileges and benefits of the several Acts of Congress relating thereto, and subject to all the conditions thereof. If, therefore, the Central Pacific Railroad Company is not a Federal corporation, its most important franchises, including that of constructing a railroad from the Pacific Ocean to Ogden city, were conferred upon it by Congress.

"It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. 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. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. 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. See *Pacific Railroad Removal Cases*, 115 U. S. 1, 14, 18.

"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 monarchical 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 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 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. . . .

"It follows that in each one of the cases now before us, the assessment made by the State Board of Equalization comprised the value of franchises or property which the board was prohibited by the Constitution of the State or of the United States from including therein; and that these values are so blended with the other items of which the assessment is composed that they cannot be separated therefrom. The assessments are, therefore, void." [1]

In *Wisc. Cent. R. R. Co.* v. *Price County*, 133 U. S. 496 (1889), the Supreme Court (Field, J.), in holding that certain lands were not subject to taxation as the plaintiff's property, said: "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 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. 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

[1] And so *San Francisco* v. *W. U. Tel. Co*, 96 Cal. 140 (1892); *Com.* v. *Westinghouse Co*, 151 Pa. 265 (1892), where the capital stock was partly invested in patent rights. — Ed.

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.[1]

"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 government 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

[1] In this case a full and elaborate opinion (GRAY, J.) holds all property of the United States to be exempt from State taxation. — ED.

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."

HOME INSURANCE COMPANY *v.* NEW YORK STATE.

SUPREME COURT OF THE UNITED STATES. 1890.

[134 *U. S.* 594.]

THE plaintiff in error, The Home Insurance Company of New York, is a corporation created under the laws of that State. Its capital stock during the year 1881 was three millions of dollars, divided into thirty thousand shares of the par value of one hundred dollars each, all fully paid. In the months of January and July of that year a divi-

dend of $150,000 was declared by the company, making together ten per cent upon the par value of its capital stock. A portion of that capital stock was invested in bonds of the United States, amounting, when the dividend was declared in July, 1881, and also on the first of November of that year, to $1,940,000.

By an Act of the Legislature of New York, passed May 26, 1881, c. 361, amending a previous Act providing for the taxation of certain corporations, joint stock companies and associations, it was declared that every corporation, joint stock company or association, then or thereafter incorporated under any law of the State, or of any other State or country, and doing business in the State, with certain designated exceptions not material in this case, should be subject to a tax upon "its corporate franchise or business," to be computed as follows: if its dividend or dividends made or declared during the year ending the first day of November amount to six per cent or more upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per cent of the dividends. A less rate is provided where there is no dividend, or a dividend less than six per cent and also where the corporation, company or association has more than one kind of capital stock — as, for instance, common and preferred stock — and upon one of them there is a dividend amounting to six or more per cent and upon the other there is no dividend or a dividend of less than six per cent. The purpose of the Act is to fix the amount of the tax each year upon the franchise or business of the corporation by the extent of dividends upon its capital stock, or, where there are no dividends, according to the actual value of the capital stock during the year. We are concerned in this case, however, only with the tax where the amount is computed by the extent of the dividends.

The tax payable by the Home Insurance Company, estimated according to its dividends, under the above law of the State, aggregated $7,500. The company resisted its payment, assuming that the tax was in fact levied upon the capital stock of the company, and contending that there should be deducted from it a sum bearing the same ratio thereto that the amount invested in bonds of the United States bears to its capital stock, and that the law requiring a tax without such reduction is unconstitutional and void. An agreed case was accordingly made up embodying a statement of the facts, between the company and the attorney-general of New York representing the State, and submitted to the Supreme Court of the State. That court gave judgment in favor of the State against the company, which on appeal to the Court of Appeals of the State was affirmed. 92 N. Y. 328. The judgment of the latter court, having been remitted to the Supreme Court and entered there, the case is brought to this court for review on writ of error.

Mr. Benjamin H. Bristow, for plaintiff in error. *Mr. Charles F. Tabor*, Attorney-General of the State of New York, for defendant in error.

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

The contention of the plaintiff in error is that the tax in question was levied upon its capital stock, and therefore invalid so far as the bonds of the United States constitute a part of that stock. If that contention were well founded there would be no question as to the invalidity of the tax. That the bonds or obligations of the United States for the payment of money cannot be the subject of taxation by a State is familiar law settled by numerous adjudications of this court. . . .

Looking now at the tax in this case upon the plaintiff in error, we are unable to perceive that it falls within the doctrines of any of the cases cited, to which we fully assent, not doubting their correctness in any particular. It is not a tax in terms upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock. The statute designates it a tax upon the "corporate franchise or business" of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.

By the term "corporate franchise or business," as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue, which is

not exempted from taxation. Its action in this matter is not the subject of judicial inquiry in a Federal tribunal. As was said in *Delaware Railroad Tax Case,* 18 Wall. 206, 231: "The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." It is true, as said by this court in *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 41, that the taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the legislature may choose; it may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the legislature of the State; it cannot be furnished by the Federal tribunals.

The tax in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed and put into real property or bonds of New York, or of other States. From the very nature of the tax, being laid upon a franchise given by the State, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the State over the corporate franchise and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other.

In some States the franchises and privileges of a corporation are declared to be personal property. Such was the case in New York with reference to the privileges and franchises of savings banks. They were so declared by a law passed in 1866, and made liable to taxation to an amount not exceeding the gross sum of the surplus earned and in the possession of the banks. The law was sustained by the Court of Appeals of the State in *Monroe Savings Bank* v. *City of Rochester,* 37 N. Y. 365, 369, 370, although the bank had a portion of its property invested in United States bonds. In its opinion the court observed that in declaring the privileges and franchises of a bank to be personal property the legislature adopted no novel principle of taxation; that the powers and privileges which constitute the franchises of a corporation were in a just sense property, quite distinct and separate from the property which, by the use of such franchises, the corporation might acquire; that they might be subjected to taxation if the legislature saw fit so to enact; that such taxation being within the power of the legislature, it might prescribe a rule or test of their value; that all franchises were not of equal value, their value depending, in some

instances, upon the nature of the business authorized, and the extent to which permission was given to multiply capital for its prosecution; and that the tax being upon the franchises and privileges, it was unimportant in what manner the property of the corporation was invested. And the court added: "It is true that where a State tax is laid upon the property of an individual or a corporation, so much of their property as is invested in United States bonds is to be treated, for the purposes of assessment, as if it did not exist, but this rule can have no application to an assessment upon a franchise, where a reference to property is made only to ascertain the value of the thing assessed." And again: "It must be regarded as a sound doctrine to hold that the State, in granting a franchise to a corporation, may limit the powers to be exercised under it and annex conditions to its enjoyment, and make it contribute to the revenues of the State. If the grantee accepts the boon it must bear the burden."

This doctrine of the taxability of the franchises of a corporation without reference to the character of the property in which its capital stock or its deposits are invested is sustained by the judgments in *Society for Savings* v. *Coite*, 6 Wall. 594, and *Provident Institution* v. *Massachusetts*, 6 Wall. 611, which were before this court at December Term, 1867. In the first of these cases it appeared that a law of Connecticut of 1863 provided that savings banks in that State should make an annual return to the comptroller of public accounts "of the total amounts of all deposits in them, respectively, on the first day of July in each successive year," and should pay to the treasurer of the State a sum equal to three-fourths of one per cent on the total amount of deposits in such banks on those days, and that the tax should be in lieu of all other taxes upon the banks or their deposits. On the first day of July, 1863, the Society for Savings, one of the banks, had invested over $500,000 of its deposits in securities of the United States, which were declared by Congress to be exempted from taxation by State authority, whether held by individuals, corporations, or associations. 12 Stat. 346, c. 33, § 2. Upon the amount of its deposits thus invested the society refused to pay the sum equal to the prescribed percentage. In a suit brought by the treasurer of the State to recover the tax, the payment of which was thus refused, the Supreme Court of Connecticut held that the tax was not on property but on the corporation as such. The case being brought here, the judgment was affirmed, this court holding that the tax was on the franchise of the corporation and not upon its property, and the fact that a part of the deposits was invested in securities of the United States did not exempt the society from the tax. Said the court: "Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the State government. Authority to that effect resides in the State independent of the Federal government, and is wholly unaffected by the

fact that the corporation or individual has or has not made investment in Federal securities." pp. 606–607.

It was contended in that case that the deposits in the bank were subjected to taxation from the fact that the extent of the tax was determined by their amount. But the court said: ". . . Different modes of taxation are adopted in different States, and even in the same State at different periods of their history. Fixed sums are in some instances required to be annually paid into the treasury of the State, and in others a prescribed percentage is levied on the stock, assets or property owned or held by the corporation, while in others the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a defined period. Experience shows that the latter mode is better calculated to effect justice among the corporations required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted and to the extent of their exercise. Existence of the power is beyond doubt, and it rests in the discretion of the legislature whether they will levy a fixed sum, or if not, to determine in what manner the amount shall be ascertained." p. 608.

In the second case mentioned, *Provident Institution* v. *Massachusetts*, it appeared that the statute of Massachusetts, passed in 1862, levying taxes on certain insurance companies and depositors in savings banks, provided that every institution for savings incorporated under its laws should pay to the Commonwealth a tax of one-half of one per cent per annum on the amount of its deposits, to be assessed one-half of said annual tax on the average amount of its deposits for the six months preceding the 1st day of May, and the other half on the average amount of its deposits for the six months preceding the 1st day of November. The Provident Institution for savings in that State was authorized to invest its deposits in securities of the United States. Its average amount of deposits for the six months preceding the 1st day of May, 1865, was over eight millions, of which over one million was invested in such securities. It paid all the taxes demanded except on the portion which was thus invested. Upon that it declined to pay the tax. In a suit brought by the Commonwealth to recover the same, the Supreme Judicial Court of the State held that the tax was one on the franchise of the company and not on property, and therefore gave judgment for the Commonwealth. The case being brought here, the judgment was affirmed. In deciding the case, this court said, referring to a section of the statute under which the tax was levied: "Deposits, as the word is employed in that section, are the sums received by the institution from depositors, without regard to the nature of the funds. They are not capital stock in any sense, nor are they even investments, as the word is there used, which simply means the sums received wholly irrespective of the disposition made of the same, or their market value." And speaking of the difference existing between taxes upon franchises

and taxes upon property, it said: "Franchise taxes are levied directly by an Act of the Legislature, and the corporations are required to pay the amount into the State treasury. They differ from property taxes as levied for State and municipal purposes in the basis prescribed for computing the amount, in the manner of assessment, and in the mode of collection;" and again, "Comparative valuation in assessing property taxes is the basis of computation in ascertaining the amount to be contributed by an individual, but the amount of a franchise tax depends upon the business transacted by the corporation and the extent to which they have exercised the privileges granted in their charter." pp. 631, 632. The court also referred to a decision made by the Supreme Court of the State to the effect that the assessment imposed was to be regarded as an excise or duty on the privilege or franchise of the corporation, not as a tax on the moneys in its hands belonging to the depositors. It was the corporation, it said, that was to make the payment, and if it failed to do so it was liable not only to an action for the amount of the tax, but might also be enjoined from the future exercise of its franchise until all taxes should be fully paid. *Commonwealth* v. *People's Savings Bank*, 5 Allen, 428, 431.

And the court held that the valuation of the property had nothing to do with determining the amount of the tax, but that the amount depended on the average amount of deposits for the six months preceding the respective days named, and that there was no necessary relation between the average amount of the deposits and the amount of property owned by the institution; and, not being a property tax, it was to be considered as a franchise tax laid upon the corporation for the privileges conferred by its charter, which by all the authorities it was competent for the State to tax irrespective of what disposition the institution had made of its funds, or in what manner they had been invested.

In *Hamilton Company* v. *Massachusetts*, 6 Wall. 632, a statute of Massachusetts which required corporations having a capital stock divided into shares, to pay a tax of a certain percentage upon the excess of the market value of such stock over the value of its real estate and machinery, was sustained as a statute imposing a franchise tax, notwithstanding a portion of the property which went to make the excess of the market value consisted of securities of the United States; this court, however, placing its decision upon the fact that under the provisions of the State Constitution and the practice under it the tax had been so considered by the highest tribunal of the State. This decision goes much farther than is necessary to sustain the judgment of the Court of Appeals of New York in the present case.

In this case we hold, as well upon general principles as upon the authority of the first two cases cited from 6th Wallace, that the tax for which the suit is brought is not a tax on the capital stock or property of the company, but upon its corporate franchise, and is not

therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States.

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 Co.* v. *Pennsylvania*, 125 U. S. 181.[1] 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 legislation 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.

Mr. Justice Miller (with whom concurred Mr. Justice Harlan), dissenting: Mr. Justice Harlan and myself dissent from the judgment in this case, because we think that, notwithstanding the peculiar language of the statute of New York, the tax in controversy is, in effect, a tax upon bonds of the United States held by the insurance company.

[1] The case here cited has *dicta* to the effect stated in the text, but the point was not involved in the decision. Of course individuals who are endowed with the corporate faculty are none the less protected as persons. To say that the corporation itself is a person, in the sense of the amendment, seems to be only a mode of expressing this. — Ed.

BELL'S GAP RAILROAD COMPANY *v.* PENNSYLVANIA.

SUPREME COURT OF THE UNITED STATES. 1890.

[134 *U. S.* 232.]

MOTIONS: (1) To revoke the allocatur and quash the writ of error; (2) To dismiss for want of jurisdiction; (3) To affirm the judgment below. The case is stated in the opinion.

Mr. William S. Kirkpatrick, Attorney-General of the Commonwealth of Pennsylvania, and *Mr. John F. Sanderson*, Deputy Attorney-General for the motions. *Mr. James W. M. Newlin*, opposing.

MR. JUSTICE BRADLEY delivered the opinion of the court. . . .

By the law of Pennsylvania all moneyed securities are subject to an annual State tax of three mills on the dollar of their actual value, except bonds and other securities issued by corporations, which are taxed at three mills on the dollar of the nominal or par value. If the treasurer of a corporation fails to make return of its loans, as required by law, the auditor-general makes out and files an account against the company, charging it with the tax supposed to be due. This account, if approved by the State treasurer, is served upon the corporation, which must pay the tax within a specified time, or show good cause to the contrary. If it objects to the tax, it is authorized, in common with all others who are dissatisfied with the auditor's stated accounts, to appeal to the Court of Common Pleas of the county where the seat of government is (at present Dauphin County), which appeal is served on the auditor-general, and by him transmitted to the clerk of said court, to be entered of record, subject to like proceedings as in common suits. A declaration is then filed on the stated account in behalf of the State, and the cause is regularly tried.

In the present case, on failure of the company (The Bell's Gap Railroad Company) to make return except under protest, the auditor-general made out an account against it containing the following charge: —

"Nominal value of script, bonds, and certificates of indebtedness owned by residents of Pennsylvania $539,000 — tax three mills . . . . . $1617.00"

The company thereupon tendered an appeal, which was filed in the Court of Common Pleas of Dauphin County, a declaration was filed on the part of the State, and the cause was tried by the court, a jury being waived.

The appeal filed by the corporation (which was the basis of the proceedings in the court) contained eight grounds of objection to the tax. Most of these objections were founded upon the Constitution, or laws of Pennsylvania, and need not be noticed here. The second objection, which refers to the Constitution of the United States, was as follows, to wit: "II. The report of the company's treasurer was made under

protest and does not constitute an assessment, and the tax sought to be imposed on so much of the company's loans as the Commonwealth claims to be held by residents of Pennsylvania for their nominal or face value, which varies from the market value on account of the differing rates of interest, etc., is illegal, and the said tax cannot be lawfully deducted by the company's treasurer from the interest payable to the holders of said loans, and the Commonwealth's demands contravene section one of the Fourteenth Amendment to the Constitution of the United States, for the following reasons:" Amongst the reasons then assigned are: 1. That the nominal value of the bonds is not their real value; 2. That the owners of the bonds have no notice, and no opportunity of being heard; 3. That the company is taxed for property it does not own; 4. That the deduction of the tax from the interest payable to the bondholders is taking their property without due process of law, and denies to them the equal protection of the laws, since all other personal property in the State is taxed at its actual value, and upon notice to the owners. The seventh objection is as follows: "VII. The tax is void as impairing the company's obligation to its creditors."

On the trial of the cause the State offered in evidence the stated account, and the plaintiff in error offered the appeal and specification of objections and an affidavit of its treasurer. The Court of Common Pleas decided in favor of the company, but its decision was reversed on writ of error by the Supreme Court of Pennsylvania, and judgment was rendered in favor of the Commonwealth for $666, being the amount of tax on bonds shown to have been owned by residents of Pennsylvania. . . .

On the merits we have no serious doubt.

1. *As to the assessment of the tax of three mills upon the nominal or face value of the bonds, instead of assessing it upon the actual value.* This might have been subject to question under the State laws; but the State courts have upheld the assessment as valid. We are to accept it, therefore, as part of the State system of taxation, authorized by its Constitution and laws. Then, how does it violate any provision of the Constitution of the United States? It is contended that it violates the first section of the Fourteenth Amendment, which forbids a State to withhold from any person the equal protection of the laws. We do not perceive that the assessment in question transgresses this provision. There is no unjust discrimination against any persons or corporations. The presumption is that corporate securities are worth their face value. Besides, the person that holds them is not affected by the tax unless he receives his interest from which the tax is deducted. So long as the interest is paid the security has to him full productive value; when it is not paid he pays no tax.

But, be this as it may, the law does not make any discrimination in this regard which the State is not competent to make. All corporate securities are subject to the same regulation The provision in the Fourteenth Amendment, that no State shall deny to any person within

its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt. . . .

2. *As to want of notice to the owners of the bonds.* What notice could they have which the law does not give them? They know that their bonds are to be assessed at their face value, and that a tax of three mills on the dollar of that value will be imposed; and that they will only be required to pay this tax when, and as, they receive the interest. If the State may assess the tax upon the face value of the bonds, notice *in pais* is not necessary. We think that there is nothing in this objection which shows any infraction of the Federal Constitution. It is urged that it is a taking of the bondholder's property without due process of law. We must confess that we cannot see it in this light. The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law, when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them. We see nothing in the process of taxation complained of, which is obnoxious to constitutional objection on this score. Stockholders in the national banks are taxed in this way, and the method

has been sustained by the express decision of this court. *National Bank* v. *Commonwealth*, 9 Wall. 353.

3. *That the corporation is taxed for property it does not own.* This objection is not true in point of fact. The corporation, as the debtor of its bondholders, holding money in its hands for their use, namely, the interest to be paid, is merely required to pay to the Commonwealth out of this fund the proper tax due on the security. The tax is on the bondholder, not on the corporation. This plan is adopted as a matter of convenience, and as a secure method of collecting the tax. That is all. It injures no party. It certainly does not infringe the Constitution of the United States by making one party pay the debts and support the just burdens of another party, as is implied in the objection.

The other objections are embraced in those which we have already considered, and need no further notice.

We would say, in conclusion, that there are several decisions of this court which virtually dispose of most of the questions involved in the present case. We refer particularly to *National Bank* v. *Commonwealth*, *supra*; *The Dollar Savings Bank* v. *United States*, 19 Wall. 227, 240; *King* v. *United States*, 99 U. S. 229; *Hagar* v. *Reclamation District No. 1*, 111 U. S. 701; *Davidson* v. *New Orleans*, 96 U. S. 97; *Walston* v. *Nevin*, 128 U. S. 578, 581.

The motion to dismiss the writ of error is denied, and the judgment of the Supreme Court of Pennsylvania is affirmed.[1]

In *Ward* v. *Maryland*, 12 Wall. 418, 428 (1870), on error to the Court of Appeals of Maryland, in holding a statute of that State unconstitutional, as imposing a discriminating tax upon non-residents trading there, the court (Clifford, J.) said: "Outside of the prohibitions, express and implied, contained in the Federal Constitution, the power of the States to tax for the support of their own governments is coextensive with the subjects within their unrestricted sovereign power, which shows conclusively that the power to tax may be exercised at the same time and upon the same subjects of private property by the United States and by the States without inconsistency or repugnancy. Such a power exists in the United States by virtue of an express grant for the purpose, among other things, of paying the debts and providing for the common defence and general welfare; and it exists in the States for the support of their own governments, because they possessed the power without restriction before the Federal Constitution was adopted, and still retain it, except so far as the right is prohibited or restricted by that instrument. *Gibbons* v. *Ogden*, 9 Wheat. 199; *Nathan* v. *Louisiana*, 8 How. 82. . . . Reasonable regulations for the collection of such taxes may be passed by the States, whether the property taxed belongs to residents or non-residents; and, in the

[1] Affirmed in *Jennings* v. *Coal Ridge, &c. Co.*, 147 U. S. 147 (1893). Compare *Pac. Exp. Co.* v. *Seibert*, 142 U. S. 339; *Giozza* v. *Tiernan*, 148 U. S. 657. — Ed.

absence of any Congressional legislation upon the same subject, no doubt is entertained that such regulations, if not in any way discriminating against the citizens of other States, may be upheld as valid; but very grave doubts are entertained whether the statute in question does not embrace elements of regulation not warranted by the Constitution, even if it be admitted that the subject is left wholly untouched by any Act of Congress.

"Excise taxes levied by a State upon commodities not produced to any considerable extent by the citizens of the State may, perhaps, be so excessive and unjust in respect to the citizens of the other States as to violate that provision of the Constitution, even though Congress has not legislated upon that precise subject; but it is not necessary to decide any of those questions in the case before the court, as the court is unhesitatingly of the opinion that the statute in question is repugnant to the second section of the fourth article of the Constitution, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. *Woodruff* v. *Parham*, 8 Wall. 139; *Hinson* v. *Lott*, 8 Id. 151.

"Taxes, it is conceded in those cases, may be imposed by a State on all sales made within the State, whether the goods sold were the produce of the State imposing the tax, or of some other State, provided the tax imposed is uniform; but the court at the same time decides in both cases that a tax discriminating against the commodities of the citizens of the other States of the Union would be inconsistent with the provisions of the Federal Constitution, and that the law imposing such a tax would be unconstitutional and invalid. Such an exaction, called by what name it may be, is a tax upon the goods or commodities sold, as the seller must add to the price to compensate for the sum charged for the license, which must be paid by the consumer or by the seller himself; and in either event the amount charged is equivalent to a direct tax upon the goods or commodities. *Brown* v. *Maryland*, 12 Wheat. 444; *People* v. *Maring*, 3 Keyes, 374.

"Imposed as the exaction is upon persons not permanent residents in the State, it is not possible to deny that the tax is discriminating with any hope that the proposition could be sustained by the court. Few cases have arisen in which this court has found it necessary to apply the guaranty ordained in the clause of the Constitution under consideration. *Conner* v. *Elliott*, 18 How. 593.

"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. Cooley on Constitutional Limits, 16; *Brown* v. *Maryland*, 12 Wheat. 449. 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. *State* v. *North et al.*, 27 Mo. 467; *Fire Department* v. *Wright*, 3 E. D. Smith, 478; *Paul* v. *Virginia*, 8 Wall. 177.

"Grant that the States may impose discriminating taxes against the citizens of other States, and it will soon be found that the power conferred upon Congress to regulate interstate commerce is of no value, as the unrestricted power of the States to tax will prove to be more efficacious to promote inequality than any regulations which Congress can pass to preserve the equality of right contemplated by the Constitution among the citizens of the several States. Excise taxes, it is everywhere conceded, may be imposed by the States, if not in any sense discriminating; but it should not be forgotten that the people of the several States live under one common Constitution, which was ordained to establish justice, and which, with the laws of Congress, and the treaties made by the proper authority, is the supreme law of the land; and that that supreme law requires equality of burden, and forbids discrimination in State taxation when the power is applied to the citizens of the other States. Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system."[1]

HORN SILVER MINING COMPANY *v.* NEW YORK STATE.

SUPREME COURT OF THE UNITED STATES. 1892.

[143 *U. S.* 305.[2]]

[ERROR to the Supreme Court of the State of New York. The State brought the action to recover taxes from the plaintiff in error, a corporation created under the laws of the Territory of Utah. The

[1] See also *Oliver* v *Washington Mills*, 11 Allen, 268, 280. — ED.

[2] The statement of facts is omitted. — ED.

taxes were assessed under a statute subjecting thereto corporations "organized under any law of the State or of any other State or country, and doing business in the State."]

Mr. Julien T. Davies (with whom was *Mr. Edward Lyman Short* on the brief) for plaintiff in error. *Mr. Charles F. Tabor*, Attorney-General of the State of New York, submitted on his brief.

Mr. Justice Field delivered the opinion of the court.

A corporation being the mere creature of the legislature, its rights, privileges, and powers are dependent solely upon the terms of its charter. Its creation (except where the corporation is sole) is the investing of two or more persons with the capacity to act as a single individual, with a common name, and the privilege of succession in its members without dissolution, and with a limited individual liability. The right and privilege, or the franchise, as it may be termed, of being a corporation, is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most States this franchise or privilege of being a corporation is deemed personal property, and is subject to separate taxation. The right of the States to thus tax it has been recognized by this court and the State courts in instances without number. . . . [Here follows a quotation from the opinion in *Delaware Railroad Tax*, 18 Wall. 206, 231.]

The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interests and policy. It may impose as a condition of the grant, as well as, also, of its continued exercise, the payment of a specific sum to the State each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. There can be, therefore, no possible objection to the validity of the tax prescribed by the statute of New York, so far as it relates to its own corporations. Nor can there be any greater objection to a similar tax upon a foreign corporation doing business by its permission within the State. As to a foreign corporation — and all corporations in States other than the State of its creation are deemed to be foreign corporations — it can claim a right to do business in another State, to any extent, only subject to the conditions imposed by its laws.

As said in *Paul* v. *Virginia*, 8 Wall. 168, 181, "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 is prejudicial to their interests or repug-

nant 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." This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest.

Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than half a century ago in *Bank of Augusta* v. *Earle*, 13 Pet. 519. One of these qualifications is that the State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 12. The other limitation on the power of the State is, where the corporation is in the employ of the general government, an obvious exception, first stated, we think, by the late Mr. Justice Bradley in *Stockton* v. *Baltimore & New York Railroad*, 32 Fed. Rep. 9, 14. As that learned justice said: "If Congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union." And this court, in citing this passage, added, "without the permission and against the prohibition of the State." *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 186.

Having the absolute power of excluding the foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. No individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the State may require for the grant of its privileges. It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation. The counsel for the appellant objects that the statute of New York is to be treated as a tax law, and not as a license to the corporation for permission to do business in the State. Conceding such to be the case, we do not perceive how it in any respect affects the validity of the tax. However it may be regarded, it is the condition upon which a foreign corporation can do business in the State, and in doing such business it puts itself under the law of the State, however that may be characterized.

The only question therefore open to serious consideration in this case is one of fact: Did the Horn Silver Mining Company do business as

a corporation within the State? The referee found such to be the fact, as a conclusion from many probative circumstances in the case. That finding was never set aside, but stands approved by the courts of New York. . . .

It is true, the greater part of the business of the company was done out of the State, and the greater part of its capital was also without it, but the statute of New York does not require that the whole business of a foreign corporation shall be done within the State in order to subject it to the taxing power of the State. It makes, in that respect, no difference between home corporations and foreign corporations, as to the franchise or business of the corporation upon which the tax is levied, provided it does business within the State, as such corporation.

There seems to be a hardship in estimating the amount of the tax upon the corporation, for doing business within the State, according to the amount of its business or capital without the State. That is a matter, however, resting entirely in the control of the State, and not a matter of Federal law, and with which, of course, this court can in no way interfere.

Since this tax was levied the law of the State has been altered, and now the tax upon foreign corporations doing business in the State is estimated by the consideration only of the capital employed within the State. It is said that against nearly all other foreign corporations, except this one, the taxes upon their franchises have been computed upon the basis of the capital employed within the State; but as to that we can only repeat what was said in the Court of Appeals of the State, that, if this be true, the defendant may have reason to complain of unjust discrimination and may properly appeal for relief to the legislature of the State, but that it is not within the power of the court to grant any relief, however great the hardship upon it.

The extent of the tax is a matter purely of State regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference with interstate commerce, we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation. The products of the mine can be brought into the State and sold there without taxation, and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company. *Judgment affirmed.*

MR. JUSTICE HARLAN dissented.[1]

[1] In *The Lumberville, &c. Co.* v. *State B'd Assessors*, 55 N. J. Law, 529, 537 (1893), the court (GARRISON, J.) said: "The franchise that is taxed as property is the privilege enjoyed by a corporation of exercising certain powers derived from the State, whereas the franchise with which we have to do is the right to exist in corporate form without reference to the powers that under such form the company may exercise. This distinction, although formulated by Mr. Justice Field in *Home Insurance Company* v. *New York*, 134 U. S. 594, was not strictly adhered to in his subsequent expressions, probably because there was nothing in that case to call for a nice use of terms. In this State we tax each of these so-called franchises. The former, as in the case of

PORTLAND BANK *v.* APTHORP.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1815.

[12 *Mass.* 252.[1]]

AN argument was had, at the last March term in Suffolk, by *Prescott* and *E. Whitman*, for the plaintiffs, and by *Morton*, Attorney-General, and *Davis*, Solicitor-General, for the defendant.

The opinion of the court was delivered, at this term, by

PARKER, C. J. . . . The charter, by which the plaintiffs were incorporated, was granted in 1799; and powers were given by it to carry on the business of loaning money for the period of twenty years. No *bonus* was required by the legislature, nor was there any reservation of a right to levy a tax or an excise upon the company. The effect of this charter was, to give to the individuals who applied for it, and their successors, a right to act as a body corporate and politic in the management of their common funds, under the restrictions and regulations provided in the charter.

They now contend, that, as the privilege was freely given to them by the government for a limited period, they cannot be subject to any tax or tribute to the government during the existence of the charter, because the legislature is, by the Constitution, limited in its powers of taxation to an equal and proportionate assessment upon all the property in the Commonwealth, and that it has not the power to select any individuals or company, or any specific object of property, and demand a tax of them, separate and distinct from such tax as might result from its equal and proportionate share of such taxes as should be required of all other individuals, companies, or property, within the Commonwealth.

The words of the Constitution, from which the authority of the legislature to impose taxes and to obtain a revenue is derived, are, "to impose and levy proportionate and reasonable assessments, rates, and taxes upon all the inhabitants of, and persons resident and estates lying within, the Commonwealth; and also to impose and levy rea-

the right to own and operate a railroad, is taxed as property having a true value, which it is the duty of the State board to ascertain for the purposes of constitutional assessment. On the other hand, the naked right of existing in corporate form is taxed as in the case before us, not at its true value, as it would have to be if it were property, but at a sum arbitrarily imposed by the legislature as an annual fee, the amount of which is to be computed by reference to the capital of the company as a criterion. It is, in short, a poll tax levied upon domestic corporations for the right to be. Such a tax is not upon property or assets, and does not in any way concern the nature of the business the company may be authorized to carry on. If the business chance to be one of commercial intercourse with other States, the burden incidental to corporate existence does not, under the Federal decisions just cited [*Home Ins. Co.* v. *N. Y.*, and *Horn Silv. Min. Co.* v. *N. Y.*], constitute a regulation of that commerce." — ED.

[1] The statement of facts is omitted. — ED.

sonable duties and excises upon any produce, goods, wares, and merchandise, and commodities whatsoever, brought into, produced, manufactured, or being within the same."

Under the first branch of this power, namely, that of imposing and levying rates and taxes, the requisition upon the banks cannot be justified; for those taxes must be proportional upon all the inhabitants of, and persons resident and estates lying within, the Commonwealth. The exercise of this power requires an estimate or valuation of all the property in the Commonwealth; and then an assessment upon each individual, according to his proportion of that property. To select any individual or company, or any specific article of property, and assess them by themselves, would be a violation of this provision of the Constitution.

But there are other sources of emolument and profit, not strictly called property, but which are rather to be considered as the means of acquiring property, from which a reasonable revenue may be exacted by the legislature, within the fair meaning of the other branches of the power above recited. The exercise of this power is called the imposing or levying of duties and excises; and the subjects upon which they are to be levied are produce, goods, wares, merchandise, and commodities, brought into, produced, manufactured, or being within the State. The former provision seems to be intended as a contribution of the individual citizens, in proportion to the property, whether real or personal, which they are respectively worth. The latter is a tax upon the articles, whoever may be the owner, or into whose hands soever they may go; operating as compensation for the privilege of producing, manufacturing, or bringing them within the State; and the sum which each individual may pay of this latter species of tax, may not be in proportion to his property; but will be only in proportion to the quantity of such particular article so taxed, as may be consumed by him, or used by him, in the way of his business and employment.

The term *excise* is of very general signification, meaning tribute, custom, tax, tollage, or assessment. It is limited, in our Constitution, as to its operation, to produce, goods, wares, merchandise, and commodities. This last word will perhaps embrace everything, which may be a subject of taxation, and has been applied by our legislature, from the earliest practice under the Constitution, to the privilege of using particular branches of business or employment, as, the business of an auctioneer, of an attorney, of a tavern-keeper, of a retailer of spirituous liquors, &c.

It must have been under this general term, *commodity*, which signifies convenience, privilege, profit, and gains, as well as goods and wares, which are only its vulgar signification, that the legislature assumed the right, which has been uniformly, and without complaint, exercised for thirty years, of exacting a sum of money from attorneys, and barristers at law, vendue masters, tavern-keepers, and retailers. For every man has a natural right to exercise either of these employ-

ments free of tribute, as much as a husbandman or mechanic has to use his particular calling. The money required of them is not a proportional tax; nor is it an excise or duty upon produce, goods, wares, or merchandise. It is a commodity, convenience, or privilege, which the legislature has, by contemporaneous construction of the Constitution, assumed a right to sell at a reasonable price; and, by parity of reason, it may impose the same conditions upon every other employment or handicraft.

It is true, that it may be unsafe, generally, to infer from the actual use of power by a government its original right to exercise that power; and, certainly, no continuance of usurpation upon the rights of a citizen, however long, can deprive him of those rights. But in questions touching the powers of government under a written constitution, not affecting the essential rights of the citizen, the practice and usage of successive legislatures, from the time the government began, when its powers, as well as the rights of the subject, were well understood, and when there was a general disposition to keep all the departments within their prescribed sphere, down to the present time, may furnish strong grounds for explanation of parts which are obscure, or not perfectly explicit.

According to the construction of the Constitution, there can be no doubt that the legislature might as well exact a fee or tribute from brokers, factors, or commission merchants, for the privilege of transacting their business, as from auctioneers, or innholders, or retailers, or attorneys. It will, undoubtedly, be the policy of a wise legislature, not to multiply burdens of this sort; but we speak only of their power, presuming that it will never be exercised but for wise or necessary purposes.

If it should be true that this right exists with respect to individuals, then the only remaining question is, whether, when a number of individuals have associated for the purpose of carrying on the business of brokerage, money-lending, or factorage, more conveniently, extensively, and securely, and for that purpose have obtained a license or charter from the government, they are exempt from a liability which would attach to them severally as individuals. Did the legislature, when it incorporated the plaintiffs, relinquish the right of laying an excise or duty upon the business which they should transact during the continuance of the charter of incorporation? There is no express waiver or relinquishment, nor is there any strong implication of one. The object of their charter is to enable them, in a body, to conduct their business as an individual, to make contracts, and to enforce them as such, avoiding the inconveniences of a copartnership. This is all that is asked for by the company, and all that is given by the charter. It is a privilege to manage their business, and not an exemption from duty. Suppose that heretofore the legislature should have enacted that no person should keep a public house, or retail spirituous liquors, without a license from some authority by them designated, but without exact-

ing any tax or duty therefor; could it be contended that afterwards they were precluded from establishing a tax or excise upon the business thus permitted to be exercised?

Every man has the implied permission of the government to carry on any lawful business; and there is no difference in the right, between those which require a license and those which do not, except in the prohibition, either express or implied, where a license is required. So that to lay a duty or excise upon branches of business which exist by license is no infringement of any privilege conveyed by such license.

The late law of the United States, requiring the use of a license, and establishing a tax to the government, seems to be predicated upon the same principles. For Congress has seen fit to require fifty per cent from tavern-keepers and retailers, in addition to the sum originally paid for the license, within the term for which it was granted.

Taxes of this sort must undoubtedly be equal; that is, they must operate upon all persons who exercise the employment which is so taxed. A tax upon one particular moneyed capital would unquestionably be contrary to the principles of justice, and could not be supported; but a tax upon all banks we think justifiable upon the grounds we have stated. *Plaintiff's nonsuit.*[1]

GLEASON *v.* McKAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1883.

[134 *Mass* 419.]

CONTRACT by the treasurer of the Commonwealth against the trustee of the McKay Sewing Machine Association, to recover a tax assessed upon said association for the year 1879, in pursuance of the St. of 1878, c. 275. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed facts. . . .

C. H. Barrows, Assistant Attorney-General, for the plaintiff. *E. Merwin*, for the defendant.

MORTON, C. J. The principal question in this case is whether the St. of 1878, c. 275, as applied to the defendant, is constitutional. The first section of the statute provides that "Chapter two hundred and eighty-three of the Acts of the year one thousand eight hundred and sixty-five, and the Acts in amendment thereof, are hereby extended to apply, so far as applicable, to companies, copartnerships, and other associations having a location or place of business within this Commonwealth, in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer. And the tax provided for in said chapter two hundred and eighty-three

[1] Compare *Conn. Mut. Life Ins. Co.* v. *Com'th*, 133 Mass. 161; *Mayor of Savannah* v. *Weed*, 84 Ga. 683 (1890). — ED.

shall be paid by such company, copartnership, or association upon the aggregate value of the shares of said capital stock, in the manner provided in said chapter for taxes upon corporations."

The power of taxation, using the word in its generic sense as including all rates and impositions laid or levied upon the people, is conferred upon the legislature by the Constitution, and is to be held and exercised subject to the limitations imposed by the Constitution. *Oliver* v. *Washington Mills,* 11 Allen, 268. The legislature is given the power "to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth," and also power "to impose, and levy, reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same." Const. Mass. c. 1, art. 4.

It is clear that the statute in question was not intended to lay a tax upon property within the first of these clauses. It does not purport to do this. It merely extends to certain copartnerships and associations the provisions of the St. of 1865, c. 283, which chapter has been held to levy an excise upon corporate franchises, and not to lay a tax on property, and which chapter can be sustained as constitutional only upon the ground that it levies an excise. *Murray* v. *Berkshire Ins. Co.*, 104 Mass. 586; *Commonwealth* v. *Hamilton Manuf. Co.*, 12 Allen, 298. Regarded as a tax on property, the tax we are considering would be invalid because not proportional; it would be an imposition upon certain property at a rate different from that to which other property in the Commonwealth is subject. But, as we have said, it does not purport to be a tax on property. In levying an imposition under this statute, no inquiry is made as to what property liable to taxation any copartnership, or other association which comes within its terms, has. Such property remains liable to taxation under the general laws. This imposition is based "upon the aggregate value of the shares of said capital stock." Such shares, if they can be said to be property, are not the property of the copartnership or association which is taxed, but of the individual partners or shareholders. It is very clear that this was intended as an excise upon some franchises or privileges sought to be held by the copartnerships or associations in supposed analogy to the franchises of corporations. And the question is whether this imposition can be upheld as such excise within the second clause of the Constitution, cited above. In this clause, there are two limitations upon the power of the legislature in imposing excises. They must be reasonable, and they must be excises upon some produce, goods, wares, merchandise or commodities, brought into, produced, manufactured, or being within the Commonwealth.

It will not be seriously contended that the privileges or rights which are taxed by this statute can be properly described as either produce, goods, wares, or merchandise. Do they fairly come within the term

"commodities," in the sense in which it is used in the Constitution? Ever since the adoption of the Constitution, the legislature in its practice, and this court in its adjudications, have given a very broad and extensive meaning to this term. It has been repeatedly held that corporate franchises enjoyed by grant from the government are commodities, and subject to an excise. So with corporate franchises granted by a foreign government, which by comity are permitted to be exercised within this Commonwealth. So where the legislature has thought, upon considerations of public policy, that certain occupations or callings, of a public or *quasi* public character, should be carried on under governmental regulation, it has been usual to impose a reasonable fee for a license. *Portland Bank* v. *Apthorp*, 12 Mass. 252; *Commonwealth* v. *People's Five Cents Savings Bank*, 5 Allen, 428; *Commonwealth* v. *Hamilton Manuf. Co.*, *ubi supra*; *Commonwealth* v. *Cary Improvement Co.*, 98 Mass. 19; *Connecticut Ins. Co.* v. *Commonwealth*, 133 Mass. 161. This imposition is clearly not in the nature of a license fee, but is an excise upon a franchise or privilege. The right to levy excises upon franchises has never been extended further than to corporate franchises specially granted by the government, or enjoyed and exercised by its permission.

The defendant in this case is not a corporation. It is merely a partnership, with all the incidents and responsibilities of a partnership. The firm property is taxable at its business domicile. *Hoadley* v. *County Commissioners*, 105 Mass. 519. It enjoys no franchises conferred upon it by the legislature. It does not ask for or enjoy any corporate or special privileges. It has constituted its partnership under its common-law rights and such legal agreements as it chooses to make. The peculiar feature that the interest of each member may be transferred without the special assent of the other members, is created by agreement of the partners under their natural rights at common law. We do not see how this peculiar feature can be called a commodity, subject to a special excise, any more than the agreement of copartnership itself, or any clause or part of it, or any other agreement, right or mode of transacting any business, can be called a commodity, and so liable to taxation at the will of the legislature.

If this tax can be upheld, it seems to us that the necessary result will be that the legislature has the power to select any business, occupation, or calling carried on, or any natural right enjoyed, under the protection of our laws, and impose upon it at its will a special tax or excise. This would be extending the meaning of the word "commodities" beyond any reasonable limits. Its effect would be to break down the limitations which the Constitution intended to impose upon the power of the legislature, for the purpose of securing the end that all sums necessary for the defence and support of the government should as far as practicable be raised by the equal taxation of the people.

We are therefore of opinion that the St. of 1878, c. 275, so far as it applies to the defendant, is unconstitutional.

Judgment for the defendant.

MINOT *v.* WINTHROP. WILLIAMS *v.* BOWDITCH. WEST *v.* PHILLIPS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1894.

[162 *Mass.* 113.]

[THE opinion in these cases, decided Oct. 17, 1894 and not yet reported, is printed from a certified copy furnished by the Reporter of Decisions. The important section of the statute under discussion is printed in a note.]

FIELD, C. J. All these cases involve the constitutionality of St. 1891, c. 425.[1] The objections urged against this statute are that the right of succession to property on the death of the owner is a necessary incident of property which is protected by the Constitution of Massachusetts; that a tax upon such succession is in effect a tax upon the property and is subject to the limitations put upon a tax upon estates by the Constitution; that if such a tax is not a tax upon property but an excise upon the right of succession this right cannot be considered as "goods, wares, merchandise, and commodities" within the meaning of these words in the Constitution; and that even if the right can be considered as a commodity the tax imposed by the statute is unreasonable, because the statute is unequal in its operation, and makes arbitrary distinctions between those persons and estates that are and those that are not subject to its provisions. The Attorney-General concedes that the tax imposed by the statute is invalid if it is a tax on property or estates. He contends that the tax is an excise; that the succession to property on the death of the owner is a privilege created by law and a commodity within the meaning of the Constitution, and that as an excise the tax is reasonable.

St. 1891, c. 425, purports to be a statute imposing a tax, and we think it apparent that the legislature in passing it intended to act under the authority granted to the General Court by the Constitution to impose and levy taxes. This authority is found in the Constitution,

[1] Section 1 is as follows: "All property within the jurisdiction of the Commonwealth, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, and whether tangible or intangible, which shall pass by will or by the laws of the Commonwealth regulating intestate succession, or by deed, grant, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, brother, sister, adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of a daughter of a decedent, or to or for charitable, educational, or religious societies or institutions, the property of which is exempt by law from taxation, shall be subject to a tax of five per centum of its value, for the use of the Commonwealth; . . . *provided, however*, that no estate shall be subject to the provisions of this Act unless the value of the same, after the payment of all debts, shall exceed the sum of ten thousand dollars." — ED.

Part II., c. 1, § 1, art. 4, and is full power and authority "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same; to be issued and disposed of by warrant, under the hand of the Governor of this Commonwealth for the time being, with the advice and consent of the council, for the public service, in the necessary defence and support of the government of the said Commonwealth, and the protection and preservation of the subjects thereof, according to such Acts as are or shall be in force within the same." The Constitution also provides as follows: "And while the public charges of government, or any part thereof, shall be assessed on polls and estates, in the manner that has hitherto been practised, in order that such assessments may be made with equality, there shall be a valuation of estates within the Commonwealth, taken anew once in every ten years at least, and as much oftener as the General Court shall order."

In the constitutional convention the committee appointed to prepare a Declaration of Rights and a Frame of a Constitution reported a draft of a constitution which gave to the General Court in the matter of taxation only the authority "to impose and levy proportional and reasonable assessments, rates, and taxes upon the persons of all the inhabitants of and residents within the said Commonwealth, and upon all estates within the same, to be issued and disposed of by warrant," etc. This was in effect the same as in the Province Charter. This draft also contained the following provision: "And that public assessments may be made with equality there shall be a valuation of estates within the Commonwealth taken once in every ten years at least." Journal of Convention, 1779–80, p. 198, c. 2, § 3, of the draft. In the convention the paragraphs above quoted were referred to committees who reported them in the form in which they stand in the Constitution. *Ibid.*, pp. 61–63. Under the Province Charter the General Court had laid imposts and excises in addition to taxes and assessments upon the persons and estates of the inhabitants, but it is evident that the framers of the Constitution intended that the authority to do this should be express. But neither in the Province nor in England had there been a tax on legacies and inheritances at the time when the Constitution was adopted, although it was a form of taxation which had been used on the Continent of Europe. See The Inheritance Tax, by Max West, vol. 4, No. 2, of the Studies in History, Economics, and Public Law of Columbia College; Smith's Wealth of Nations, Book V., c. 2; Dos Passos on Law of Collateral Inheritance Taxes; Hanson's Probate Legacy and Succession Duties.

The descent or devolution of property on the death of the owner in England and in this country has always been regulated by law. We

have no occasion in these cases to consider whether the legislature has the power to make the Commonwealth the universal legatee or successor of all the property of all its inhabitants when they die, for the purposes not only of paying the public charges, but also of distributing the property according to its will among the living inhabitants or for the purpose of abolishing private property altogether. We assume that under the Constitution this cannot be done either directly or indirectly; that the legislature cannot so far restrict the right to transmit property by will or by descent as to amount to an appropriation of property generally; that it cannot impose a tax which shall be equivalent or almost equivalent to the value of the property, and cannot so limit the persons who can take as heirs, devisees, distributees, or legatees that the great mass of all the property of the inhabitants must become vested in the Commonwealth by escheat. The State can take property by taxation only for the public service, and we assume that its right to take property, if any exists, by regulating the distribution of it on the death of the owner is limited in the same manner, and that this right must be exercised in a reasonable way.

Under our system of law the right to make a will or testament and the right to transmit or take property by descent are now mainly if not wholly regulated by statute. In *Mager* v. *Grima*, 8 How. 490–493, the Supreme Court of the United States say of a statute of Louisiana: "Now the law in question is nothing more than an exercise of the power which every State and sovereignty possesses of regulating the manner and terms upon which property real or personal, within its dominion, may be transmitted by last will and testament or by inheritance, and of prescribing who shall and who shall not be capable of taking it." In *Brettun* v. *Fox*, 100 Mass. 234, this court say: "The objection of the respondent that the statute could not constitutionally limit the owner's power of testamentary disposition is equally novel and unfounded. The power to dispose of property by will is neither a natural nor a constitutional right, but depends wholly upon statute, and may be conferred, taken away, or limited and regulated, in whole or in part, by the legislature; and no exercise of legislative authority in this respect is more usual than that which secures to a widow a certain share in the estate of her husband." See *Lavery* v. *Egan*, 143 Mass. 389.

If under the power to regulate the devolution of property on the death of the owner, the legislature cannot take away altogether the inheritable quality of property, yet such regulations as are thought reasonable concerning the persons who can take or transmit real or personal property by will or inheritance have been made in every civilized State. Taxes on legacies and inheritances or on succession in any form to property on the death of the owner have generally been considered not as taxes upon property but as excises upon the privilege of taking or transmitting property in this way. The decision in *Curry* v. *Spencer*, 61 N. H. 624, that a statute imposing such a tax is in violation of

the Constitution of New Hampshire, goes on the ground that the tax is not proportional, and so cannot be supported as a tax upon property under the Constitution of that State, which it seems authorizes only taxes and assessment upon polls and property. See *State* v. *Express Co.*, 60 N. H. 219.

The Constitution of the United States, by art. 1, § 8, provides as follows: "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." Direct taxes must be apportioned among the several States according to the respective numbers of their inhabitants, to be determined as provided by the second section of the same article. In *Scholey* v. *Rew*, 23 Wall. 331, the validity of the succession taxes imposed by the U. S. St. of June 30, 1864, as amended by the St. of July 13, 1866, was considered. 13 St. at Large, 287, *et seq.*, 14 St. at Large, 140, *et seq.* There was no room for any contention that the Congress of the United States could regulate in the States the transmission of property by will or inheritance, and the question was whether it had authority under the taxing power to impose such taxes. The decision was that such taxes were not direct taxes, but excises or duties, and as such within the authority of Congress to lay and collect without apportionment among the States. The decisions generally are that such taxes are excises. See *Mager* v. *Grima*, 8 How. 490; *In re McPherson*, 104 N. Y. 306; *In re Estate of Swift*, 137 N. Y. 77; *In re Knoedler*, 140 N. Y. 377; *Wallace* v. *Myers*, 38 Fed. Rep. 184; *State* v. *Dalrymple*, 70 Md. 294; *Tyson* v. *State*, 28 Md. 577; *Eyre* v. *Jacob*, 14 Gratt. 422; *Pullen* v. *Commissioners*, 66 N. C. 361; Dos Passos on Law of Collateral Inheritance and Taxes; Hanson's Probate Legacy and Succession Duties.

It is contended that the authority given in our Constitution to the General Court is not to levy duties and excises generally, but only to levy duties and excises "upon any produce, goods, wares, merchandise, and commodities whatsoever brought into, produced, manufactured, or being within the" Commonwealth. The excises to which the inhabitants of the Province of the Massachusetts Bay were accustomed were taxes in the nature of license fees for carrying on certain kinds of business, taxes on the sale of goods, wares, and merchandise, such as intoxicating liquors, tea, coffee and chocolate, china ware, etc., and stamp taxes on legal papers. The words "produce, goods, wares, and merchandise" "brought into, produced, manufactured, or being" within the Commonwealth, are words of definite meaning, but the words "any commodities whatsoever" are of less certain signification. In a general sense, a commodity is something of convenience, advantage, benefit, or profit; and in a special sense, a commodity is something produced for use and an article of trade or commerce. It has been decided that the word "commodities" in our Constitution is not used in

this special sense, and that it means more than "produce, goods, wares, and merchandise." In *Portland Bank* v. *Apthorp*, 12 Mass. 252, 256, the court say: "The term 'excise' is of very general signification, meaning tribute, custom, tax, tollage, or assessment. It is limited in our Constitution as to its operation, to produce, goods, wares, merchandise, and commodities." . . . [Here follows the rest of the passage at p. 1417, *supra*, which ends with "handicraft," on p. 1418.] It was held in this case that a statute laying a tax on the stock of a banking corporation was an excise on the franchise or employment, and as such was constitutional. Since that decision the legislature has often imposed excises upon the franchises of corporations. See *Commonwealth* v. *People's Five Cents Savings Bank*, 5 Allen, 428; *Commonwealth* v. *Lowell Gas Light Co.*, 12 Allen, 75; *Commonwealth* v. *Hamilton Manuf. Co.*, 12 Allen, 298; *Commonwealth* v. *Provident Institution for Savings*, 12 Allen, 312; *Manufacturers' Ins. Co.* v. *Loud*, 99 Mass. 146; *Attorney-General* v. *Bay State Mining Co.*, 99 Mass. 148; *Commonwealth* v. *Lancaster Savings Bank*, 123 Mass. 493; *Commonwealth* v. *Barnstable Savings Bank*, 126 Mass. 526; *Connecticut Mutual Life Ins. Co.* v. *Commonwealth*, 133 Mass. 161.

In *Attorney-General* v. *Bay State Mining Co.*, *supra*, the court say: "It is not merely the creation of corporate functions and privileges, or the conferring of rights and franchises by the legislature, which entitles the State to tax the possessor of such privileges and rights. The exercise of powers or privileges, and even of occupations, without especial powers or privileges, may be equally subjected to such taxation, under the constitutional authority to 'impose and levy reasonable duties and excises.' It was so considered in the case of *Portland Bank* v. *Apthorp*, 12 Mass. 252; and the tax of one per cent, laid upon the capital stock of the bank, was justified upon principles equally applicable to individuals transacting similar business, and to brokers, auctioneers, etc."

In *Commonwealth* v. *Lancaster Savings Bank*, *supra*, the court say: "A duty or excise may thus be exacted not merely upon certain articles produced or brought into the States, but also upon any commodities whatsoever. 'Commodity' is a general term, and includes the privilege and convenience of transacting a particular business; and, upon persons carrying on such business, it has never been questioned that the legislature may levy an excise, or provide that a license must be obtained in order to transact it."

In *Gleason* v. *McKay*, 134 Mass. 419, it was decided that St. 1878, c. 275, was unconstitutional. That statute attempted to apply St. 1865, c. 238, "to companies, copartnerships, and other associations having a location or place of business within this Commonwealth, in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer." The St. 1865, c. 283, imposed an excise tax upon the franchises of cer-

tain corporations. It was held that the tax intended to be imposed by St. 1878, c. 275, was not in the nature of a license fee, but of an excise upon a franchise or privilege, and that the defendant enjoyed no franchises or privileges conferred upon it by the legislature. The defendant was a partnership, the peculiar feature of which was that by agreement between the partners the interest of each might be transferred in much the same manner as stock in an incorporated company. This peculiar feature was held not to be a commodity within the meaning of the Constitution. It is to be noticed that the tax intended to be imposed was not upon a business or employment. The statute in terms applied only to certain kinds of partnership, leaving other partnerships and persons doing the same kinds of business untaxed, and the partnerships taxed possessed no especial privileges derived from the legislature. In *Portland Bank* v. *Apthorp*, it was said of excises: "Taxes of this sort must undoubtedly be equal; that is, they must operate upon all persons who exercise the employment which is so taxed." As the tax considered in *Gleason* v. *McKay* was not upon a business or employment, and as there was no franchise or privilege conferred by the legislature, the distinction between partnerships with transferrible shares and those without rendered the tax unequal and unreasonable, because it was a discrimination founded upon an immaterial fact. See *Oliver* v. *Washington Mills*, 11 Allen, 268.

When the Constitution of Massachusetts was adopted, Massachusetts was in many respects an independent State, and the legislature could lay duties and imposts on imported goods, wares, and merchandise, as well as excises on domestic goods, wares, merchandise, and commodities, and taxes and assessments upon the persons and estates of the inhabitants. The Constitution of the United States took from the States the right to lay imposts and duties on imports and exports, but it did not affect the other powers of taxation possessed by the States, unless they interfered with the powers granted to the United States. The language of the Constitution of Massachusetts is general, and may well be held to authorize the laying of excises upon all such gainful employments and privileges as are created or may be regulated by law, and commonly have been considered legitimate subjects of taxation in other States and countries. We are of opinion that the privilege of transmitting and receiving by will or descent property on the death of the owner is a commodity within the meaning of this word in the Constitution, and that an excise may be laid upon it. Although St. 1891, c. 425, in form imposes a tax upon the property which passes in the manner described in the first section, yet the tax plainly is not meant to be a substitute for the annual tax upon estates, or to be an additional tax of that nature; the statute can only take effect by regarding the tax as an excise, and the statute should be so construed as to take effect, if such a construction reasonably can be given to it. We see no difficulty in doing this, and are of opinion that the statute was intended to impose a tax in the nature of an excise.

The only other condition expressed in the Constitution is that duties and excises must be reasonable. In *Connecticut Mutual Life Ins. Co.* v. *Commonwealth*, 133 Mass. 161, 163, the court say: "The power to determine what callings, franchises, or privileges, or, to use the language of the Constitution, 'commodities,' shall be subjected to an excise, and the amount of such excise belongs exclusively to the legislature. The provision that it must be 'reasonable' was not designed to give to the judicial department the right to revise the decisions of the legislature as to the policy and expediency of an excise. Great latitude of discretion is given to the legislature in determining not only what 'commodity' shall be subjected to excise, but also the amount of the excise and the standard or measure to be adopted as the foundation of the proposed excise. The court cannot declare a tax or excise illegal and void, as being unreasonable, unless it is unequal, or plainly and grossly oppressive, and contrary to common right."

The tax imposed by the statute we are considering is said to be unequal, because it is not imposed upon all estates and upon all heirs, devisees, legatees, and distributees. To make a distinction between collateral kindred, or strangers in blood, and kindred in the direct line in reference to the assessment of such a tax, either by exempting the kindred in the direct line or by imposing on collaterals and strangers a higher rate of taxation, has the sanction of nearly all States which have levied taxes of this kind. It has a sanction in reason, for the moral claim of collaterals and strangers is less than that of kindred in the direct line, and the privilege is therefore greater. The tax imposed by this statute is uniformly imposed upon all estates and all persons within the description contained in it, and the tax is not plainly and grossly oppressive in amount.

It is also contended that the tax is unreasonable on account of the exemption contained in the proviso of the first section of the statute. In all, or nearly all, systems of taxation there are some exemptions, but the objection here is that estates whose value, after the payment of all debts, shall not exceed ten thousand dollars are exempt without regard to the value of the property received by the devisees, legatees, heirs, or distributees. It is argued that the excise, if upon the privilege of taking property by will or descent, should be the same whenever the privilege enjoyed is the same in kind and extent, whatever may be the value of the estate, and that the exemptions should relate to the value of the property received by those who have the privilege of receiving it, and not to the value of the estate. But the right or privilege taxed can, perhaps, be regarded either as the right or privilege of the owner of property to transmit it on his death by will or descent to certain persons, or as the right or privilege of these persons to receive the property. The tax, too, has some of the characteristics of a duty on the administration of estates. The cost of administering small estates is proportionately greater than that of administering large ones; and this of itself, particularly in intestate estates, operates to diminish the amounts received

very much as a tax would. The statutes of the different States and nations which have levied taxes on devises, legacies, and inheritances have usually made exemptions, and these have sometimes related to the value of the estates and sometimes to the value of the property received by the heirs, devisees, legatees, or distributees. The exemption in the statute under consideration is certainly large as an exemption of estates, but it is peculiarly within the discretion of the legislature to determine what exemptions should be made in apportioning the burdens of taxation among those who can best bear them, and we are not satisfied that this exemption is so clearly unreasonable as to require us to declare the statute void.

The result is, in the opinion of a majority of the court, that in *Williams* v. *Bowditch*, the judgment rendered for the defendant must be affirmed; and that in *West* v. *Phillips et al.*, as no other objection has been taken to the decree of the Probate Court, the decree must be affirmed.

In *Minot* v. *Winthrop* there are several remaining questions.[1] . . .

LATHROP, J. I am unable to concur in the opinion of the majority of the court. It proceeds upon the grounds that "the privilege of transmitting and receiving by will or descent property on the death of the owner is a commodity within the meaning of this word in the Constitution," and that the tax imposed is a reasonable one. I differ from my brethren on both grounds.

The meaning of the word "commodity" was first defined in *Portland Bank* v. *Apthorp*, 12 Mass. 252, as meaning "privilege, profit, and gains." The tax in that case, which was upon the stock of banking corporations, was held to be constitutional on the historical ground that the legislature had exercised the right for thirty years of exacting a sum of money, in the nature of a license, from those carrying on certain employments; that this was a contemporaneous construction of the Constitution, and was therefore justified; and that the same principle applied to corporations as to individuals. In other words, the word "commodity" was held to mean the privilege of carrying on business, because the legislature both before and soon after the framing of the Constitution had levied an excise tax on certain classes of business.

In all the subsequent cases where an excise tax has been held to be constitutional, the decision has been put upon the ground that the tax was upon the franchise of the corporation; namely, upon its privilege of doing business. *Commonwealth* v. *People's Five Cents Savings Bank*, 5 Allen, 428; *Commonwealth* v. *Lowell Gas Light Co.*, 12 Allen, 75; *Commonwealth* v. *Hamilton Manuf. Co.*, 12 Allen, 298; *Commonwealth* v. *Provident Institution for Savings*, 12 Allen, 312;

[1] For a like decision in Maine (July, 1894), see *State* v. *Hamlin*, 30 Atl. Rep. 76. See also *supra*, p. 1271. Compare *Matter of Tax on Est. of Hoffman*, 12 N. Y. Law Journal, 189 (Oct. 20, 1894, N. Y. Court of Appeals); *State* v. *U. S. & Can. Exp. Co.*, 60 N. H. 219 (1890). — ED.

Manufacturers' Ins. Co. v. *Loud*, 99 Mass. 146; *Commonwealth* v. *Lancaster Savings Bank*, 123 Mass. 493; *Attorney-General* v. *Bay State Mining Co.* 99 Mass. 148; *Commonwealth* v. *Barnstable Savings Bank*, 126 Mass. 526; *Connecticut Ins. Co.* v. *Commonwealth*, 133 Mass. 161.

In *Commonwealth* v. *Lancaster Savings Bank*, 123 Mass. 493, by the terms of the statute, a tax was to be assessed on the first day of May on the average amount of deposits for the six months preceding that day. In the preceding December the bank was restrained by an injunction from doing further business, and placed in the hands of receivers. The corporation was not dissolved by these proceedings, and it was contended that it was liable to pay the tax. It was, however, held that the tax was a franchise tax upon the privilege of doing business, and that, as the bank was not doing business on the first day of May, it was not liable.

It will be noticed in the case last cited that the tax was on the average amount of deposits during the six months prior to a certain day. During some of these months it had received deposits, but, as it was not doing business on the day named, it was held not to be liable to the tax.

In *Gleason* v. *McKay*, 134 Mass. 419, the legislature sought to impose an excise tax upon copartnerships "in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer." The statute was held to be unconstitutional. Morton, C. J., said: "The imposition is clearly not in the nature of a license fee, but is an excise upon a franchise or privilege. The right to levy excises upon franchises has never been extended further than to corporate franchises specially granted by the government, or enjoyed or exercised by its permission. . . . If this tax can be upheld, it seems to us that the necessary result will be that the legislature has the power to select any business, occupation, or calling carried on, or any natural right enjoyed, under the protection of our laws, and impose upon it at its will a special tax or excise, this would be extending the meaning of the word 'commodities' beyond any reasonable limits. Its effect would be to break down the limitations which the Constitution intended to impose upon the power of the legislature, for the purpose of securing the end that all sums necessary for the defence and support of the government should as far as practicable be raised by the equal taxation of the people."

The case last cited seems to me not distinguishable from the case at bar. I am also unable to see, if the privilege of transmitting and receiving by will or descent property on the death of the owner is to be considered a commodity, why the privilege of holding property cannot be considered a commodity, and why all taxes cannot be levied as excise taxes, and the burden of supporting the government be imposed upon one class in the community without regard to proportion or equality, and thus the intent of the Constitution be entirely disregarded.

I fail also to see how the tax sought to be levied, by the statute before us, if it is an excise tax, can be regarded as "reasonable." This word has always been held to include among its requirements equality. Thus in *Portland Bank* v. *Apthorp*, 12 Mass. 252, 258, it was said by Parker, C. J.: "Taxes of this sort must undoubtedly be equal; that is, they must operate upon all persons who exercise the employment which is so taxed. A tax upon one particular moneyed capital would unquestionably be contrary to the principles of justice, and could not be supported." See also *Oliver* v. *Washington Mills*, 11 Allen, 268, 280; *Connecticut Ins. Co.* v. *Commonwealth*, 133 Mass. 161.

So far as I am aware no excise tax heretofore passed in this Commonwealth has contained any exemptions. Assuming that reasonable exemptions may be allowed, it seems to me that the legislature in the statute now before us has so far exceeded its powers that the exemptions should be considered so unreasonable and to work so great an inequality, that the Act should be pronounced unconstitutional.

Without dwelling upon the exemption of direct heirs, and of charitable, educational, or religious societies, which appears to me reasonable, if any exemptions are to be allowed, it seems to me that the proviso at the end of the first section is entirely unreasonable. This provides "that no estate shall be subject to the provisions of this Act unless the value of the same, after the payment of all debts, shall exceed the sum of ten thousand dollars." The effect of this is to throw a burdensome tax of five per cent, equal to a year's income, upon a class of estates small in comparison with the large number of estates yearly administered upon in this Commonwealth.

In other States of this country, whose constitutions allow an excise tax of this nature, there is no exemption in some, while in others the exemptions run from $250 to $500, and in none does it exceed $1,000. See Dos Passos on Collateral Inheritance Taxes, 45 *et seq.*

There is also another difficulty to which I see no answer. If this tax is to be considered constitutional on the ground that it is a tax upon the privilege of taking by devise or succession, there is clearly on the face of the Act no equality. Suppose A and B die seised of separate estates the respective values of which, after payment of debts, are nine and over ten thousand dollars. A bequeaths a legacy to C of five thousand dollars, and B bequeaths a legacy to D of the same amount. C and D each enjoy the same privilege; yet C pays no tax, while D pays a tax of $250. Can this be said to be equal or even reasonable? The necessary effect of the tax is to produce inequality; and, in my judgment, it is as much the duty of the court to declare the statute to be in violation of the Constitution as if it imposed a tax upon property and were disproportionate, as was done in *Cheshire* v. *County Commissioners*, 118 Mass. 386.

PART IV.

CHAPTER VIII.

EX POST FACTO[1] AND RETROACTIVE LAWS.

From Madison's *Debates in the Federal Convention*, 5 Ell. Deb. 462.

[Aug. 22, 1787.] Mr. Gerry and Mr. M'Henry moved to insert, after the second section, article 7 [of the Report of the Committee of Detail, 5 Ell. Deb. p. 379], the clause following, to wit: — "The legislature shall pass no bill of attainder, nor any *ex post facto* law." Mr. Gerry urged the necessity of this prohibition, which, he said, was greater in the national than the State legislature; because, the number of members in the former being fewer, they were on that account the more to be feared. Mr. Gouverneur Morris thought the precaution as to *ex post facto* laws unnecessary, but essential as to bills of attainder. Mr. Ellsworth contended, that there was no lawyer, no civilian, who would not say that *ex post facto* laws were void of themselves. It cannot, then, be necessary to prohibit them. Mr. Wilson was against inserting anything in the Constitution as to *ex post facto* laws. It will bring reflections on the Constitution, and proclaim that we are ignorant of the first principles of legislation, or are constituting a government that will be so. The question being divided, the first part of the motion, relating to bills of attainder, was agreed to, *nem. con.* On the second part, relating to *ex post facto* laws, Mr. Carroll remarked, that experience overruled all other calculations. It had proved that, in whatever light they might be viewed by civilians or others, the State legislatures had passed them, and they had taken effect. Mr. Wilson. — If these prohibitions in the State constitutions have no effect, it will be useless to insert them in this Constitution. Besides, both sides will agree to the principle, but will differ as to its application. Mr. Williamson. — Such a prohibitory clause is in the Constitution of North Carolina; and, though it has been violated, it has done good there, and may do good here, because the judges can take hold of it. Dr. Johnson thought the clause unnecessary, and implying an improper suspicion of the national legislature. Mr. Rutledge was in favor of the clause. On the question for inserting the prohibition of *ex post facto* laws, — New Hampshire, Massachusetts, Delaware, Maryland, Virginia, South Carolina, Georgia, ay, 7; Connecticut, New Jersey, Pennsylvania, no, 3; North Carolina, divided.

Ibid. 485. [Aug. 28.] Mr. King moved to add, in the words used in the ordinance of Congress establishing new States, a prohibition on the States to interfere in private contracts. Mr. Gouverneur Morris. — This would be going too far. There are a thousand laws relating to bringing actions, limitations of actions, &c., which affect contracts. The judicial power of the United States will be a protection in cases within their jurisdiction; and within the State itself a majority must rule, whatever may be the mischief done among themselves. Mr. Sherman — Why then prohibit bills of credit? Mr. Wilson was in favor of Mr. King's motion. Mr. Madison admitted that inconveniences might arise from such a prohibition; but thought on the

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[1] **Ex post facto**. . . [med. L. phrase, lit. "from what is done afterwards" (*ex*, from, out of; *postfacto*, abl. of *postfactum*, neut. pa. pple. of *postfacĕre*, f. *post*, after, and *facĕre*, to do). The separation of *postfacto* in current spelling is erroneous.] From an after act or deed; = "after the fact." . . .

Quasi-adj. Done after another thing, and operating retrospectively, *esp.* in *Ex post facto* law. . . . — Dr. Murray's *New English Dictionary*, p. 443. — Ed.

whole it would be overbalanced by the utility of it. He conceived, however, that a negative on the State laws could alone secure the effect. Evasions might and would be devised by the ingenuity of the legislatures. Col. Mason. — This is carrying the restraint too far. Cases will happen, that cannot be foreseen, where some kind of interference will be proper and essential. He mentioned the case of limiting the period for bringing actions on open account, — that of bonds after a certain lapse of time, — asking, whether it was proper to tie the hands of the States from making provision in such cases. Mr. Wilson. — The answer to these objections is, that retrospective *interferences* only are to be prohibited. Mr. Madison. — Is not that already done by the prohibition of *ex post facto* laws, which will oblige the judges to declare such interferences null and void. Mr. Rutledge moved, instead of Mr. King's motion, to insert, "nor pass bills of attainder, nor retrospective [in the printed Journal, "*ex post facto*"] laws." On which motion, — New Hampshire, New Jersey, Pennsylvania, Delaware, North Carolina, South Carolina, Georgia, ay, 7 ; Connecticut, Maryland, Virginia, no, 3.

Ibid. 488. [Aug. 29.] Mr. Dickinson mentioned to the House, that, on examining Blackstone's Commentaries, he found that the term "*ex post facto*" related to criminal cases only ; that they would not, consequently, restrain the States from retrospective laws in civil cases; and that some further provision for this purpose would be requisite.

[On September 14, the Committee of Revision reported a "Revised Draft of the Constitution," which is found in 1 Ell. Deb. 298. Art. I., s. 10, began thus: "No State shall coin money . . . nor pass any bill of attainder, nor *ex post facto* laws, nor laws altering or impairing the obligation of contracts ; nor," &c. — Ed.]

Ibid. 545. [Sept. 14.] Col. Mason moved to strike out from the clause (article 1, sect. 9) "no bill of attainder, nor any *ex post facto* law, shall be passed," the words "nor any *ex post facto* law." He thought it not sufficiently clear that the prohibition meant by this phrase was limited to cases of a criminal nature ; and no legislature ever did or can altogether avoid them in civil cases. Mr. Gerry seconded the motion ; but with a view to extend the prohibition to "civil cases," which he thought ought to be done. On the question, all the states were, no.

Ibid. 546. [Sept. 14.] The first clause of article 1, sect. 10, was altered so as to read, — "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." Mr. Gerry 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. He made a motion to that effect. He was not seconded.

[The foregoing passages comprise all in "Madison's Debates" that throws light on the phrases "*ex post facto* laws," and "laws impairing the obligation of contracts." In reading the earlier judicial opinions on questions arising under the Constitution of the United States, it should be remembered that "Madison's Debates" was not made public until 1840. The Convention sat with closed doors. At its dissolution, the "journal and other papers" were intrusted to Washington, the President, with instructions to retain them, "subject to the order of Congress, if ever formed under the Constitution." In 1796 Washington deposited these in the State Department ; and in 1819 the Journal was for the first time published, under direction of Congress. This publication gave but a meagre idea of what took place in the Convention. Our chief source of instruction, "Madison's Debates," was first published, by order of Congress, in 1840. This fact may help to account for the views of Mr. Justice Johnson, on *ex post facto* laws, in his note to *Satterlee* v. *Matthewson*, 2 Pet. 380, 681 (1829). See 8 Am. Law Rev. 200. — Ed.]

CALDER *v.* BULL.

SUPREME COURT OF THE UNITED STATES. 1798.

[3 *Dallas*, 386.]

IN error from the State of Connecticut. The cause was argued at the last term (in the absence of the chief justice), and now the court delivered their opinions *seriatim*.

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 [21st] 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.

It appears to me a self-evident proposition, that the several State legislatures retain all the powers of legislation delegated to them by the State constitutions, which are not expressly taken away by the Constitution of the United States. The establishing courts of justice, the appointment of judges, and the making regulations for the administration of justice within each State, according to its laws, on

all subjects not intrusted to the Federal government, appear to me to be the peculiar and exclusive province and duty of the State legislatures. All the powers delegated by the people of the United States to the Federal government are defined, and no constructive powers can be exercised by it, and all the powers that remain in the State governments are indefinite, except only in the Constitution of Massachusetts.

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

Whether the legislature of any of the States can revise and correct, by law, a decision of any of its courts of justice, although not prohibited by the Constitution of the State, is a question of very great importance, and not necessary now to be determined, because the resolution or law in question does not go so far. I cannot subscribe to the omnipotence of a State legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution, or fundamental law of the State. The people of the United States erected their constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require, nor to refrain from acts which the laws permit. There are acts which the Federal or State legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An Act of the Legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be

considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A, and gives it to B. It is against all reason and justice for a people to intrust a legislature with such powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit of our State governments amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid and punish; they may declare new crimes, and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our Federal or State legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy altogether inadmissible in our free republican governments.

All the restrictions contained in the Constitution of the United States, on the power of the State legislatures, were provided in favor of the authority of the Federal government. The prohibition against 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

[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. 2, c. 10; and of Bishop Atterbury, in 1723, 9 Geo. I., c. 17.

[4] The Conventry Act, in 1670, 22 & 23 Car. 2, c. 1.

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 any *ex post facto* law," necessarily requires some explanation; for naked and without explanation it is unintelligible, and means nothing. Literally it is only that a law shall not be passed concerning, and after the fact, or thing done, or action committed. I would ask, what fact; of what nature or kind; and by whom done? That Charles I., King of England, was beheaded; that Oliver Cromwell was Protector of England; that Louis XVI., late King of France, was guillotined, — are all facts that have happened, but it would be nonsense to suppose that the States were prohibited from making any law after either of these events, and with reference thereto. The prohibition in the letter is not to pass any law concerning and after the fact, but the plain and obvious meaning and intention of the prohibition is this, that the legislatures of the several States shall not pass laws after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights, of either property or contracts. The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any *ex post facto* law, was to secure the person of the subject from injury or punishment, in consequence of such law. If the prohibition against making *ex post facto* laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated were unnecessary, and therefore improper, for both of them are retrospective.

I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 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.

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

In the Declaration of Rights, by the Convention of Massachusetts, part first, section 24th, "Laws made to punish actions done before the existence of such laws, and which have not been declared crimes by

preceding laws, are unjust, &c." In the Declaration of Rights, by the Convention of Maryland, article 15th, "Retrospective laws punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, &c." In the Declaration of Rights by the Convention of North Carolina, article 24th, I find the same definition, precisely in the same words as in the Maryland Constitution. In the Declaration of Rights by the Convention of Delaware, article 11th, the same definition was clearly intended, but inaccurately expressed; by saying, "laws punishing offences (instead of actions, or facts) committed before the existence of such laws, are oppressive, &c."

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

In 2 Lord Raymond, 1352, Raymond, J., called the stat. 7 Geo. 1, stat. 2, pt. 8, about registering contracts for South Sea stock, an *ex post facto* law; because it affected contracts made before the statute.

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

It was argued by the counsel for the plaintiffs in error, that the Legislature of Connecticut had no constitutional power to make the resolution, or law, in question, granting a new hearing, &c. Without giving an opinion, at this time, whether this court has jurisdiction to decide that any law made by Congress, contrary to the Constitution of the United States, is void, I am fully satisfied that this court has no jurisdiction to determine that any law of any State legislature, contrary to the Constitution of such State, is void. Further, if this court had such jurisdiction, yet it does not appear to me, that the resolution, or law, in question, is contrary to the Charter of Connecticut, or its Constitution, which is said by counsel to be composed of its charter, Acts of Assembly, and usages and customs. I should think that the courts of Connecticut are the proper tribunals to decide whether laws

contrary to the Constitution thereof are void. In the present case they have, both in the Inferior and Superior Courts, determined that the resolution, or law, in question, was not contrary to either their State or the Federal Constitution.

To show that the resolution was contrary to the Constitution of the United States, it was contended that the words, *ex post facto* law, have a precise and accurate meaning, and convey but one idea to professional men, which is, "by matter of after fact; by something after the fact." And Co. Litt. 241; Fearne's Cont. Rem. (old ed.) 175 and 203; Powell on Devises, 113, 133, 134, were cited; and the table to Coke's Reports (by Wilson), title *ex post facto*, was referred to. There is no doubt that a man may be a trespasser from the beginning, by matter of after fact; as where an entry is given by law, and the party abuses it; or where the law gives a distress, and the party kills, or works the distress. I admit, an act unlawful in the beginning may, in some cases, become lawful by matter of after fact. I also agree that the words "*ex post facto*" have the meaning contended for, and no other, in the cases cited, and in all similar cases where they are used unconnected with, and without relation to, legislative acts, or laws.

There appears to me a manifest distinction between the case where one fact relates to, and affects another fact, as where an after fact, by operation of law, makes a former fact either lawful or unlawful; and the case where a law made after a fact done, is to operate on, and to affect such fact. In the first case both the acts are done by private persons. In the second case the first act is done by a private person, and the second act is done by the legislature to affect the first act. I believe that but one instance can be found in which a British judge called a statute that affected contracts made before the statute, an *ex post facto* law; but the judges of Great Britain always considered penal statutes, that created crimes, or increased the punishment of them, as *ex post facto* laws.

If the term *ex post facto* law is to be construed to include and to prohibit the enacting any law after a fact, it will greatly restrict the power of the Federal and State legislatures; and the consequences of such a construction may not be foreseen. If the prohibition to make no *ex post facto* law extends to all laws made after the fact, the two prohibitions, not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were improper and unnecessary.

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

the States pass no law to deprive a citizen of any right vested in him by existing laws. It is not to be presumed that the Federal or State legislatures will pass laws to deprive citizens of rights vested in them by existing laws; unless for the benefit of the whole community; and on making full satisfaction. The restraint against making any *ex post facto* laws was not considered, by the framers of the Constitution, as extending to prohibit the depriving a citizen even of a vested right to property; or the provision, "that private property should not be taken for public use, without just compensation," was unnecessary.

It seems to me that the right of property, in its origin, could only arise from compact express, or implied, and I think it the better opinion, that the right, as well as the mode or manner of acquiring property, and of alienating or transferring, inheriting or transmitting it, is conferred by society, is regulated by civil institution, and is always subject to the rules prescribed by positive law. When I say that a right is vested in a citizen, I mean, that he has the power to do certain actions, or to possess certain things, according to the law of the land. If any one has a right to property, such right is a perfect and exclusive right; but no one can have such right before he has acquired a better right to the property than any other person in the world; a right, therefore, only to recover property cannot be called a perfect and exclusive right. I cannot agree, that a right to property vested in Calder and wife, in consequence of the decree of the 21st of March, 1783, disapproving of the will of Morrison, the grandson. If the willwas valid, Mrs. Calder could have no right, as heiress of Morrison, the physician; but if the will was set aside, she had an undoubted title.

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

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

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

[The concurring opinions of JUSTICES PATERSON, IREDELL, and CUSHING are omitted.] [1]

[1] In the course of MR. JUSTICE IREDELL'S opinion he said: "If then, a government, composed of legislative, executive, and judicial departments, were established by a constitution which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully

WATSON ET AL. *v.* MERCER ET AL.

SUPREME COURT OF THE UNITED STATES. 1834.

[8 *Pet.* 88; 11 *Curtis's Decisions*, 38.][1]

THE case is stated in the opinion of the court.

Hopkinson and *Montgomery*, for the plaintiff. *Rogers*, *contra*.

STORY, J., delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Pennsylvania, brought under the 25th section of the Judiciary Act of 1789. 1 Stats. at Large, 85.

enacted, and the judicial power could never interpose to pronounce it void. It is true, that some speculative jurists have held, that a Legislative Act against natural justice must, in itself, be void; but I cannot think, that under such a government any court of justice would possess a power to declare it so. Sir William Blackstone, having put the strong case of an Act of Parliament which should authorize a man to try his own cause, explicitly adds, that even in that case, 'there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words as leave no doubt whether it was the intent of the legislature or no.' 1 Bl. Comm. 91.

"In order, therefore, to guard against so great an evil, it has been the policy of all the American States, which have, individually, framed their State constitutions since the Revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any Act of Congress, or of the Legislature of a State, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject; and all that the court could properly say, in such an event, would be, that the legislature, possessed of an equal right of opinion, had passed an Act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights in which the subject can be viewed: 1st. If the legislature pursue the authority delegated to them, their Acts are valid. 2d. If they transgress the boundaries of that authority, their Acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust; but in the latter case, they violate a fundamental law, which must be our guide whenever we are called upon as judges to determine the validity of a Legislative Act."

Compare *Satterlee* v. *Matthewson*, 2 Pet. 380 (1829); s. c. *infra*, p. 1617.

Legislation of this same character is still upheld in Connecticut (*Wheeler's Appeal*, 45 Conn. 306, 1877), on the ground of established usage. *Contra*, in Pennsylvania, *De Chastellux* v. *Fairchild*, 15 Pa. St. 18 (1850), overruling *Braddee* v. *Brownfield*, 2 W. & S. 271 (1841).

In Massachusetts, long after the adoption of the Constitution, the legislature continued the practice of granting new trials and the like; *e. g.*, see the Resolves of the General Court of June 5, 1784; and often subsequently. A Resolve of this character, of Feb. 15, 1813, was held inoperative, and the principle condemned, in *Holden* v. *James*, 11 Mass. 396 (1814). Compare Cooley, Const. Lim. (6th ed.), 113, 484. — ED.

[1] The case is taken from Curtis's Decisions. — ED.

The original suit is an ejectment by the defendants in error for certain lands in Lancaster County in the State of Pennsylvania, upon which a final judgment was rendered in their favor. The facts, so far as they are material to the questions over which this court has jurisdiction, are these. On the 8th of May, 1785, James Mercer and Margaret, his wife, executed a deed of the premises, then being the property of the wife, to Nathan Thompson, in fee, who afterwards, on the same day, reconveyed the same to James Mercer, the husband, in fee; the object of the deeds being to vest the estate in the husband. The certificate of the acknowledgment of the deed of Mercer and wife to Thompson, by the magistrate who took the same, does not set forth all the particulars, as were required by the law of Pennsylvania of the 24th of February, 1770, respecting the acknowledgment of deeds of *femes covert*. The Legislature of Pennsylvania, on the 26th of April, 1826, passed an Act, the object of which was to cure all defective acknowledgments of this sort, and to give them the same efficacy as if they had been originally taken in the proper form. The plaintiffs in the ejectment claimed title to the premises under James Mercer, the husband; and the defendants, as heirs at law of his wife, who died without issue. The ejectment was brought after the passage of the Act of 1826.

In the case of the *Lessee of Watson and Wife* v. *Bailey*, 1 Binney, 470, the acknowledgment of this very deed from Mercer and wife to Thompson was held to be fatally defective to pass her title. But the Act of 1826 has been repeatedly held by the Supreme Court of Pennsylvania to be constitutional, and to give validity to such defective acknowledgments. It was so held in *Barnet* v. *Barnet*, 15 Serg. & R. 72, and *Tate and Wife* v. *Stooltzfoos*, 16 Id. 35, and again, upon solemn deliberation and argument, in the case now before this court. The object of the present writ of error is to revise the opinions thus pronounced by the highest State court.

Our authority to examine into the constitutionality of the Act of 1826 extends no further than to ascertain whether it violates the Constitution of the United States; for the question whether it violates the Constitution of Pennsylvania, is, upon the present writ of error, not before us.

The Act of 1826 provides "that no grant, &c., deed of conveyance, &c., heretofore *bonâ fide* made and executed by husband and wife, and acknowledged by them before some judge, &c., authorized by law, &c., to take such acknowledgment as aforesaid, before the 1st day of September next, shall be deemed, held, or adjudged invalid, or defective, or insufficient in law, or avoided, or prejudiced, by reason of any informality or omission in setting forth the particulars of the acknowledgment made before such officer as aforesaid, in the certificate thereof; but all and every such grant, &c., deed of conveyance, &c., so made, executed, and acknowledged, as aforesaid, shall be as good, valid, and effectual in law, for transferring, passing, and conveying the

estate, right, and title, and interest of such husband and wife of, in, and to the lands, &c., mentioned in the same, as if all the requisites and particulars of such acknowledgment mentioned in the Act, to which this is supplementary, were particularly set forth in the certificate thereof, or approved upon the face of the same."

The argument for the plaintiffs in error is, first, that the Act violates the Constitution of the United States, because it divests their vested rights as heirs at law of the premises in question; and secondly, that it violates the obligation of a contract, that is, of the patent granted by the proprietaries of Pennsylvania to Samuel Patterson, the ancestor of the original defendants, from whom they trace their title to the premises, by descent through Margaret Mercer.

As to the first point, it is clear that this court has no right to pronounce an Act of the State legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the States from passing retrospective laws generally, but only *ex post facto* laws. Now it has been solemnly settled by this court, that the phrase *ex post facto* laws is not applicable to civil laws, but to penal and criminal laws, which punish [a] party for acts antecedently done which were not punishable at all, or not punishable to the extent or in the manner prescribed. In short, *ex post facto* laws relate to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively. The cases of *Calder* v. *Bull*, 3 Dall. 386, 1 Cond. Rep. 172; *Fletcher* v. *Peck*, 6 Cranch, 87, 2 Cond. Rep. 308; *Ogden* v. *Saunders*, 12 Wheat. 266, 6 Cond. Rep. 523; and *Satterlee* v. *Matthewson*, 2 Pet. 380, fully recognize this doctrine.

In the next place, does the Act of 1826 violate the obligation of any contract? In our judgment, it certainly does not, either in its terms or its principles. It does not even affect to touch any title acquired by a patent or any other grant. It supposes the titles of the *femes covert* to be good, however acquired; and only provides that deeds of conveyance made by them shall not be void, because there is a defective acknowledgment of the deeds, by which they have sought to transfer their title. So far, then, as it has any legal operation, it goes to confirm, and not to impair the contract of the *femes covert*. It gives the very effect to their acts and contracts which they intended to give; and which, from mistake or accident, has not been effected. This point is so fully settled by the case of *Satterlee* v. *Matthewson*, 2 Pet. 380, that it is wholly unnecessary to go over the reasoning upon which it is founded.

Upon the whole, it is the unanimous opinion of the court, [that] there is no error in the judgment of the Supreme Court of Pennsylvania, so far as it is subject to the revision of this court, and therefore it is affirmed, with costs.[1]

[1] And so *Balt. & Susq. R. R. Co.* v. *Nesbit*, 10 How. 395 (1850). — Ed.

CUMMINGS *v.* THE STATE OF MISSOURI.

SUPREME COURT OF THE UNITED STATES. 1866.

[4 *Wall.* 277.]

IN January, 1865, a convention of representatives of the people of Missouri assembled at St. Louis, for the purpose of amending the Constitution of the State. The representatives had been elected in November, 1864. In April, 1865, the present Constitution — amended and revised from the previous one — was adopted by the convention; and in June, 1865, by a vote of the people. . . . [Here follows a recital of several sections of this instrument: (1) Disqualifying as voters at any election under the Constitution, or any law of the State or any ordinance or by-law of a municipal corporation, all persons who had ever been "in armed hostility to the United States," or had done any one of several specified acts, or had ever "by act or word manifested his adherence to the cause of such enemies, or his desire for their triumph . . . or his sympathy with" the enemies of the government of the United States; and so on with much detail. All such persons were also declared disqualified to hold "any office of trust, honor, or profit," under State authority, and from being an officer, &c., of any corporation in the State, public or private, or professor or teacher in any educational institution or school, or holding real estate in trust for any religious association: (2) Prescribing an oath, denying such disqualifications, to be taken by all the classes of persons in the State holding office, &c., who are indicated above: (3) Forbidding, after sixty days, all who do not take the said oath from acting as attorneys or counsellors at law, or bishop, priest, . . . or other clergyman of any religious persuasion, under penalties of fine and imprisonment: (4) Declaring the false taking of said oath to be perjury, and fixing the punishment thereof.]

In September, A. D. 1865, after the adoption of this Constitution, the Reverend Mr. Cummings, a priest of the Roman Catholic Church, was indicted and convicted in the Circuit Court of Pike County, in the State of Missouri, of the crime of teaching and preaching in that month, as a priest and minister of that religious denomination, without having first taken the oath prescribed by the Constitution of the State; and was sentenced to pay a fine of five hundred dollars, and to be committed to jail until said fine and costs of suit were paid.

On appeal to the Supreme Court of the State, the judgment was affirmed; and the case was brought to this court on writ of error, under the twenty-fifth section of the Judiciary Act.

Mr. David Dudley Field, for Mr. Cummings, plaintiff in error. *Mr. Montgomery Blair* filed a brief on the same side. *Mr. Reverdy Johnson*, for the plaintiff in error, in reply.

Mr. G. P. Strong, *contra*, for the State, defendant in error. *Mr. J. B. Henderson*, on the same side.

Mr. Justice Field delivered the opinion of the court. . . .

We admit the propositions of the counsel of Missouri, that the States which existed previous to the adoption of the Federal Constitution possessed originally all the attributes of sovereignty; that they still retain those attributes, except as they have been surrendered by the formation of the Constitution, and the amendments thereto; that the new States, upon their admission into the Union, became invested with equal rights, and were thereafter subject only to similar restrictions, and that among the rights reserved to the States is the right of each State to determine the qualifications for office, and the conditions upon which its citizens may exercise their various callings and pursuits within its jurisdiction.

These are general propositions, and involve principles of the highest moment. But it by no means follows that, under the form of creating a qualification or attaching a condition, the States can in effect inflict a punishment for a past act which was not punishable at the time it was committed. The question is not as to the existence of the power of the State over matters of internal police, but whether that power has been made in the present case an instrument for the infliction of punishment against the inhibition of the Constitution.

Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession. Webster defines the term to mean "any natural endowment or any acquirement which fits a person for a place, office, or employment, or enables him to sustain any character, with success." It is evident from the nature of the pursuits and professions of the parties, placed under disabilities by the Constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions. There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrolment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counsellor to practise his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee. It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the

person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen. .

The disabilities created by the Constitution of Missouri must be regarded as penalties — they constitute punishment. We do not agree with the counsel of Missouri that "to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all." The learned counsel does not use these terms — life, liberty, and property — as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment. By statute 9 and 10 William III., chap. 32, if any person educated in or having made a profession of the Christian religion, did, "by writing, printing, teaching, or advised speaking," deny the truth of the religion, or the divine authority of the Scriptures, he was for the first offence rendered incapable to hold any office or place of trust; and for the second, he was rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, besides being subjected to three years' imprisonment without bail. 4 Black. 44.

By statute 1 George I., chap. 13, contempts against the king's title, arising from refusing or neglecting to take certain prescribed oaths, and yet acting in an office or place of trust for which they were required, were punished by incapacity to hold any public office; to prosecute any suit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of Parliament; and the offender was also subject to a forfeiture of five hundred pounds to any one who would sue for the same. Id. 124.

"Some punishments," says Blackstone, "consist in exile or banishment, by abjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment. Some extend to confiscation by forfeiture of lands or movables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors, and the like." Id. 377.

In France, deprivation or suspension of civil rights, or of some of

them, and among these of the right of voting, of eligibility to office, of taking part in family councils, of being guardian or trustee, of bearing arms, and of teaching or being employed in a school or seminary of learning, are punishments prescribed by her code.

The theory upon which our political institutions rest is, that all men have certain inalienable rights — that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty, or property, but also embracing deprivation or suspension of political or civil rights, and the disabilities prescribed by the provisions of the Missouri Constitution being in effect punishment, we proceed to consider whether there is any inhibition in the Constitution of the United States against their enforcement.

The counsel for Missouri closed his argument in this case by presenting a striking picture of the struggle for ascendency in that State during the recent Rebellion between the friends and the enemies of the Union, and of the fierce passions which that struggle aroused. It was in the midst of the struggle that the present Constitution was framed, although it was not adopted by the people until the war had closed. It would have been strange, therefore, had it not exhibited in its provisions some traces of the excitement amidst which the convention held its deliberations.

It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. In *Fletcher* v. *Peck*, 6 Cranch, 137, Mr. Chief Justice Marshall, speaking of such action, uses this language: "Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State."

"'No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.'" . . . [The court here holds that the new Constitution is a bill of attainder within the meaning of this clause.]

We proceed to consider the second clause of what Mr. Chief Justice Marshall terms a bill of rights for the people of each State — the clause which inhibits the passage of an *ex post facto* law.

By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.

In *Fletcher* v. *Peck*, Mr. Chief Justice Marshall defined an *ex post facto* law to be one "which renders an act punishable in a manner in which it was not punishable when it was committed." "Such a law," said that eminent judge, "may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime, which was not declared by some previous law to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing for public use the estate of an individual, in the form of a law annulling the title by which he holds the estate? The court can perceive no sufficient grounds for making this distinction. This rescinding Act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?"

The Act to which reference is here made was one passed by the State of Georgia, rescinding a previous Act, under which lands had been granted. The rescinding Act, annulling the title of the grantees, did not, in terms, define any crimes, or inflict any punishment, or direct any judicial proceedings; yet, inasmuch as the legislature was forbidden from passing any law by which a man's estate could be seized for a crime, which was not declared such by some previous law rendering him liable to that punishment, the chief justice was of opinion that the rescinding Act had the effect of an *ex post facto* law, and was within the constitutional prohibition.

The clauses in the Missouri Constitution, which are the subject of consideration, do not, in terms, define any crimes, or declare that any punishment shall be inflicted, but they produce the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared. They assume that there are persons in Missouri who are guilty of some of the acts designated. They would have no meaning in the Constitution were not such the fact. They are aimed at past acts, and not future acts. They were intended especially to operate upon parties who, in some form or manner, by action or words, directly or indirectly, had aided or countenanced Rebellion, or sympathized with parties engaged in the Rebellion, or had endeavored to escape the proper responsibilities and duties of a citizen in time of war; and they were intended to operate by depriving such persons of the right to hold certain offices and trusts,

and to pursue their ordinary and regular avocations. This deprivation is punishment; nor is it any less so because a way is opened for escape from it by the expurgatory oath. The framers of the Constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed. To them there is no escape provided; to them the deprivation was intended to be, and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything else.

Now, some of the acts to which the expurgatory oath is directed were not offences at the time they were committed. It was no offence against any law to enter or leave the State of Missouri for the purpose of avoiding enrolment or draft in the military service of the United States, however much the evasion of such service might be the subject of moral censure. Clauses which prescribe a penalty for an act of this nature are within the terms of the definition of an *ex post facto* law — "they impose a punishment for an act not punishable at the time it was committed."

Some of the acts at which the oath is directed constituted high offences at the time they were committed, to which, upon conviction, fine and imprisonment, or other heavy penalties, were attached. The clauses which provide a further penalty for these acts are also within the definition of an *ex post facto* law — "they impose additional punishment to that prescribed when the act was committed."

And this is not all. The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way — by an inquisition, in the form of an expurgatory oath, into the consciences of the parties.

The objectionable character of these clauses will be more apparent if we put them into the ordinary form of a legislative Act. Thus, if instead of the general provisions in the Constitution the convention had provided as follows: Be it enacted, that all persons who have been in armed hostility to the United States shall, upon conviction thereof, not only be punished as the laws provided at the time the offences charged were committed, but shall also be thereafter rendered incapable of holding any of the offices, trusts, and positions, and of exercising any of the pursuits mentioned in the second article of the Constitution of Missouri; — no one would have any doubt of the nature of the enactment. It would be an *ex post facto* law, and void; for it would add a new punishment for an old offence. So, too, if the convention had passed an enactment of a similar kind with reference to those acts

which do not constitute offences. Thus, had it provided as follows: Be it enacted, that all persons who have heretofore, at any time, entered or left the State of Missouri, with intent to avoid enrolment or draft in the military service of the United States, shall, upon conviction thereof, be forever rendered incapable of holding any office of honor, trust, or profit in the State, or of teaching in any seminary of learning, or of preaching as a minister of the gospel of any denomination, or of exercising any of the professions or pursuits mentioned in the second article of the Constitution; — there would be no question of the character of the enactment. It would be an *ex post facto* law, because it would impose a punishment for an act not punishable at the time it was committed.

The provisions of the Constitution of Missouri accomplish precisely what enactments like those supposed would have accomplished. They impose the same penalty, without the formality of a judicial trial and conviction; for the parties embraced by the supposed enactments would be incapable of taking the oath prescribed; to them its requirement would be an impossible condition. Now, as the State, had she attempted the course supposed, would have failed, it must follow that any other mode producing the same result must equally fail. The provision of the Federal Constitution, intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the State is exerted. If this were not so, if that which cannot be accomplished by means looking directly to the end, can be accomplished by indirect means, the inhibition may be evaded at pleasure. No kind of oppression can be named, against which the framers of the Constitution intended to guard, which may not be effected. Take the case supposed by counsel — that of a man tried for treason and acquitted, or, if convicted, pardoned — the legislature may nevertheless enact that, if the person thus acquitted or pardoned does not take an oath that he never has committed the acts charged against him, he shall not be permitted to hold any office of honor or trust or profit, or pursue any avocation in the State. Take the case before us; — the Constitution of Missouri, as we have seen, excludes, on failure to take the oath prescribed by it, a large class of persons within her borders from numerous positions and pursuits; it would have been equally within the power of the State to have extended the exclusion so as to deprive the parties, who are unable to take the oath, from any avocation whatever in the State. Take still another case: — suppose that in the progress of events, persons now in the minority in the State should obtain the ascendency, and secure the control of the government; nothing could prevent, if the constitutional prohibition can be evaded, the enactment of a provision requiring every person, as a condition of holding any position of honor or trust, or of pursuing any avocation in the State, to take an oath that he had never advocated or advised or supported the imposition of the present expurgatory oath. Under this form of legislation the most flagrant invasion of private rights, in

periods of excitement, may be enacted, and individuals, and even whole classes, may be deprived of political and civil rights. . . .

The judgment of the Supreme Court 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. *And it is so ordered.*

The CHIEF JUSTICE, and MESSRS. JUSTICES SWAYNE, DAVIS, and MILLER dissented. In behalf of this portion of the court, a dissenting opinion was delivered by MR. JUSTICE MILLER. This opinion applied equally or more to the case of *Ex parte Garland* (the case next following), which involved principles of a character similar to those discussed in this case. The dissenting opinion is, therefore, published after the opinion of the court in that case.[1]

[1] In *Ex parte Garland*, 4 Wall. 333 (1866), a like decision was reached in the case of A. H. Garland, afterwards Attorney-General of the United States. He had been admitted as an attorney and counsellor of the Supreme Court of the United States, at the December Term of 1860. By Acts of Congress, of 1862 and 1865, it was made a necessary qualification for being admitted to the bar of any of the Federal courts, or of acting under any previous admission, that the person in question should make oath under penalties for perjury, that (among other things) he had never voluntarily aided any persons in armed hostility to the United States, or sought or exercised any office under, or voluntarily supported, any pretended government hostile to the United States. Garland, in July, 1865, received a full pardon from the President of the United States This pardon he now produced, and filed his petition to be allowed to continue to practise as an attorney and counsellor of this court, without taking the oath aforesaid.

Reverdy Johnson and *M. H Carpenter*, for the petitioner *Messrs. Speed* and *Stanbery, contra*, for the United States. The petitioner and R. H. Marr, a counsellor in like position, were also allowed to appear in support of the petitioner's contention.

FIELD, J., for the court, gave an opinion, granting the petition on the same grounds laid down in *Cummings* v. *Missouri*, and also on the ground of the pardon above named. That opinion is omitted.

MR. JUSTICE MILLER, on behalf of himself and the CHIEF JUSTICE, and JUSTICES SWAYNE and DAVIS, delivered the following dissenting opinion, which applies also to the opinion delivered in *Cummings* v. *Missouri*.

I dissent from the opinions of the court just announced.

It may be hoped that the exceptional circumstances which give present importance to these cases will soon pass away, and that those who make the laws, both State and national, will find in the conduct of the persons affected by the legislation just declared to be void, sufficient reason to repeal, or essentially modify it. For the speedy return of that better spirit, which shall leave us no cause for such laws, all good men look with anxiety, and with a hope, I trust, not altogether unfounded.

But the question involved, relating, as it does, to the right of the legislatures of the nation and of the State, to exclude from offices and places of high public trust, the administration of whose functions are essential to the very existence of the government, those among its own citizens who have been engaged in a recent effort to destroy that government by force, can never cease to be one of profound interest.

It is at all times the exercise of an extremely delicate power for this court to declare that the Congress of the nation, or the legislative body of a State, has assumed an authority not belonging to it, and by violating the Constitution, has rendered void its attempt at legislation. In the case of an Act of Congress, which expresses the

sense of the members of a co-ordinate department of the government, as much bound by their oath of office as we are to respect that Constitution, and whose duty it is, as much as it is ours, to be careful that no statute is passed in violation of it, the incompatibility of the Act with the Constitution should be so clear as to leave little reason for doubt, before we pronounce it to be invalid.

Unable to see this incompatibility, either in the Act of Congress or in the provision of the Constitution of Missouri, upon which this court has just passed, but entertaining a strong conviction that both were within the competency of the bodies which enacted them, it seems to me an occasion which demands that my dissent from the judgment of the court, and the reasons for that dissent, should be placed on its records.

In the comments which I have to make upon these cases, I shall speak of principles equally applicable to both, although I shall refer more directly to that which involves the oath required of attorneys by the Act of Congress, reserving for the close some remarks more especially applicable to the oath prescribed by the Constitution of the State of Missouri. . . .

The provisions of that instrument [the Constitution of the United States], relied on to sustain this doctrine, are those which forbid Congress and the States, respectively, from passing bills of attainder and *ex post facto* laws. It is said that the Act of Congress, and the provision of the Constitution of the State of Missouri under review, are in conflict with both these prohibitions, and are therefore void.

I will examine this proposition, in reference to these two clauses of the Constitution, in the order in which they occur in that instrument.

1. In regard to bills of attainder, I am not aware of any judicial decision by a court of Federal jurisdiction which undertakes to give a definition of that term. We are therefore compelled to recur to the bills of attainder passed by the English Parliament, that we may learn so much of their peculiar characteristics, as will enable us to arrive at a sound conclusion, as to what was intended to be prohibited by the Constitution. . . . A statute, then, which designates no criminal, either by name or description — which declares no guilt, pronounces no sentence, and inflicts no punishment — can in no sense be called a bill of attainder.

2. Passing now to consider whether the statute is an *ex post facto* law, we find that the meaning of that term, as used in the Constitution, is a matter which has been frequently before this court, and it has been so well defined as to leave no room for controversy. The only doubt which can arise is as to the character of the particular case claimed to come within the definition, and not as to the definition of the phrase itself. All the cases agree that the term is to be applied to criminal causes alone, and not to civil proceedings. In the language of Justice Story, in the case of *Watson* v. *Mercer*, 8 Peters, 88, "*Ex post facto* laws relate to penal and criminal proceedings, which impose punishment and forfeiture, and not to civil proceedings, which affect private rights retrospectively." *Calder* v. *Bull*, 3 Dallas, 386; *Fletcher* v. *Peck*, 6 Cranch, 87; *Ogden* v. *Saunders*, 12 Wheat. 266; *Satterlee* v. *Matthewson*, 2 Peters, 380.

The first case on the subject is that of *Calder* v. *Bull*, and it is the one in which the doctrine concerning *ex post facto* laws is most fully expounded. [Here follows a part of what is said on p. 1439, *supra*.]

This exposition of the nature of *ex post facto* laws has never been denied, nor has any court or any commentator on the Constitution added to the classes of laws here set forth, as coming within that clause of the organic law. In looking carefully at these four classes of laws, two things strike the mind as common to them all: 1st. That they contemplate the trial of some person charged with an offence. 2d. That they contemplate a punishment of the person found guilty of such offence.

Now, it seems to me impossible to show that the law in question contemplates either the trial of a person for an offence committed before its passage, or the punishment of any person for such an offence. It is true that the Act requiring an oath provides a penalty for falsely taking it. But this provision is prospective, as no one is supposed to take the oath until after the passage of the law. This prospective penalty is the only thing in the law which partakes of a criminal character. It is in all other respects a civil proceeding. It is simply an oath of office, and it is required of all

office-holders alike. As far as I am informed, this is the first time in the history of jurisprudence that taking an oath of office has been called a criminal proceeding. If it is not a criminal proceeding, then, by all the authorities, it is not an *ex post facto* law. No trial of any person is contemplated by the Act for any past offence. Nor is any party supposed to be charged with any offence in the only proceeding which the law provides.

A person proposing to appear in the court as an attorney is asked to take a certain oath. There is no charge made against him that he has been guilty of any of the crimes mentioned in that oath. There is no prosecution. There is not even an implication of guilt by reason of tendering him the oath, for it is required of the man who has lost everything in defence of the government, and whose loyalty is written in the honorable scars which cover his body, the same as of the guiltiest traitor in the land. His refusal to take the oath subjects him to no prosecution. His taking it clears him of no guilt, and acquits him of no charge.

Where, then, is this *ex post facto* law which tries and punishes a man for a crime committed before it was passed? It can only be found in those elastic rules of construction which cramp the powers of the Federal government when they are to be exercised in certain directions, and enlarges them when they are to be exercised in others. No more striking example of this could be given than the cases before us, in one of which the Constitution of the United States is held to confer no power on Congress to prevent traitors practising in her courts, while in the other it is held to confer power on this court to nullify a provision of the Constitution of the State of Missouri, relating to a qualification required of ministers of religion.

But the fatal vice in the reasoning of the majority is in the meaning which they attach to the word punishment, in its application to this law, and in its relation to the definitions which have been given of the phrase, *ex post facto* laws. . . .

The law in question does not in reality deprive a person, guilty of the acts therein described, of any right which he possessed before; for it is equally sound law, as it is the dictate of good sense, that a person who, in the language of the Act, has voluntarily borne arms against the government of the United States while a citizen thereof, or who has voluntarily given aid, comfort, counsel, or encouragement to persons engaged in armed hostility to the government, has, by doing those things, forfeited his right to appear in her courts and take part in the administration of her laws. Such a person has exhibited a trait of character which, without the aid of the law in question, authorizes the court to declare him unfit to practise before it, and to strike his name from the roll of its attorneys if it be found there.

I have already shown that this Act provides for no indictment or other charge, that it contemplates and admits of no trial, and I now proceed to show that even if the right of the court to prevent an attorney, guilty of the acts mentioned, from appearing in its forum, depended upon the statute, that still it inflicts no punishment in the legal sense of that term.

"Punishment," says Mr. Wharton in his Law Lexicon, "is the penalty for transgressing the laws;" and this is, perhaps, as comprehensive and at the same time as accurate a definition as can be given. Now, what law is it whose transgression is punished in the case before us? None is referred to in the Act, and there is nothing on its face to show that it was intended as an additional punishment for any offence described in any other Act. A part of the matters of which the applicant is required to purge himself on oath may amount to treason, but surely there could be no intention or desire to inflict this small additional punishment for a crime whose penalty already was death and confiscation of property. In fact, the word punishment is used by the court in a sense which would make a great number of laws, partaking in no sense of a criminal character, laws for punishment, and therefore *ex post facto*. A law, for instance, which increased the facility for detecting frauds by compelling a party to a civil proceeding to disclose his transactions under oath would result in his punishment in this sense, if it compelled him to pay an honest debt which could not be coerced from him before. But this law comes clearly within the class described by this court, in *Watson* v. *Mercer*, as civil proceedings which affect private rights retrospectively.

Again, let us suppose that several persons afflicted with a form of insanity heretofore deemed harmless, shall be found all at once to be dangerous to the lives of persons with whom they associate. The State, therefore, passes a law that all persons so affected shall be kept in close confinement until their recovery is assured. Here is a case of punishment in the sense used by the court for a matter existing before the passage of the law. Is it an *ex post facto* law? And, if not, in what does it differ from one? Just in the same manner that the Act of Congress does, namely, that the proceeding is civil and not criminal, and that the imprisonment in the one case and the prohibition to practise law in the other, are not punishments in the legal meaning of that term.

The civil-law maxim, "*Nemo debet bis vexari, pro unâ et eadem causâ*," has been long since adopted into the common law as applicable both to civil and criminal proceedings, and one of the amendments of the Constitution incorporates this principle into that instrument so far as punishment affects life or limb. It results from this rule, that no man can be twice lawfully punished for the same offence. We have already seen that the acts of which the party is required to purge himself on oath constitute the crime of treason. Now, if the judgment of the court in the cases before us, instead of permitting the parties to appear without taking the oath, had been the other way, here would have been the case of a person who, on the reasoning of the majority, is punished by the judgment of this court for the same acts which constitute the crime of treason. Yet, if the applicant here should afterwards be indicted for treason on account of these same acts, no one will pretend that the proceedings here could be successfully pleaded in bar of that indictment. But why not? Simply because there is here neither trial nor punishment within the legal meaning of these terms.

I maintain that the purpose of the Act of Congress was to require loyalty as a qualification of all who practise law in the national courts. The majority say that the purpose was to impose a punishment for past acts of disloyalty.

In pressing this argument it is contended by the majority that no requirement can be justly said to be a qualification which is not attainable by all, and that to demand a qualification not attainable by all is a punishment.

The Constitution of the United States provides as a qualification for the offices of President and Vice-President that the person elected must be a native-born citizen. Is this a punishment to all those naturalized citizens who can never attain that qualification? The constitutions of nearly all the States require as a qualification for voting that the voter shall be a white male citizen. Is this a punishment for all the blacks who can never become white? Again, it was a qualification required by some of the State constitutions, for the office of judge, that the person should not be over sixty years of age. To a very large number of the ablest lawyers in any State this is a qualification to which they can never attain, for every year removes them farther away from the designated age. Is it a punishment? The distinguished commentator on American law, and chancellor of the State of New York, was deprived of that office by this provision of the Constitution of that State, and he was thus, in the midst of his usefulness, not only turned out of office, but he was forever disqualified from holding it again, by a law passed after he had accepted the office. This is a much stronger case than that of a disloyal attorney forbid by law to practise in the courts, yet no one ever thought the law was *ex post facto* in the sense of the Constitution of the United States.

Illustrations of this kind could be multiplied indefinitely, but they are unnecessary.

The history of the time when this statute was passed, — the darkest hour of our great struggle, — the necessity for its existence, the humane character of the President who signed the bill, and the face of the law itself, all show that it was purely a qualification, exacted in self-defence, of all who took part in administering the government in any of its departments, and that it was not passed for the purpose of inflicting punishment, however merited, for past offences.

I think I have now shown that the statute in question is within the legislative power of Congress in its control over the courts and their officers, and that it was not void as being either a bill of attainder or an *ex post facto* law.

If I am right on the questions of qualification and punishment, that discussion disposes also of the proposition that the pardon of the President relieves the party accepting it of the necessity of taking the oath, even if the law be valid.

I am willing to concede that the presidential pardon relieves the party from all the penalties, or in other words, from all the punishment, which the law inflicted for his offence. But it relieves him from nothing more. If the oath required as a condition to practising law is not a punishment, as I think I have shown it is not, then the pardon of the President has no effect in releasing him from the requirement to take it. If it is a qualification which Congress had a right to prescribe as necessary to an attorney, then the President cannot, by pardon or otherwise, dispense with the law requiring such qualification.

This is not only the plain rule as between the legislative and executive departments of the government, but it is the declaration of common sense. The man who, by counterfeiting, by theft, by murder, or by treason, is rendered unfit to exercise the functions of an attorney or counsellor-at-law, may be saved by the executive pardon from the penitentiary or the gallows, but is not thereby restored to the qualifications which are essential to admission to the bar. No doubt it will be found that very many persons, among those who cannot take this oath, deserve to be relieved from the prohibition of the law; but this in no wise depends upon the act of the President in giving or refusing a pardon. It remains to the legislative power alone to prescribe under what circumstances this relief shall be extended.

In regard to the case of *Cummings* v. *The State of Missouri*, allusions have been made in the course of argument to the sanctity of the ministerial office, and to the inviolability of religious freedom in this country.

But no attempt has been made to show that the Constitution of the United States interposes any such protection between the State governments and their own citizens. Nor can anything of this kind be shown. The Federal Constitution contains but two provisions on this subject. One of these forbids Congress to make any law respecting the establishment of religion, or prohibiting the free exercise thereof. The other is, that no religious test shall ever be required as a qualification to any office or public trust under the United States.

No restraint is placed by that instrument on the action of the States; but on the contrary, in the language of Story (Commentaries on the Constitution, § 1878), "the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions."

If there ever was a case calling upon this court to exercise all the power on this subject which properly belongs to it, it was the case of the Rev. B. Permoli, 3 Howard, 589. An ordinance of the first municipality of the city of New Orleans imposed a penalty on any priest who should officiate at any funeral, in any other church than the obituary chapel. Mr. Permoli, a Catholic priest, performed the funeral services of his church over the body of one of his parishioners, enclosed in a coffin, in the Roman Catholic Church of St. Augustine. For this he was fined, and relying upon the vague idea advanced here, that the Federal Constitution protected him in the exercise of his holy functions, he brought the case to this court. But hard as that case was, the court replied to him in the following language: "The Constitution (of the United States) makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the States." Mr. Permoli's writ of error was, therefore, dismissed for want of jurisdiction.

In that case an ordinance of a mere local corporation forbid a priest, loyal to his government, from performing what he believed to be the necessary rites of his church over the body of his departed friend. This court said it could give him no relief. In this case the Constitution of the State of Missouri, the fundamental law of the people of that State, adopted by their popular vote, declares that no priest of any church shall exercise his ministerial functions, unless he will show, by his own

KRING *v.* MISSOURI.

SUPREME COURT OF THE UNITED STATES. 1882.

[107 *U. S.* 221.]

ERROR to the Supreme Court of the State of Missouri.

The case is stated in the opinion of the court.

Mr. Jefferson Chandler and *Mr. L. D. Seward*, for the plaintiff in error. *Mr. Samuel F. Phillips*, for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

Kring was indicted in the Criminal Court of St. Louis for murder in the first degree, charged to have been committed Jan. 4, 1875, and he pleaded not guilty. He has been tried four times before a jury, and sentenced once on a plea of guilty of murder in the second degree. His case has been three times before the Court of Appeals, and three times before the Supreme Court of the State. In the last instance, the Supreme Court affirmed the judgment by which he was found guilty of murder in the first degree and sentenced to be hung. He thereupon brought the present writ of error.

It is to be premised that the Court of Appeals is an intermediate appellate tribunal between the Criminal Court of St. Louis and the Supreme Court of the State, to which all appeals of this character are first taken.

At the trial, immediately preceding the last one in the court of original jurisdiction, the prisoner was permitted to plead guilty of murder in the second degree. The plea was accepted by the prosecuting attorney and the court, and he was thereupon sentenced to imprisonment in the penitentiary for twenty-five years. He took an appeal from the judgment on the ground that he had an understanding with the prosecuting attorney that if he would plead as he did, his sentence should not exceed ten years' imprisonment. The Supreme Court reversed the judgment, and remanded the case to the St. Louis Criminal Court for further proceeding, where, when the case was again called, he refused to withdraw his plea of guilty of murder in the second degree, and refused to renew his plea of not guilty, which had been withdrawn when he pleaded guilty of murder in the second degree. The court, then, against his remonstrance, made an order setting aside his plea of guilty

oath, that he has borne a true allegiance to his government. This court now holds this constitutional provision void, on the ground that the Federal Constitution forbids it. I leave the two cases to speak for themselves. . . .

See valuable comments on these cases in Pomeroy, *Const. Law* (Bennett's ed.), ss. 501–512, 525–534. The cases were briefly affirmed in *Pierce* v. *Carskadon*, 16 Wall. 234. Compare *Dent* v. *West Va.*, 129 U. S. 114. See also *Foster* v. *Board of Police Com'rs*, 37 Pac. Rep. 763 (Cal. May, 1894), where a city ordinance was sustained which forbade issuing licenses to sell intoxicating liquors to persons, among others, who had previously employed women as waiters. — ED.

of murder in the second degree and directing a general plea of not guilty to be entered. On this plea he was tried, found guilty, and sentenced to death, and the judgment, as we have already said, was affirmed by the Supreme Court of the State.

By refusing to plead not guilty as charged in the indictment, and to withdraw his plea of guilty of murder in the second degree, the defendant raised the point that the proceedings under that plea — namely, its acceptance by the prosecuting attorney and the court, and his conviction and sentence under it — were an acquittal of the charge of murder in the first degree, and that he could not be tried again for that offence. This point he insisted on in the Circuit Court, the Court of Appeals, and the Supreme Court.

Both these latter tribunals, in their opinions, which are a part of the record, conceded that such was the law of the State of Missouri at the time the homicide was committed. But they overruled the defence on the ground that by sect. 23, art. 2, of the Constitution of Missouri, which took effect Nov. 30, 1875, that law was abrogated, and for this reason he could be tried for murder in the first degree, notwithstanding his conviction and sentence for murder in the second degree.

As after the commission of the crime for which he was indicted, this new Constitution was adopted, and, as it is construed by the Court of Appeals and the Supreme Court, it changes the law as it then stood, to his disadvantage, the jurisdiction of this court is invoked on the ground that, as to this case, and as so construed, it is an *ex post facto* law, within the meaning of sect. 10, art. 1, of the Constitution of the United States. . . .

This law, in force at the date of the homicide for which Kring is now under sentence of death, was changed by the State of Missouri between that time and his trial so as to deprive him of its benefit, to which he would otherwise have been entitled, and we are called on to decide whether in this respect, and as applied by the court to this case, it is an *ex post facto* law within the meaning of the Constitution of the United States.

There is no question of the right of the State of Missouri, either by her fundamental law or by an ordinary act of legislation, to abolish this rule, and that it is a valid law as to all offences committed after its enactment. The question here is, Does it deprive the defendant of any right of defence which the law gave him when the act was committed so that as to that offence it is *ex post facto?*

This term necessarily implies a fact or act done, after which the law in question is passed. Whether it is *ex post facto* or not relates, in criminal cases, to which alone the phrase applies, to the time at which the offence charged was committed. If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offence, be an *ex post facto* law. If passed after the commission of the offence, it is as to that *ex post facto*, though whether of the class forbidden by the Constitution may depend

on other matters. But so far as this depends on the time of its enactment, it has reference solely to the date at which the offence was committed to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its *ex post facto* character.

In the case before us an argument is made founded on a change in this rule. It is said the new law in Missouri is not *ex post facto*, because it was in force when the plea and judgment were entered of guilty of murder in the second degree; thus making its character as an *ex post facto* law to depend, not upon the date of its passage as regards the commission of the offence, but as regards the time of pleading guilty. That, as the new law was in force when the conviction on that plea was had, its effect as to future trials in that case must be governed by that law. But this is begging the whole question; for if it was as to the offence charged an *ex post facto* law, within the true meaning of that phrase, it was not in force and could not be applied to the case, and the effect of that plea and conviction must be decided as though no such change in the law had been made.

Such, however, is not the ground on which the Supreme Court and the Court of Appeals placed their judgment. "There is nothing," say they, "in this; the change is a change not in crimes, but in criminal procedure, and such changes are not *ex post facto*." . . .

In the case before us the Constitution of Missouri so changes the rule of evidence, that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely, a judicial conviction for a lower grade of homicide, is not received as evidence at all, or, if received, is given no weight in behalf of the offender. It also changes the punishment, for, whereas the law as it stood when the homicide was committed was that, when convicted of murder in the second degree, he could never be tried or punished by death for murder in the first degree, the new law enacts that he may be so punished, notwithstanding the former conviction.

But it is not to be supposed that the opinion in that case [*Calder* v. *Bull*], 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. A reference to some decisions of those courts will show the same liberality of construction of the provision, many of them going much farther than is necessary to go in this case to show the error of the Missouri courts. . . .

When, in answer to all this evidence of the tender regard for the rights of a person charged with crime under subsequent legislation affecting those rights, we are told that this very radical change in the law of Missouri to his disadvantage is not subject to the rule because it is a change, not in crimes, but in criminal procedure, we are led to inquire what that court meant by criminal procedure.

The word "procedure," as a law term, is not well understood, and is not found at all in Bouvier's Law Dictionary, the best work of the kind in this country. Fortunately a distinguished writer on Criminal Law in America has adopted it as the title to a work of two volumes. Bishop on Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says: "§ 2. The term 'procedure' is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, Pleading, Evidence, and Practice." And in defining Practice, in this sense, he says: "The word means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in;" and Evidence, he says, as part of procedure, "signifies those rules of law

whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted."

If this be a just idea of what is intended by the word "procedure" as applied to a criminal case, it is obvious that a law which is one of procedure may be obnoxious as an *ex post facto* law, both by the decision in *Calder* v. *Bull*, 3 Dall. 386, and in *Cummings* v. *The State of Missouri*, 4 Wall. 277; for in the former case this court held that "any law which alters the legal rules of evidence, and receives less or different testimony than the law requires at the time of the commission of the offence, in order to convict the offender," is an *ex post facto* law; and in the latter, one of the reasons why the law was held to be *ex post facto* was that it changed the rule of evidence under which the party was punished.

But it cannot be sustained without destroying the value of the constitutional provision, that a law, however it may invade or modify the rights of a party charged with crime, is not an *ex post facto* law, if it comes within either of these comprehensive branches of the law designated as Pleading, Practice, and Evidence.

Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by State legislation after the offence was committed, and such legislation not held to be *ex post facto* because it relates to procedure, as it does according to Mr. Bishop? And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot.

Some light may be thrown upon this branch of the argument by a recurrence to a few of the numerous decisions of the highest courts construing the associated phrase in the same sentence of the Constitution which forbids the States to pass any law impairing the obligation of contracts. It has been held that this prohibition also relates exclusively to laws passed after the contract is made, and its force has been often sought to be evaded by the argument that laws are not forbidden which affect only the remedy, if they do not change the nature of the contract, or act directly upon it.

The analogy between this argument and the one concerning laws of procedure in relation to the contiguous words of the Constitution is obvious. But while it has been held that a change of remedy made after the contract may be valid, it is only so when there is substituted an adequate and sufficient remedy by which the contract may be enforced, or where such remedy existed and remained unaffected by the new law. *Tennessee* v. *Sneed*, 96 U. S. 69.

On this point it has been held that laws are void enacted after the date of the contract: —

1. Which give the debtor a longer stay of execution after judgment. *Blair* v. *Williams*, 4 Litt. (Ky.) 34; *McKinney* v. *Carroll*, 5 Mon.

(Ky.) 96. 2. Which require on a sale of his property under execution an appraisement, and a bid of two-thirds the value so ascertained. *Bronson* v. *Kinzie*, 1 How. 311; *McCracken* v. *Hayward*, 2 Id. 608; *Sprott* v. *Reid*, 3 Greene (Iowa), 489. 3. Which allow a period of redemption after such sale. *Lapsley* v. *Brashears*, 4 Litt. (Ky.) 47; *Cargill* v. *Power*, 1 Mich. 369; *Robinson* v. *Howe*, 13 Wis. 341. 4. Which exempt from sale under judgment for the debt a larger amount of the debtor's property than was exempt when the debt was contracted. *Edwards* v. *Kearzey*, 96 U. S. 595, and the cases there cited; Story's Commentary on the Constitution, sec. 1385.

There are numerous similar decisions showing that a change of the law which hindered or delayed the creditor in collecting his debt, though it related to the remedy or mode of procedure by which it was to be collected, impaired the obligation of the contract within the meaning of the Constitution.

Why is not the right to life and liberty as sacred as the right growing out of a contract? Why should not the contiguous and associated words in the Constitution, relating to retroactive laws, on these two subjects, be governed by the same rule of construction? And why should a law, equally injurious to the rights of the party concerned, be under the same circumstances void in one case and not in the other?

But it is said that at the time the prisoner pleaded guilty of murder in the second degree, and at the time he procured the reversal of the judgment of the criminal court on that plea, the new Constitution was in force, and he was bound to know the effect of the change in the law on his case.

We do not controvert the principle that he was bound to know and take notice of the law. But as regards the effect of the plea and the judgment on it, the Constitution of Missouri made no change.

It still remained the law of Missouri, as it is the law of every State in the Union, that so long as the judgment rendered on that plea remained in force, or after it had been executed, the defendant was liable to no further prosecution for any charge found in that indictment.

Such was the law when the crime was committed, such was the law when he pleaded guilty, such is the law now in Missouri and everywhere else. So that, in pleading guilty under an agreement for ten years' imprisonment, both he and the prosecuting attorney and the court all knew that the result would be an acquittal of all other charges but that of murder in the second degree.

Did he waive or annul this acquittal by prosecuting his writ of error? Certainly not by that act, for if the judgment of the lower court sentencing him to twenty-five years' imprisonment had been affirmed, no one will assert that he could still have been tried for murder in the first degree. Nor was there anything else done by him to waive this acquittal. He refused to withdraw his plea of guilty. It was stricken out by order of the court against his protest. He refused then to plead not guilty, and the court in like manner, against his protest, ordered a

general plea of not guilty to be filed. He refused to go to trial on that plea, and the court forced him to trial.

The case rests, then, upon the proposition that, having an erroneous sentence rendered against him on the plea accepted by the court, he could only take the steps which the law allowed him to reverse that sentence at the hazard of subjecting himself to the punishment of death for another and a different offence of which he stood acquitted by the judgment of that court.

That he prosecuted his legal right to a review of that sentence with a halter around his neck, when, if he succeeded in reversing it, the same court could tighten it to strangulation, and if he failed, it did him no good. And this is precisely what has occurred. His reward for proving the sentence of the court of twenty-five years' imprisonment (not its judgment on his guilt) to be erroneous, is that he is now to be hanged instead of imprisoned in the penitentiary. No such result could follow a writ of error before, and as to this effect the new Constitution is clearly *ex post facto*. The whole error, which results in such a remarkable conclusion, arises from holding the provision of the new Constitution applicable to this case, when the law is *ex post facto* and inapplicable to it.

If Kring or his counsel were bound to know the law when they prosecuted the writ of error, they were bound to know it as we have expounded it. If they knew that by the words of the new Constitution such a judgment of acquittal as he had when he undertook to reverse it would be no longer an acquittal after it was reversed, they also knew that, being as to his case an *ex post facto* law, it could have no such effect on that judgment.

We are of opinion that any law passed after the commission of an offence which, in the language of Mr. Justice Washington, in *United States* v. *Hall*, "in relation to that offence, or its consequences, alters the situation of a party to his disadvantage," is an *ex post facto* law; and in the language of Denio, J., in *Hartung* v. *The People*, "No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offence was committed, and which existed as a law at the time." Tested by these criteria, the provision of the Constitution of Missouri which denies to plaintiff in error the benefit which the previous law gave him of acquittal of the charge of murder in the first degree, on conviction of murder in the second degree, is, as to his case, an *ex post facto* law within the meaning of the Constitution of the United States, and for the error of the Supreme Court of Missouri, in holding otherwise, its judgment will be reversed, and the case remanded to it, with direction to reverse the judgment of the Criminal Court of St. Louis, and for such further proceedings as are not inconsistent with this opinion; and it is *So ordered.*

Mr. Justice Matthews, with whom concurred Mr. Chief Justice Waite, Mr. Justice Bradley, and Mr. Justice Gray, dissenting. . . .

The right which it is alleged has been violated is supposed to arise in this way. At the time of the commission of the offence in 1875, it was well established as the law of Missouri, by the decisions of the Supreme Court of the State, that "when a person is indicted for murder in the first degree, and is put upon his trial and convicted of murder in the second degree and a new trial is ordered at his instance, he cannot legally be put upon his trial again for the charge of murder in the first degree; he can be put upon his trial only upon the charge of murder in the second degree." *State* v. *Ross*, 29 Mo. 32; *State* v. *Smith*, 53 Id. 139. And it is not denied that a plea of guilty of murder in the second degree, accepted by the State, would have been at that time equally an acquittal of the charge of murder in the first degree, having the same force as to future trials as a conviction of murder in the second degree, although the judgment should be reversed on the application of the prisoner.

On Nov. 30, 1875, the State of Missouri adopted a new constitution, which contained (sect. 23, art. 2) the provision, that, "if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law."

In the case of *State* v. *Simms*, 71 Mo. 538, it was decided that this provision overthrows the rule laid down in the case of *State* v. *Ross*, *ubi supra*, and was "equivalent to declaring that when such judgment is reversed for error at law, the trial had is to be regarded as a mistrial, and that the cause, when remanded, is put on the same footing as a new trial, as if the cause had been submitted to a jury, resulting in a mistrial by the discharge of the jury in consequence of their inability to agree on a verdict."

The rule thus introduced by the Constitution of 1875 was the one applied in the trial of the prisoner, instead of that previously in force; and the contention is, that to apply it in a case such as the present, where the alleged offence was committed prior to the adoption of the new Constitution, is to give it operation as an *ex post facto* law, in violation of the prohibition of the Constitution of the United States.

In examining this proposition it must constantly be borne in mind, that the plea of guilty of murder in the second degree, the legal effect of which, when admitted, is the precise subject of the question, was entered long after the new rule established by the Constitution of Missouri took effect; that the prisoner himself moved to set it aside, and for leave to renew his plea of not guilty, on the ground that he had been misled into making his plea of guilty under circumstances that would make it operate as a fraud upon his rights, if it were permitted to stand; and that, because the court denied this motion, he made and prosecuted his appeal for a reversal of its judgment, in full view of the rule, then in force, of the application of which he now complains, which expressly declared what should be the effect of such a reversal.

The classification of *ex post facto* laws first made by Mr. Justice

Chase, in *Calder* v. *Bull*, 3 Dall. 386, 390, seems to have been generally accepted. It is as follows: [See p. 1439, *supra*.] This definition was the basis of the opinion of the court in *Cummings* v. *The State of Missouri*, 4 Wall. 277, and *Ex parte Garland*, Id. 333, and was expressly relied on in the opinion of the dissenting judges, which says: "This exposition of the nature of *ex post facto* laws has never been denied, nor has any court or any commentator on the Constitution added to the classes of laws here set forth, as coming within that clause of the organic law."

Now, under which of these heads does the controverted rule of the Missouri Constitution fall? It cannot be contended that it is embraced in either of the first three. If in any, it must be covered by the fourth. But what rule of evidence, existing at the time of the commission of the offence, is altered to the disadvantage of the prisoner? The answer made is this: that, at that time, an accepted plea of guilty of murder in the second degree was conclusive proof that the prisoner was not guilty of murder in the first degree, and that it was abrogated, so as to deprive the prisoner of the benefit of it. But while that rule was in force, the prisoner had no such evidence of which he could avail himself. How, then, has he been deprived of any benefit from it? He had not, during the period while the rule was in force, entered any plea of guilty of murder in the second degree, and no such plea had been admitted by the State. All that can be said is, that if, while the rule was in force he had entered such a plea with the consent of the State, its legal effect would have been as claimed, and by its change he has lost what advantage he would have had in such a contingency. But it does not follow that such a contingency would have happened. It was not within the power of the prisoner to bring it about, for it required the concurrence and consent of the State; and it cannot be assumed that, under such a rule and in such a case, that consent would have been given. It is not enough to say that, under a ruling of the court, a party might have lost the benefit of certain evidence, if such evidence had existed. To predicate error in such a case, it must be shown that the party had evidence of which, in fact, he has been illegally deprived. Such a case would have been presented here, if the plea of guilty of murder in the second degree had been entered and accepted before the Constitution of 1875 took effect and while the old rule was in force. Then the law would have taken effect upon the transaction between the prisoner and the prosecution, in the acceptance of his plea; the *status* of the prisoner would have been fixed and declared; he would have stood acquitted of record of the charge of murder in the first degree; and the new rule would have been an *ex post facto* law if it had made him liable to conviction and punishment for an offence of which by law he had been declared to be innocent.

But, in the circumstances of the present case, the evidence, of which it is said the prisoner has been deprived, came into being after the law had been changed. It was evidence created by the law itself, for it

consists simply in a technical inference; and the law in force when it was created necessarily determines its quality and effect. That law did not operate upon the offence to change its character; nor upon its punishment to aggravate it; nor upon the evidence which, according to the law in force at the time of its commission, was competent to prove or disprove it. It operated upon a transaction between the prisoner and the prosecution, which might or might not have taken place; which could not take place without mutual consent; and when it did take place, that consent must be supposed to have been given by both with reference to the law as it then existed, and not with reference to a law which had then been repealed.

It is the essential characteristic of an *ex post facto* law that it should operate retrospectively, so as to change the law in respect to an act or transaction already complete and past. Such is not the effect of the rule of the Constitution of Missouri now in question. . . . It cannot affect the case of any individual, except upon his own request, for he must take the first step in its application. When he pleads guilty of murder in the second degree, he knows that its acceptance cannot operate as an acquittal of the higher offence. When he asks to have the conviction reversed, he understands that if his application is granted, the judgment must be set aside with the same effect as if it had never been rendered. It does not touch the substance or merits of his defence, and is in itself a sensible and just rule in criminal procedure.

And, "so far as mere modes of procedure are concerned," says Judge Cooley, Const. Lim. 272, "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. Statutes giving the government additional challenges, and others which authorized the amendment of indictments, have been sustained and applied to past transactions, as doubtless would be any similar statute calculated merely to improve the remedy, and in its operation working no injustice to the defendant and depriving him of no substantial right." Accordingly it was held by this court, in *Gut* v. *The State*, 9 Wall. 35, in the language of Mr. Justice Field, delivering its opinion, that "a law changing the place of trial from one county to another county in the same district, or even to a different district from that in which the offence was committed or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offence or the finding of the indictment."

And in the case of *Ex parte McCardle*, 7 Wall. 506, it was the unanimous decision of the court, that it was competent for Congress, in a case affecting personal liberty, to deprive the complaining party of the benefit of an appeal from the judgment of an inferior court, after his appeal had taken effect and while it was pending. It would have been equally competent for the Constitution of Missouri to have declared that no appeal or writ of error should thereafter be allowed to reverse the judgment of the court of original jurisdiction in any pending criminal cause, which certainly would be giving a different, because irreversible, effect to that judgment from what such judgments would have had under the law in force when the offence was committed. If it be true, in the logic of the law, as it is in all its other applications, that the greater includes the less, then it was competent for that Constitution to provide that, as to all judgments in criminal cases thereafter rendered, which should be reversed for error, on the appeal of the defendant, the effect of the reversal should be such as not to be a bar to a subsequent conviction for any crime described in the indictment; for that would have been to say, not that there shall be no appeal at all, but that if an appeal is taken its effect shall only be such as is prescribed in the law allowing it. . . .

The rule of law in Missouri, the benefit of which is claimed for the prisoner in this proceeding, notwithstanding its repeal by the Constitution of the State before it could have been applied in his case, was established, not by statute, but by a series of judicial decisions of the Supreme Court of the State. Those decisions might at any time have been reversed by the same tribunal, and a new rule introduced, such as that actually declared by the Constitution. In that event, could it be said, with any plausibility, that the later decisions, reversing the law as previously understood, could not be applied to all subsequent proceedings in cases where, upon a plea of guilty of murder in the second degree thereafter entered and accepted, an erroneous judgment thereon had been reversed, notwithstanding, when the offence was committed, the prior decisions had been in force? Would the new rule, as introduced and applied by the later judicial decisions, be in violation of the prohibition of the Constitution of the United States against *ex post facto* laws? But the Constitution of Missouri has done no more than this.

The nature and operation of the rule are not affected by any peculiarity in the authority which establishes it. If it is not objectionable as an *ex post facto* law, when introduced by judicial decision, it is because it is not so in its nature; and, if not, it does not become so when introduced by a legislative declaration. . . .

It is doubtless quite true that it is difficult to draw the line in particular cases beyond which legislative power over remedies and procedure cannot pass without touching upon the substantial rights of the parties affected, as it is impossible to fix that boundary by any general words. The same difficulty is encountered, as the same principle applies, in determining, in civil cases, how far the legislature may

modify the remedy without impairing or enlarging the obligation of contracts. Every case must be decided upon its own circumstances, as the question continually arises and requires an answer. But it is a familiar principle, that, before rights derived under public laws have become vested in particular individuals, the State, for its own convenience and the public good, may amend or repeal the law without just cause of complaint. . . . The substance of the prisoner's defence, upon the merits, has not been touched; no vested right under the law had wrought a result upon his legal condition before its repeal. He is, therefore, in no position to invoke the constitutional prohibition, which is, by the judgment of this court, now interposed between him and the crime of which he has been convicted.

In our opinion, the judgment of the Supreme Court of Missouri should be affirmed.[1]

[1] In *Hopt* v. *Utah*, 110 U. S. 574, at the time of a homicide, persons who had been adjudged felons, unless pardoned or judgment reversed, could not be witnesses. In 1882, after the homicide and before the trial, this law was repealed and upon the trial of the plaintiff in error, an adjudged felon excluded by the former law was admitted to testify against the accused. In sustaining this, the court (HARLAN, J.), said (p. 588): "But it is insisted that the Act of 1882, so construed, would, as to this case, be an *ex post facto* law, within the meaning of the Constitution of the United States, in that it permitted the crime charged to be established by witnesses whom the law, at the time the homicide was committed, made incompetent to testify in any case whatever.

"The provision of the Constitution which prohibits the States from passing *ex post facto* laws was examined in *Kring* v. *Missouri*, 107 U. S. 221. The whole subject was there fully and carefully considered. The court, in view of the adjudged cases, as well as upon principle, held, that a provision of the Constitution of Missouri denying to the prisoner, charged with murder in the first degree, the benefit of the law as it was at the commission of the offence — under which a conviction of murder in the second degree was an acquittal of murder in the first degree, even though such judgment of conviction was subsequently reversed — was in conflict with the Constitution of the United States.

"That decision proceeded upon the ground that the State Constitution deprived the accused of a substantial right which the law gave him when the offence was committed, and, therefore, in its application to that offence and its consequences, altered the situation of the party to his disadvantage. By the law as established when the offence was committed, Kring could not have been punished with death after his conviction of murder in the second degree, whereas by the abrogation of that law by the constitutional provision subsequently adopted, he could thereafter be tried and convicted of murder in the first degree, and subjected to the punishment of death. Thus the judgment of conviction of murder in the second degree was deprived of all force as evidence to establish his absolute immunity thereafter from punishment for murder in the first degree. This was held to be the deprivation of a substantial right which the accused had at the time the alleged offence was committed.

"But there are no such features in the case before us. Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.

"The crime for which the present defendant was indicted, the punishment prescribed

therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, or change the ingredients of the offence or the ultimate facts necessary to establish guilt, but — leaving untouched the nature of the crime and the amount or degree of proof essential to conviction — only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charged."

In *Medley, Petitioner*, 134 U. S. 160 (1890), MR. JUSTICE MILLER delivered the opinion of the court.

This is an application to this court by James J. Medley for a writ of *habeas corpus*, the object of which is to relieve him from the imprisonment in which he is held by J A. Lamping, warden of the State penitentiary of the State of Colorado.

The petitioner is held a prisoner under sentence of death pronounced by the District Court of the Second District of the State of Colorado for the county of Arapahoe. The petition of the prisoner sets forth that an indictment for the murder of Ellen Medley was found against him by the grand jury of Arapahoe County on the 5th day of June, 1889; that the indictment charges petitioner with this murder, which took place on the 13th day of May of that year; that he was tried in said district court on the 24th day of September thereafter and found guilty by the jury of murder in the first degree; that on the 29th day of November he was sentenced to be remanded to the custody of the sheriff of Arapahoe County, and within twenty-four hours to be taken by said sheriff and delivered to the warden of the State penitentiary, to be kept in solitary confinement until the fourth week of the month of December thereafter, and that then, upon a day and hour to be designated by the warden, he should be taken from said place of confinement to the place of execution, within the confines of the penitentiary, and there be hanged by the neck until he was dead.

Copies of the indictment, of the verdict of the jury, and of the sentence of the court are annexed to the petition as exhibits.

The petitioner then sets forth that he was sentenced under the statute of Colorado, approved April 19th, 1889, and which went into effect July 19th, 1889, and repealed all Acts and parts of former Acts inconsistent therewith, without any saving clause, and that the crime on account of which the sentence was passed was charged to be and was actually committed on the 13th day of May of the same year.

The petitioner enumerates some twenty variances between the statute in force at the time the crime was committed and that under which he was sentenced to punishment in the present case, all of which are claimed to be changes to his prejudice and injury, and therefore *ex post facto* within the meaning of section 10, article 1 of the Constitution of the United States, which declares that no State shall pass any bill of attainder or *ex post facto* law. . . . We think . . . that neither the repealing clause nor any other part of this Act was in force prior to the 19th of July, 1889, and that the crime, having been committed in May of that year, was to be governed in all particulars, of trial and punishment, by the law then in force, except so far as the legislature had power to apply other principles to the trial and punishment of the crime. If these were conducted and administered under the law of 1889, which became a law after the commission of the offence, and its provisions so far as applied by the court to the case of the prisoner, were such invasions of his rights as to properly be called *ex post facto* laws, they were void.

It is unnecessary to examine all the points in which, according to the argument for plaintiff, the new statute was *ex post facto;* therefore we shall notice only a few of

those which appear to us most deserving of attention, and in doing this we shall compare the new statute with the one which it superseded and repealed.

The first of these, and perhaps the most important, is that which declares that the warden shall keep such convict in solitary confinement until the infliction of the death penalty. The former law, the Act of 1883, contained no such provision. It declared that every person convicted of murder in the first degree should suffer death, and every person convicted of murder of the second degree should suffer imprisonment in the penitentiary for a term of not less than ten years, which might extend to life; and it declared that the manner of inflicting the punishment of death should be by hanging the person convicted by the neck until death, at such time as the court should direct, not less than fifteen nor more than twenty-five days from the time sentence was pronounced, unless for good cause the court or governor might prolong the time. The prisoner was to be kept in the county jail under the control of the sheriff of the county, who was the officer charged with the execution of the sentence of the court. Solitary confinement was neither authorized by the former statute, nor was its practice in use in regard to prisoners awaiting the punishment of death.

This matter of solitary confinement is not, as seems to be supposed by counsel, and as is suggested in an able opinion on this statute, furnished us by the brief of the counsel for the State, by Judge Hayt (in the case of Henry Tyson), a mere unimportant regulation as to the safe-keeping of the prisoner, and is not relieved of its objectionable features by the qualifying language, that no person shall be allowed access to said convict except his attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with prison regulations.

Solitary confinement as a punishment for crime has a very interesting history of its own, in almost all countries where imprisonment is one of the means of punishment. In a very exhaustive article on this subject in the American Cyclopædia, Volume XIII., under the word "Prison" this history is given. In that article it is said that the first plan adopted when public attention was called to the evils of congregating persons in masses without employment, was the solitary prison connected with the Hospital San Michele at Rome, in 1703, but little known prior to the experiment in Walnut Street Penitentiary, in Philadelphia, in 1787. The peculiarities of this system were the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction. Other prisons on the same plan, which were less liberal in the size of their cells and the perfection of their appliances, were erected in Massachusetts, New Jersey, Maryland and some of the other States. But experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. It became evident that some changes must be made in the system, and the *separate* system was originated by the Philadelphia Society for Ameliorating the Miseries of Public Prisons, founded in 1787.

The article then gives a great variety of instances in which the system is somewhat modified, and it is within the memory of many persons interested in prison discipline that some thirty or forty years ago the whole subject attracted the general public attention, and its main feature of solitary confinement was found to be too severe.

It is to this mode of imprisonment that the phrase solitary confinement has been applied in nearly all instances where it is used, and it means this exclusion from human associations; where it is intended to mitigate it by any statutory enactment or by any regulations of persons having authority to do so, it is by express exceptions and modifications of the original principle of "solitary confinement." The statute of Colorado is undoubtedly framed on this idea. Instead of confinement in the ordinary

county prison of the place where he and his friends reside; where they may, under the control of the sheriff, see him and visit him; where the sheriff and his attendants must see him; where his religious adviser and his legal counsel may often visit him without any hindrance of law on the subject, the convict is transferred to a place where imprisonment always implies disgrace, and which, as this court has judicially decided in *Ex parte Wilson*, 114 U. S. 417; *Mackin* v. *United States*, 117 U. S. 348; *Parkinson* v. *United States*, 121 U. S. 281; and *United States* v. *De Walt*, 128 U. S. 393, is itself an infamous punishment, and is there to be kept in "solitary confinement," the primary meaning of which phrase we have already explained.

The qualifying phrase in this statute is but a small mitigation of this solitary confinement, it expressly declares that no one shall be allowed access to the convict except certain persons, and these are not admissible unless their access to the prisoner is in accordance with prison regulations, prescribed by the board of commissioners of the penitentiary under section 2553 of the laws of Colorado in force since 1877. This section declares that "the board of commissioners of the penitentiary shall make such rules and regulations for the government, discipline, and police of the penitentiary, and for the punishment of prisoners confined, not inconsistent with law, as they deem expedient." What these may be at any particular time is unknown. How far they may permit access of counsel, physicians, the spiritual adviser, and the members of his family, is a matter in their discretion, which they exercise by general rules, which may be altered at any time so as to exclude all these persons, and thus the prisoner be left to the worst form of solitary confinement.

Even the statutory amelioration is a very limited one. By the words "his attendants," in the statute, is evidently meant the officers of the prison and subordinates, who must necessarily furnish him with his food and his clothing, and make inspection every day that he still exists. They may be forbidden by prison regulations, however, from holding any conversation with him. The attendance of the counsel can only be casual, and a very few interviews, one or two, perhaps, are all that he would have before his death, and that of the physician not at all, unless he was so sick as to require it, and the spiritual adviser of his own selection, and the members of his family, are all dependent for their opportunities of seeing the prisoner upon the regulations of the prison. The solitary confinement, then, which is meant by the statute, remains of the essential character of that mode of prison life as it originally was prescribed and carried out, to mark them as examples of the just punishment of the worst crimes of the human race.

The brief of counsel for the prisoner furnishes us with the statutory history of solitary confinement in the English law. The Act 25 George II. c. 37, entitled "An Act for the better preventing the horrid crime of murder," is preceded by the following preamble: "Whereas, the horrid crime of murder has of late been more frequently perpetrated than formerly; and whereas it is thereby become necessary that some further terror and peculiar mark of infamy be added to the punishment of death now by law upon such as shall be guilty of the said offence," — then follow certain enactments, the sixth section of which reads as follows: "Be it further enacted, That from and after such conviction and judgment given thereupon, the jailer or keeper to whom such criminal shall be delivered for safe custody shall confine such prisoner to some cell separate and apart from the other prisoners, and that no person or persons whatsoever, except the jailer or keeper, or his servants, shall have access to any such prisoner, without license being first obtained."

This statute is very pertinent to the case before us, as showing, first, what was understood by solitary confinement at that day, and, second, that it was considered as an additional punishment of such a severe kind that it is spoken of in the preamble as "a further terror and peculiar mark of infamy" to be added to the punishment of death. In Great Britain, as in other countries, public sentiment revolted against this severity, and by the statute of 6 and 7 William IV., c. 30, the additional punishment of solitary confinement was repealed.

The term *ex post facto* law, as found in the provision of the Constitution of the United States, to wit, that "no State shall pass any bill of attainder, *ex post facto* law,

or law impairing the obligation of contracts," has been held to apply to criminal laws alone, and has been often the subject of construction in this court. Without making extracts from these decisions, it may be said that any law which was passed after the commission of the offence for which the party is being tried is an *ex post facto* law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed, *Calder* v. *Ball*, 3 Dall 386, 390; *Kring* v. *Missouri*, 107 U. S. 221; *Fletcher* v. *Peck*, 6 Cranch, 87; or which alters the situation of the accused to his disadvantage; and that no one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authority before the imputed offence was committed, or by some law passed afterwards by which the punishment is not increased.

It seems to us that the considerations which we have here suggested show that the solitary confinement to which the prisoner was subjected by the statute of Colorado of 1889, and by the judgment of the court in pursuance of that statute, was an additional punishment of the most important and painful character, and is, therefore, forbidden by this provision of the Constitution of the United States.

Another provision of the statute, which is supposed to be liable to this objection, of its *ex post facto* character, is found in section three, in which the particular day and hour of the execution of the sentence within the week specified by the warrant shall be fixed by the warden, and he shall invite to be present certain persons named, to wit, a chaplain, a physician, a surgeon, the spiritual adviser of the convict, and six reputable citizens of the State of full age, and that the time fixed by said warden for such execution shall be by him kept secret, and in no manner divulged except privately to said persons invited by him to be present as aforesaid, and such persons shall not divulge such invitation to any person or persons whomsoever, nor in any manner disclose the time of such execution. And section six provides that any person who shall violate or omit to comply with the requirements of section three of the Act shall be punished by fine or imprisonment. We understand the meaning of this section to be that within the one week mentioned in the judgment of the court the warden is charged with the power of fixing the precise day and hour when the prisoner shall be executed; that he is forbidden to communicate that time to the prisoner; that all persons whom he is directed to invite to be present at the execution are forbidden to communicate that time to him; and that, in fact, the prisoner is to be kept in utter ignorance of the day and hour when his mortal life shall be terminated by hanging, until the moment arrives when this act is to be done.

Objections are made to this provision as being a departure from the law as it stood before, and as being an additional punishment to the prisoner, and therefore *ex post facto*. It is obvious that it confers upon the warden of the penitentiary a power which had heretofore been solely confided to the court; and is therefore a departure from the law as it stood when the crime was committed.

Nor can we withhold our conviction of the proposition that when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place. Notwithstanding the argument that under all former systems of administering capital punishment the officer appointed to execute it had a right to select the time of *the day* when it should be done, this new power of fixing any day and hour during a period of a week for the execution is a new and important power conferred on that officer, and is a departure from the law as it existed at the time the offence was committed, and with its secrecy must be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment.

There are other provisions of the statute pointed out in the argument of counsel, which are alleged to be subject to the same objection, but we think the two we have mentioned are quite sufficient to show that the Constitution of the United States is violated by this statute as applied to crimes committed before it came into force.

These considerations render it our duty to order the release of the prisoner from

HARTUNG *v.* THE PEOPLE.

NEW YORK COURT OF APPEALS. 1860.

[22 *N. Y.* 95.]

WRIT of error to the Supreme Court. Mary Hartung, the plaintiff in error, was indicted and convicted in the Albany Oyer and Terminer, for the murder of her husband by poisoning. He died on the 21st of April, 1858. Sentence having been pronounced, the record of the

the custody of the warden of the penitentiary of Colorado, as he is now held by him under the judgment and order of the court. . . .

MR. JUSTICE BREWER (with whom concurred MR. JUSTICE BRADLEY) dissenting.

I dissent from the opinion and judgment as above declared. The substantial punishment imposed by each statute is death by hanging. The differences between the two, as to the manner in which this sentence of death shall be carried into execution, are trifling. What are they? By the old law, execution must be within twenty-five days from the day of sentence. By the new, within twenty-eight days. By the old, confinement prior to execution was in the county jail. By the new, in the penitentiary. By the old, the sheriff was the hangman. By the new, the warden. Under the old, no one had a right of access to the condemned except his counsel, though the sheriff might, in his discretion, permit any one to see him. By the new, his attendants, counsel, physician, spiritual adviser, and members of his family have a right of access, and no one else is permitted to see him. Under the old, his confinement might be absolutely solitary, at the discretion of the sheriff, with but a single interruption. Under the new, access is given to him as a matter of right, to all who ought to be permitted to see him. True, access is subject to prison regulations; so, in the jail, the single authorized access of counsel was subject to jail regulations. It is not to be assumed that either regulations would be unreasonable, or operate to prevent access at any proper time. Surely, when all who ought to see the condemned have a right of access, subject to the regulations of the prison, it seems a misnomer to call this "solitary confinement," in the harsh sense in which this phrase is sometimes used. All that is meant is, that a condemned murderer shall not be permitted to hold anything like a public reception; and that a gaping crowd shall be excluded from his presence. Again, by the old law, the sheriff fixes the hour within a prescribed day. By the new, the warden fixes the hour and day within a named week. And these are all the differences which the court can find between the two statutes, worthy of mention.

Was there ever a case in which the maxim, "*De minimis non curat lex*," had more just and wholesome application? Yet, on account of these differences, a convicted murderer is to escape the death he deserves, and be turned loose on society.

I am authorized to say that MR. JUSTICE BRADLEY concurs in this dissent.

"It may be said, generally speaking, that an *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offence or its consequences, alters the situation of a party to his disadvantage; *Cummings* v. *Missouri*, 4 Wall. 277; *Kring* v. *Missouri*, 107 U. S. 221; but the prescribing of different modes of procedure, and the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition. COOLEY, *Const. Lim.* (5th ed.) 329." FULLER, C. J., for the court, in *Duncan* v. *Missouri*, 152 U. S. 377, 382–383. Compare *In re Wright*, 3 Wyoming, 478 (1891). — ED.

Oyer and Terminer, together with a bill of exceptions taken by the prisoner, were brought by writ of error to the Supreme Court, and the judgment against her having been affirmed, at general term in the third district, a writ of error from this court was allowed.

The exceptions taken upon the trial were here all determined against the prisoner. They are not of sufficient interest to require a report of that portion of the opinion of the court relating to them.

The final judgment in the Supreme Court, against the plaintiff in error, was rendered on the 9th day of January, 1860. The day appointed for her execution had passed, and before a new day had been appointed, the case was brought to this court. After the return to the writ of error, which was made February 14, 1860, and previous to the argument, *viz.*, on the 14th of April, 1860, an Act passed the legislature (ch. 410 of 1860), "in relation to capital punishment." The determination of the case turned upon the operation of that Act. The judgment was reversed, and the court not being able judicially to see that upon a new trial the prisoner might not be convicted of manslaughter, in some inferior degree, a new trial was ordered.

William J. Hadley, for the plaintiff in error. *Samuel G. Courtney*, for The People, defendants in error.

By the Court, DENIO, J.: . . . But a question of great importance arises under the Act of April last, in relation to capital punishments. (Ch. 410 of the Laws of 1860.) By the terms of that statute, all those portions of the existing statutes which provided for the punishment of death on convictions for crime were repealed, without any saving in respect to offences already committed. This repeal was effected by amending the first section of the first chapter of the fourth part of the Revised Statutes, which declared that all persons who should be convicted of treason, murder, or arson in the first degree should suffer death, so that it should read that those convicted of such crimes should be punished as therein provided; and then there was no subsequent provision left for inflicting the punishment of death in any case. Twelve sections of the same title are repealed by their numbers. One of these — section 25 — is that which prescribes the manner of death in capital executions, namely, by hanging. The other repealed sections contain regulations respecting executions in certain cases, which would be inapplicable to the mode of punishment referred to in the new Act. There are no provisions directed to be inserted as new sections, nor any other amendments of existing sections of the Revised Statutes. As thus changed by the law of 1860, the Revised Statutes would not provide for the punishment of death in any case, though certain details respecting executions which remain unrepealed would show that such a punishment was considered as existing. The new statute sets out with a declaration that no crime thereafter committed, except treason, and murder in the first degree, shall be punished with death in the State of New York. (§ 1.) The remaining parts of the Act define the

crime of murder anew, dividing it into first and second degrees. It is clearly inferrible from the 1st section, and also from the 4th and 5th sections, that capital punishment was intended to be retained, under certain modifications, as the punishment for murder in the first degree, though it is not so enacted in terms. These sections are as follows:

"§ 4. When any person shall be convicted of any crime punishable with death, and sentenced to suffer such punishment, he shall, at the same time, be sentenced to confinement at hard labor in the State prison until such punishment of death shall be inflicted. The presiding judge of the court at which such conviction shall have taken place shall immediately thereupon transmit to the Governor of the State, by mail, a statement of such conviction and sentence, with the notes of testimony taken by such judge on the trial.

"§ 5. No person so sentenced or imprisoned shall be executed in pursuance of such sentence within one year from the day on which such sentence of death shall be passed, nor until the whole record of the proceedings shall be certified by the clerk of the court in which the conviction was had, under the seal thereof, to the Governor of the State, nor until a warrant shall be issued by the Governor, under the great seal of the State, directed to the sheriff of the county in which the State prison may be situated, commanding the said sentence of death to be carried into execution."

In a subsequent section it is provided that the provisions of the Act for the punishment of murder in the first degree shall apply to the crime of treason. (§ 9.) But there are no provisions in the Act specially providing for the punishment of murder in the first degree, nor any which do not, in terms, equally apply to the crime of treason. I cannot attach any intelligible meaning to these several provisions except by assuming that the person who drew the bill supposed that in the 1st or the 4th and 5th sections he had declared murder in the first degree punishable with death. But there was not, in either of these sections, or elsewhere in the Act, any separate provision for the punishment of that crime, or which declared that any crime should be punished with death. It is true that, in the declaration of the 1st section, that no crime except treason and the first degree of murder should be punished with death, there is an implication, in the nature of a negative pregnant, that those crimes shall be so punished. So, in the 4th section, where it is said that, upon a conviction for a crime punishable with death and a sentence to such punishment, there shall be added a sentence to imprisonment, it is clearly enough implied that there are crimes punished capitally. So, likewise, when the 5th section declares that no person so sentenced shall be executed within one year from the sentence, nor until the Governor shall have issued his warrant, there is, of course, a very strong implication that he may be so executed after the expiration of the year if such a warrant shall be issued. It is very unusual to leave the meaning of the legislature upon a subject so important to be deduced by implication. Still, the

intention to preserve the punishment of death, when the Governor shall approve of the sentence, in addition to imprisonment for one year, is so manifest, that, in the further discussion of this case, I shall assume that such is the effect of the statute.

It is necessary now to notice a further provision in the Act especially applicable to the case of this convict, which is in the following words: "All persons now under sentence of death in this State, or convicted of murder and awaiting sentence, shall be punished as if convicted of murder in the first degree under this Act." (§ 10.)

Several interesting questions arise as to the application of this statute to the case before us: first, whether the prisoner can be executed under the provisions of the Revised Statutes which were in force when the crime was committed and when the trial and conviction took place, but which have since been repealed; second, if not, whether she can be punished with death, with the addition of a preliminary imprisonment as provided in the 4th section of the Act of 1860; and, finally, whether we can give effect to our conclusions, if they are favorable to the prisoner, upon this writ of error, in which we sit in review of a judgment which was not erroneous at the time it was pronounced.

1. . . . But it scarcely required an examination of authorities to establish a principle so plain upon reason as that life cannot be taken under color of law, after the only law by which it was authorized to be taken has been abrogated by the law-making power. But, if the doctrine was less clearly established by reason and authority, it would be the rule to be applied to this case upon the concession of the statute of 1860 itself. In several of the cases which have been adjudged, and to which reference has been made, the immunity extended to the offender was the result of accident or inadvertence. It was apparent that, if the thought had occurred to the law-makers, a saving clause as to existing offences, and especially as to prosecutions and convictions which had taken place, would have been added. Here, however, it is entirely clear that it was intended by the law-makers that offenders in the situation of the plaintiff in error should not be punished under the law which was repealed; for, by the 10th section, as we have seen, a special provision is made for such cases. Convicts for murder, sentenced under the former law, or awaiting sentence, were declared to be punishable, not under the law prevailing when the offence was committed and when the conviction took place, but, "as if convicted of murder under this Act."

2. This leads me to the second question to be considered, namely, whether it is competent for the legislature, after the conviction of a person prosecuted for murder, to change the punishment which the law had annexed to the offence for another and different punishment, as was attempted to be done in this case. It is highly probable that it was the intention of the legislature to extend favor, rather than increased severity, towards this convict and others in her situation; and

it is quite likely that, had they been consulted, they would have preferred the application of this law to their cases, rather than that which existed when they committed the offences of which they were convicted. But the case cannot be determined upon such considerations. No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority, before the imputed offence was committed, and which existed as a law at that time. It would be useless to speculate upon the question whether this would be so upon the reason of the thing, and according to the spirit of our legal institutions, because the rule exists in the form of an express written precept, the binding force of which no one disputes. No State shall pass any *ex post facto* law, is the mandate of the Constitution of the United States. The present question is, whether the provision under immediate consideration is such a law, within the meaning of the Constitution. I am of opinion that it is. The scope and apparent intention of the Act of 1860 is to reduce the punishment for murder, in certain cases. At present, we have no concern with the new arrangement, for in that respect the Act is prospective. But the substituted punishment is made applicable to offences committed under the old law, where convictions have already been had. Persons convicted of murder, as that offence was declared by the Revised Statutes, where the judgment has not been executed, are to be punished as though convicted of murder in the first degree under the Act of 1860. To abolish the penalty which the law attached to the crime when it was committed, and to declare it to be punishable in another way, is, as it respects the new punishment, the essence of an *ex post facto* law. *Fletcher* v. *Peck*, 6 Cranch, 87–138. In this case, Chief Justice Marshall defined an *ex post facto* law to be, one which rendered an act punishable "in a manner in which it was not punishable when it was committed." Chancellor Kent has expressed his approval of that definition, which, he says, is distinguished for its comprehensive brevity and precision. 4 Kent, 409. Judge Chase, in *Calder* v. *Bell*, 3 Dall. 386, stated his apprehension of what was meant in the Constitution by the term in question as follows: He said such laws were, "first, any law which makes an act done before the passing of the law, and which was innocent when done, criminal; second, any law which aggravates a crime, and makes it greater than it was when committed; third, any law which changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; fourth, any law which alters the legal rules of evidence."

Neither of the cases in which these remarks were made, involved any question as to the kind or degree of change in the punishment of an offence already committed, which might be made without a violation of the Constitution. A rule upon that subject is now to be laid down for the first time. In my opinion, then, it would be perfectly competent for the legislature, by a general law,

to remit any separable portion of the prescribed punishment. For instance, if the punishment were fine and imprisonment, a law which should dispense with either the fine or the imprisonment might, I think, be lawfully applied to existing offences; and so, in my opinion, the term of imprisonment might be reduced, or the number of stripes diminished in cases punishable in that manner. Anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence, would not be liable to objection. And any change which should be referrible to prison discipline, or penal administration, as its primary object, might also be made to take effect upon past as well as future offences, as changes in the manner or kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, or the like. Changes of this sort might operate to increase or mitigate the severity of the punishment of the convict, but would not raise any question under the constitutional provision we are considering. The change wrought by the Act of 1860, in the punishment of existing offences of murder, does not fall within either of these exceptions. If it is to be construed to vest in the Governor a discretion to determine whether the convict should be executed, or remain a perpetual prisoner at hard labor, this would only be equivalent to what he might do under the authority to commute a sentence. But he can, under the Constitution, only do this once for all. If he refuses the pardon, the convict is executed according to sentence. If he grants it, his jurisdiction of the case ends. The Act in question places the convict at the mercy of the Governor in office at the expiration of one year from the time of the conviction, and of all his successors during the lifetime of the convict. He may be ordered to execution at any time, upon any notice or without notice. Under one of the repealed sections of the Revised Statutes, it was required that a period should intervene between the sentence and the execution of not less than four, nor more than eight weeks. (§ 12.) If we stop here, the change effected by the statute is between an execution within a limited time to be prescribed by the court, or a pardon or commutation of the sentence during that period, on the one hand, and the placing of the convict at the mercy of the executive magistrate for the time, and his successors, to be executed at his pleasure at any time after one year, on the other. The sword is indefinitely suspended over his head, ready to fall at any time. It is not enough to say, if even that can be said, that most persons would probably prefer such a fate to the former capital sentence. It is enough to bring the law within the condemnation of the Constitution, that it changes the punishment, after the commission of the offence, by substituting for the prescribed penalty a different one. We have no means of saying whether one or the other would be the most severe in a given case. That would depend upon the disposition and temperament of the convict. The legislature cannot thus experiment upon the criminal law.

The law, moreover, prescribes one year's imprisonment, at hard

labor, in a State prison, in addition to the punishment of death. In every case of the execution of a capital sentence, it must be preceded by the year's imprisonment at hard labor. True, the concluding part of the judgment cannot be executed unless the Governor concurs, by ordering the execution. But as both parts may, in any given case, be inflicted, and as the convict is consequently, under this law, exposed to the double infliction, it is, within both the definitions which have been mentioned, an *ex post facto* law. It changes the punishment, and inflicts a greater punishment than that which the law annexed to the crime when committed. It is enough, in my opinion, that it changes it in any manner except by dispensing with divisible portions of it; but, upon the other definition announced by Judge Chase, where it is implied that the change must be from a less to a greater punishment, this Act cannot be sustained.

The mode of execution, according to the Revised Statutes, was by hanging (§ 25); but that section is repealed. How, then, is the convict to be executed? This law does not prescribe the manner. The common law cannot be resorted to, for that system, as applied to this subject, was not in existence when this offence was committed, having been superseded by the Revised Statutes. The mode must, therefore, rest in the discretion of the Governor or the sheriff, and, for aught I see, the method prevailing in France, or Russia, or Constantinople, or that which the English law formerly applied to convictions for heresy or petit treason, may be adopted.

The punishment of murder at the common law was by hanging the offender by the neck until he should be dead. The statutory provision, declaring that the punishment of death should be thus inflicted, was consequently in affirmance of the prescription of the common law. When the legislature of 1860 repealed that section of the statute without substituting anything as to the execution of a capital sentence in its place, they necessarily determined that it should no longer be obligatory for the court by its judgment, or the executive officers in the performance of their duties, to resort to that method of inflicting the punishment of death. It is not clear, whether under the late Act the manner of the execution should be determined by the court, the Governor, or the sheriff. The only thing relating to the subject which is certain is, that the execution is no longer required to be by hanging. The provision in the 5th section of the 1st article, forbidding cruel and unusual punishments, would no doubt apply to the case; but then the duty of determining whether any given method of inflicting death would be within the prohibitions, would be thrown upon the court or the executive magistrate. It is this system, thus uncertain in its results in particular cases, and always depending upon official discretion, that the legislature has substituted for the definite and certain mode of executing the sentence which was prescribed by the law which existed when the offence of this convict was committed. With the expediency of the change considered as a rule to be applied

to future cases, we have nothing to do, but we feel bound to say that in its application to offences which had been committed before the Act was passed, it was a violation of the constitutional provision under consideration.

We are therefore of opinion, that the 10th section of the law in question, as applied to the present case, is an *ex post facto* law, and that it is unconstitutional and void. . . . All the other judges concurring.

Judgment reversed and new trial ordered.

SHEPHERD *v.* THE PEOPLE.

NEW YORK COURT OF APPEALS. 1862.

[25 *N. Y.* 406.]

JAMES SHEPHERD was indicted in the New York General Sessions, in October, 1857, for arson in the first degree, charged to have been committed on the 9th day of June, 1857, and was tried before the Recorder of the city of New York, in February, 1861. The jury found him guilty of the offence. The counsel for the prisoner moved in arrest of judgment, and for a new trial, substantially on the following grounds:

First: That when the offence charged was committed, the punishment prescribed by the Revised Statutes for arson in the first degree was death; but that the Act of April 14th, 1860, entitled, "An Act in relation to capital punishment, and to provide for the more certain punishment of the crime of murder," had changed the punishment for arson in the first degree, prescribed by the Revised Statutes, to imprisonment in one of the State prisons, at hard labor, for life; that the prisoner could not be sentenced under the Act of 1860, because so far as it applied or was intended to apply to crimes of arson in the first degree committed before the passage of the Act, it was *ex post facto*, and unconstitutional.

Second: That the prisoner could not be sentenced under the Act of 1860, because the provisions of that Act, prescribing imprisonment for life as the punishment for arson in the first degree, were prospective merely, and were not intended to apply to a crime of arson in the first degree, committed before the passage of the Act.

Third: That there was no punishment whatever prescribed by the Act of 1860 for arson in the first degree, committed in June, 1857.

The motions in arrest of judgment, and for a new trial, were denied; and the prisoner thereupon was sentenced to be imprisoned at Sing Sing, and be kept at hard labor, for the term of his natural life.

The case having been carried to the Supreme Court, by writ of error, the judgment was affirmed, at general term in the first district; and

was brought to this court by writ of error to the Supreme Court, which writ of error brought up the record alone, without any bill of exceptions.

John W. Ashmead, for the plaintiff in error. *Nelson J. Waterbury*, for The People.

SUTHERLAND, J. When the crime of which the prisoner was convicted was committed it was punishable with death. The prisoner was sentenced to imprisonment in the State prison at Sing Sing for life. The prisoner must have been sentenced on the theory that the provisions of the Act of April 14, 1860, substituting imprisonment for life, for death, as the punishment for arson in the first degree, were intended to apply not only to an offence committed after that Act took effect, but also to the offence of which the prisoner had been convicted, committed in 1857, before the passage of the Act. . . .

It is perfectly plain, that the legislature, by the Act of 1860, intended to punish crimes of arson in the first degree, thereafter committed, with imprisonment in a State prison for life; for section six of the Act provides that punishment for murder in the second degree; and section nine declares, that the punishment for murder in the second degree, "as herein provided, shall apply to all crimes now punishable with death, except," &c.; and arson in the first degree was then, by the Revised Statutes, punishable with death. The prisoner was sentenced under the Act of 1860, and upon a construction of that Act, that the provisions of the Act changing the punishment for arson in the first degree from death to imprisonment for life, were intended to apply to a crime of arson in the first degree, committed before the passage of the Act, and when the provision of the Revised Statutes punishing the crime with death was in full force. I doubt whether such is the true and reasonable construction of the Act. What particularly distinguishes the question in this case from that in the case of *Hartung* v. *The People*, 22 N. Y. 95, is that, by the tenth section of the Act, it is expressly declared that all persons then under sentence of death, or convicted of murder and awaiting sentence, should be punished as if convicted of murder in the first degree under the Act. This section applied to Mrs. Hartung's case. She was under sentence of death, for murder, when the Act of 1860 was passed. The question was, whether she could be punished under the Act; and it was held that she could not; that so far as the Act attempted to subject to the new punishment of death and previous imprisonment at hard labor, persons who had been convicted of murder, it was *ex post facto*, and void. The Act does not expressly declare that the provisions of the act changing the punishment of arson in the first degree should apply to offences committed before the passage of the Act. . . .

The passage of the Act of April 17, 1861, reviving and undertaking to reapply the punishment for murder and for arson in the first degree, in force at the time the Act of April 14, 1860 was passed, to offences committed previously to the day that Act took effect, certainly does not

show that the Act of 1860 was not intended to have a retrospective operation; but the passage of the Act of April 17, 1861, must certainly be deemed a conclusive legislative construction of the Act of 1860, to the effect that that Act presently abolished or repealed the provisions of the Revised Statutes prescribing the punishment of murder and of arson in the first degree, so that the prisoner (who was sentenced prior to the passage of the Act of April 17, 1861) could not have been sentenced to suffer death under the provisions of the Revised Statutes in force when his crime was committed, whatever may be deemed to be the force or effect of the Act of 1861. Nor does it follow that the provisions of the Act of 1860, changing the punishment of arson in the first degree to imprisonment for life, should be construed as intended to have a retrospective operation, if that Act should be deemed to have repealed the provisions of the Revised Statutes punishing that crime. If the legislature, by the Act of 1860, carelessly or unintentionally repealed the law punishing the prisoner's crime, that is no reason why reasonable and well-settled principles of construction should be disregarded for the purpose of punishing it under that Act.

If the Act of 1860 presently repealed the provisions of the Revised Statutes prescribing the punishment of death for arson in the first degree, and the provisions of the Act of 1860, changing that punishment to imprisonment for life, were intended to apply only to offences thereafter committed, the consequence was, that the prisoner's crime was left without any law punishing it. (Dwarr. 676, 677; *State* v. *Daley*, 29 Conn. 272, and cases cited by Judge Denio in the case of Mrs. Hartung.) . . .

No doubt the Act of April 17, 1861, was passed upon the careless assumption that this court, in Mrs. Hartung's case, had decided that the Act of 1860 had repealed the provisions of the Revised Statutes punishing treason, murder and arson, in the first degree, and that offences committed previous to the passage of the Act of 1860 could not be punished under it; whereas I think that the only point that can be said to have been decided in that case was, that, so far as that Act attempted by the tenth section to subject to the new punishment of death and previous imprisonment at hard labor, persons already under conviction for murder, it was *ex post facto* and void. The Act of 1861 having been passed upon an erroneous assumption, has increased the doubts and complications resulting from the extraordinary Act of 1860, and one might be almost excused for thinking that both Acts were mainly designed to punish judges who should unfortunately be called upon to construe and apply them.

But the question presented by the record in this case is, not whether the prisoner might have been sentenced under the provisions of the Revised Statutes to suffer death, or whether, if the judgment should be reversed, and the court can and should award a new trial, and he should be tried and convicted again, he could be sentenced to suffer

death under the Revised Statutes or the Act of 1861, or both; but the question presented by the record is, whether the sentence to imprisonment for life, which was pronounced upon him under the Act of 1860, was legal. I think it was not, because, for reasons before stated, I think the provisions of the Act, changing the punishment for arson in the first degree to imprisonment for life, must be deemed to have been intended to apply only to offences committed after the Act should take effect.

If, however, the provisions of the Act, changing the punishment of arson in the first degree, should be held to have been intended to apply to offences committed before the passage of the Act, in my opinion so far the Act should be held to be *ex post facto* and void.

I think this is shown conclusively by Judge Denio in his opinion in the Hartung case; but I will add that a law which increased the punishment with which an act was punishable when committed would be plainly *ex post facto*, although it might be said, perhaps, that the new law did not change the manner of the punishment; as, for instance, if, when the act was committed, it was punishable with thirty days' imprisonment and the new law declared that it should be punished with forty days' imprisonment; for as to the number of days' imprisonment by which the punishment was increased, the case would be precisely the same as if the act when committed had not been punishable at all, and under the new law the criminal could not be sentenced to any less number of days than were prescribed by it.

So also if an act, when committed, was punishable by thirty days' imprisonment, a subsequent law changing the punishment of the act to thirty stripes or to thirty dollars fine would be plainly *ex post facto*, for when the act was committed it was not punishable in that manner, and in view of the constitutional prohibition of *ex post facto* laws, the case would be precisely the same as if the act had not been punishable at all when committed. If you do not hold a law punishing an act in a different manner than it was punishable when committed to be *ex post facto*, irrespective of the question whether the new punishment is or is not more merciful or lenient, you will leave it to the discretion of the legislature and of judges to say whether the new punishment is or is not more merciful or lenient than the old; and such a construction of the constitutional prohibition would impair its value and certainty of protection. A law, the effect of which is simply to reduce or diminish the punishment with which an act was punishable when committed, cannot be an *ex post facto* law, because it inflicts no new or additional punishment.

In *Fletcher* v. *Peck*, 6 Cranch, Chief Justice Marshall defined an *ex post facto* law to be one which makes an act punishable "in a manner in which it was not punishable when committed." Add to this, or which increases the punishment with which the act was punishable when committed, and I think the definition will be as complete, and certain and safe, as can well be made.

It is plain, then, that the moral or philosophical disquisition as to whether imprisonment for life at hard labor is better or more desirable or less severe than death, has really nothing to do with the question whether the Act of 1860, assuming that it was intended to have a retrospective operation, is, so far, *ex post facto* or not. Imprisonment for life at hard labor is an entirely different kind or manner of punishment, from punishment by death. The Act of 1860 entirely changed the punishment for arson in the first degree. It changed it from death to imprisonment for life. The two punishments have no elements in common. If it should be held that the Act of 1860 merely diminished the punishment with which the prisoner's crime was punishable when committed, because imprisonment for life at hard labor is generally considered a more lenient punishment than death, or one which the criminal would prefer to suffer, then it could be held that a law changing the punishment of an act from imprisonment for a certain number of days or months to a fine, or from a certain number of stripes to imprisonment for a certain number of days, was not *ex post facto*, because the court might think the new punishment more lenient than the old, or that the criminal would prefer to suffer the new punishment. Indeed, as I have before said, if you depart from the principle that a law is *ex post facto* because it punishes the offence in a different manner, or by a different kind of punishment, than it was punishable with when committed, the question whether the law is *ex post facto* is left to judicial discretion; for a decision of the question must depend upon the opinion of judges, as to whether the new punishment is more severe than the old, or whether the new punishment would or would not generally be preferred by criminals to the old. The construction of constitutional limitations should be left as little as possible to either legislative or judicial discretion.

My conclusion is, then, that the provisions of the Act of 1860, changing the punishment of arson in the first degree, were intended to apply only to offences thereafter committed; but if it should be held otherwise, then that those provisions are *ex post facto* and void, so far as they were intended to apply to a crime of arson in the first degree, committed before the passage of the Act. In either view of the Act, and upon either holding, the judgment of the court below must be reversed. . . .

My conclusion is, if the judgment against the prisoner, James Shepherd, is reversed, he should be discharged.

Denio, Ch. J., Wright, Selden, and Allen, JJ., concurred, not now passing on the construction of the Act of 1860, but on the ground that, if retrospective, it is unconstitutional; Davies, Smith, and Gould, JJ., dissented from that portion of the opinion which denies the power of the court to order a new trial, and requires the discharge of the prisoner.

Judgment reversed and prisoner discharged.

HARTUNG *v.* THE PEOPLE.

NEW YORK COURT OF APPEALS. 1863.

[26 *N.* Y. 167.]

AFTER the reversal of the conviction and judgment in this case, at the September term in 1860 (22 N. Y. 95), the record having been remitted to the Oyer and Terminer of Albany County, the District Attorney again moved the trial of the case, when the defendant had leave of that court to plead the former conviction and judgment in bar; and she accordingly put in three special pleas setting forth the indictment, plea of not guilty, trial, verdict, and sentence. The first plea averred that the former convictions were legal and valid and had not been reversed on any legal error therein committed. The second set out, in addition, the constitutional provision declaring that no person should be subject to be twice put in jeopardy for the same offence, and the third set out, at large, the Act of 1860, respecting capital punishment (ch. 410), and averred that it repealed all the provisions of law for the punishment of murder which existed when the alleged offence was committed. The District Attorney put in replication setting out the affirmance of the conviction on error brought to the Supreme Court, and its reversal in the Court of Appeals and the award of a new trial. The replication averred that the reversal was based upon the reasons mentioned in the published opinion of the court, namely, the effect of the Act of 1860; and they also set forth an Act of the legislature, passed the 17th April, 1861, entitled an Act in relation to cases of murder, &c. (ch. 303), restoring, as was averred, the provisions of law respecting murder, as they existed prior to the enactment of the statute of 1860, and at the time when the alleged offence mentioned in the indictment was committed. The prisoner demurred to the replication, and the District Attorney joined in demurrer. The Oyer and Terminer gave judgment upon the demurrer in favor of the prisoner, and adjudged that she be discharged; but this judgment was reversed by the Supreme Court, on error brought on behalf of The People, the court, however, giving leave to the prisoner to withdraw the pleas in bar and to proceed to trial on the issue of not guilty. The present writ of error was brought by the prisoner to review that judgment, and the case was argued here by

William J. Hadley, for the plaintiff in error, and by *Ira Shafer*, late District Attorney, for The People.

DENIO, CH. J. When the case of the plaintiff in error came before us on a former occasion, she had been convicted of murder, upon a legal trial, and had been sentenced to be executed. This court then reversed the judgment because the legislature had subsequently enacted a statute which forbade the execution of such sentence as that

which had been pronounced against her, and had required that such convict should be subjected to imprisonment at hard labor for one year, and, as we construed the legislative intention, should thereafter be executed if the Governor should issue his warrant for such execution. We considered this provision for imprisonment and death in the same case to be an *ex post facto* law, and held it to be void, because the Constitution of the United States had prohibited the States from enacting such laws. It was considered to be *ex post facto*, because it attempted to change the punishment which the law had attached to the offence of the prisoner when it was committed, not by remitting some divisible portion of it, but by altering its kind and character. The principle of the judgment thus reversed has been since reaffirmed and applied in the case of *Shepherd* v. *The People*, 25 N. Y. 406.

Laying out of view for the moment the Act relating to murder, passed in the year 1861, and considering this case as uninfluenced by this Act, the inquiry is whether this convict can be again tried and convicted for the same murder. The legislature, by declaring that persons under sentence of death when the Act of 1860 was passed, instead of being executed according to their sentence, and according to the law as it had existed up to that time, should be put to hard labor for a considerable period, and afterwards hold their lives at the pleasure of the Executive, and be executed when, in his discretion, he should think proper so to order, did effectually repeal, as to that class of offenders, the prior law for the punishment of murder. As the punishment attempted to be substituted for that provided by the antecedent law, which had been abolished, could not be applied on account of the constitutional prohibition, it followed inevitably that the interference of the legislature had rendered it impossible that the prisoner should be punished under either law. It was not a sufficient answer to the difficulty to say that the members of the legislature did not probably intend to grant impunity to offenders in the situation of the prisoner. They did intend to abrogate as to her and as to all persons in the same situation the former punishment, and that design they effectually carried out. They intended also that such offenders should be punished in another way, but this they could not effect on account of the constitutional inhibition. The reversal of the judgment against this prisoner, proceeding, as it did, upon the absence of any law for the punishment of her offence, as effectually exempted her from being again tried and sentenced for the murder charged in the indictment, as it shielded her from the execution of the sentence already pronounced. If a new verdict of guilty should be returned on a second trial, it would be impossible to render a judgment of death pursuant to the Revised Statutes, because the legislature had forbidden her to be punished in that way. It would be as true after such fresh trial and verdict, that she was a person who had been under sentence of death when the Act of 1860 was passed, as it was when we reversed the former judgment, and the same reason which compelled us to reverse that judgment would pre-

clude the giving of a similar judgment upon the second verdict, and would require the reversal of such second judgment if one should be rendered. It would be equally impossible to pronounce the compound judgment of imprisonment at hard labor and a subsequent execution as mentioned in the Act of 1860, because the constitutional objection to that law would apply to her case after a second trial and a new conviction, in the same manner as when judgment was rendered upon the first conviction. It is, therefore, apparent to my mind that in reversing the judgment which had been rendered against the prisoner, we necessarily determined that the legislature had so interfered with the arrangements for the punishment of the crime of murder that a particular class of offenders, embracing the prisoner, could not be punished at all. It was the duty of the Court of Oyer and Terminer to give effect to that judgment in its disposition of the prisoner's case, upon the record being remitted to that court. The order which it made was in accordance with the law as it was here adjudged, unless the Act of 1861 affects the case, and we think it was the only order which it could lawfully make. . . . [Here follows a discussion as to the construction of the statute of 1860.]

We are of the opinion that the Act of 1861 does not affect the case of the plaintiff in error. If it could apply to the persons in the situation in which she was when the Act of 1860 repealed the penalty to which she was subject by the antecedent law, it must be by retracting the repealing clauses and reinstating such antecedent law and directing its application to her case, and to the cases of all other persons similarly situated. But while the repeal remained unaffected by any subsequent law, the process against the plaintiff in error came before this court in the regular course of justice, and the question was presented whether the conviction and judgment which had been pronounced respecting her should be affirmed and executed, or should be reversed and annulled as unwarranted by the then existing law; and the judgment was that it should be reversed and annulled. No question can now be made as to the legal propriety of that determination. It is *res adjudicata* between the people of the State and the plaintiff in error. Now acts done and closed pursuant to a law which is subsequently repealed, must endure and stand and be good and effectual notwithstanding such repeal. Dwarr. on Statutes, 534. This was the case as to the alleged offence of the plaintiff in error. When the process against her was presented for final adjudication in this court, and it was found that there was no law authorizing the punishment of her imputed offence, a judgment was pronounced in her favor which absolved her from being again legally questioned for that offence. It was equivalent to an acquittal upon that charge, for it was the judgment of a court of competent jurisdiction that in the then state of the law she could not be subjected to punishment. The effect of the repealing Act of 1860 was to expunge the prior law from the statute book as completely as though it had never existed. If the legislature was

competent to change this state of the law, by a repeal of the repealing Act, and thus to blot out such first repealing Act so that it could not thereafter be availed of, which it is not necessary to deny, still it could not, in my judgment, destroy the effect of a judgment pronounced in the mean time and while the first repealing Act was in force. Suppose a person had been prosecuted after the passage of the Act of 1860, and before its repeal by the Act of 1861, for an alleged murder committed before the passage of such first mentioned Act, and had been acquitted, not for want of proof of the *corpus delicti*, but upon the grounds on which we proceeded when this case was before us for the first time, namely, that the Act of 1860 had repealed the provisions of the Revised Statutes for the punishment of murder. No one, I suppose, could maintain that such a person could be again prosecuted for the same offence after the enactment of the statute of 1861. Such prosecution, in my judgment, would be liable to be defeated by two conclusive objections; first, that the Act of 1861 as applied to such a case would be an *ex post facto* law and unconstitutional. By the repeal of the provisions of the Revised Statutes and the trial and acquittal of the offender while such repealing law was in force, the act of the prisoner, though not innocent in a moral sense, would be dispunishable. A legislative Act restoring the repealed law would have precisely the same effect as though the offence had not been punishable originally, but had been made so for the first time by the restoring Act. Such a law would be within the spirit of this constitutional prohibition and would, in my opinion, be void. The other objection referred to would arise under the constitutional injunction that no person shall be twice put in jeopardy for the same offence. . . . Enough appears in the case as now presented to show that the award of a new trial was improvidently entered, and the whole case being legitimately before us on this writ of error, we are bound to give effect to the law as it has been pronounced, and we accordingly reverse the judgment of the Supreme Court and affirm that of the Court of Oyer and Terminer, and direct the prisoner to be discharged. . . .

All the judges concurring, *Judgment ordered accordingly.*

RATZKY *v.* THE PEOPLE.

New York Court of Appeals. 1864.

[29 *N. Y.* 124.]

Writ of error to the Supreme Court:

The plaintiff in error was indicted in the Kings County Oyer and Terminer, on the 10th day of November, 1862, for the felonious killing of one Sisgismund Fellner, on the 18th day of October, 1861. He

was convicted of the crime of murder in the first degree, at a Court of Oyer and Terminer held in that county in April, 1863. The prisoner's counsel moved in arrest of judgment: 1st. Upon the ground that the indictment did not sufficiently describe and charge the crime of murder in the first degree, as defined in the Act of April 14th, 1860, relative to capital punishment; and 2d. That the Act does not prescribe any punishment for the crime of which the prisoner was found guilty, and consequently the court had no power to impose any punishment. The court overruled the motion, and on the third day of August, 1863, the prisoner was sentenced to be remanded to the common jail of Kings County, and there detained until the 23d day of September, 1863, and from there removed to the place of execution, and that there, between the hour of twelve meridian and two in [the] afternoon, he be hung by the neck until dead, and that the sheriff cause such execution to be done. The conviction was affirmed at the general term, and on the 19th of December, 1863, the plaintiff brought his writ of error to this court.

S. H. Stuart, for the plaintiff in error. *S. D. Morris* (District Attorney), for The People.

DAVIES, J. The provisions and effect of the Act of April 14, 1860, have been much discussed in this court, and it may be regarded as settled: 1. That offences committed prior to the passage of that Act, the offender cannot be punished in conformity with it, as it substitutes a different punishment for the crime of murder from that prescribed by the laws of the State at the time the offence was committed. It followed from this that no person could be punished for the crime of murder in the first degree where the offence had been committed prior to the Act of April, 1860, so long as the provisions of that Act continued in force. *Hartung* v. *The People*, 22 N. Y. 95. *Same* v. *Same*, March T. 1863; *Shepherd* v. *The People*, 25 N. Y. 406. 2. That a law changing the punishment for offences committed before its passage is *ex post facto* and void under the Constitution, unless the change consists in the remission of some separable part of the punishment before prescribed, or is referable to prison discipline, or penal administration, as its primary object. 3. That the punishment of death was retained by the Act of April 14th, 1860; that the time and manner implicating the death penalty had not been provided for by the terms of that Act; and that the provision of the Revised Statutes, fixing such time and manner, having been expressly repealed, could not be invoked to supply such omission. 4. That in reference to the crime of murder in the first degree, committed after the passage of that Act, and while it remained in force, the offender could be convicted and punished pursuant to the provisions of that Act, and that the proper sentence, upon the conviction for that crime, under that Act, was that the prisoner should be sentenced to suffer the punishment of death, and should at the same time be sentenced to confinement at hard labor, in the State prison, until such punishment of death should be inflicted.

Lowenberg v. *The People*, 27 N. Y. R. 336; *Jeffords* v. *The Same*, January, 1864.

At the time, therefore, of the commission of the offence, for which the plaintiff, in error, has been convicted, the punishment prescribed by law was that he should suffer death therefor, and that until such punishment of death should be inflicted, he should be confined at hard labor in the State prison. If, therefore, the provisions of the Act of 1860 were in full force at the time of the trial, conviction, and sentence of the prisoner, the sentence pronounced must be declared to be illegal, as unauthorized by the terms of that Act. The legislature, by the Act of April 12th, 1862, and which was in force as a law at the time of the sentence, changed the punishment for the crime of murder in the first degree by a revival of the provisions of the Revised Statutes, which directed the manner in which persons sentenced to death should be executed, and made it obligatory on the court to fix the day of sentence not less than four weeks nor more than eight weeks from the time such sentence was pronounced. By section second of the latter Act, it is declared that no offence committed previous to the time when the Act should take effect, should be affected by that Act, except that when any punishment should be mitigated by its provisions (that is, by the provisions of the Act of April, 1862), such provisions should control any judgment to be pronounced after that Act should take effect, for any offences committed before that time. The learned justice, who tried the prisoner and pronounced the sentence of death upon him, undoubtedly acted upon the idea that the provisions of this section were applicable to the present case, and that the punishment for the crime of murder in the first degree, had been mitigated by the law of 1862, and that consequently the punishment prescribed by the Revised Statutes was applicable. For by the Act of 1860, the prisoner convicted of the crime of murder in the first degree was to be punished with death, and to be confined at hard labor in the State prison until such punishment of death should be inflicted. As no person so sentenced or imprisoned could be executed in pursuance of such sentence, within one year from the day on which such sentence should be pronounced, it followed that every person so sentenced to the punishment of death had also to be punished by imprisonment in the State prison, at hard labor, at least for the term of one year. It cannot be doubted that these punishments were separable, and that it was competent for the legislature, in relation to offences committed while the Act of 1860 was in force, to declare that either of them might be omitted. Such omission resulted in a mitigation of the punishment.

But the main difficulty in the present case is, the punishment revised and provided for by the Act of 1862, is different from that in 1860, in other most important particulars. It is true that both Acts declare that persons convicted of the crime of murder in the first degree, shall be punished with death. But by the Act of 1860, such punishment could not be inflicted within one year from the day on which such sentence

of death should be passed, nor until the Governor of the State should issue his warrant under the great seal thereof, commanding such sentence to be carried into execution. We see, therefore, the difference in the punishment for the crime of murder, as prescribed in the Act of 1860, and that prescribed by the Revised Statutes. This court had occasion to consider this difference in the case of *Hartung* v. *The People*, *supra*, and deemed it radical. It was then said: . . . [Here follows the passage on p. 1479, *supra*, beginning "The change wrought," and ending at the words, "The law moreover."] These conclusions were arrived at without any reference to the prescription of at least one year imprisonment at hard labor in a State prison, in addition to the punishment of death. We thus have one authoritative exposition of the different punishments for murder in the first degree as prescribed by the Revised Statutes and in the law of 1860, and that the change of punishment in that prescribed in the latter Act, by substituting for the penalty prescribed by the Revised Statutes, a different one, renders the Act *ex post facto* and void. The Act of 1860, sought to inflict a different punishment for the crime of murder in the first degree than was prescribed for that offence by law at the time of its commission. This rendered the Act void, irrespective of the consideration of the additional punishment at hard labor in a State prison, for one year or more. If, therefore, the punishment declared by the Act was obnoxious, in that it changed that prescribed by the Revised Statutes, which were in force at the time the offence was committed in the *Hartung Case*, it logically follows that for the same reason the punishment prescribed by the Revised Statutes, cannot be inflicted upon a criminal whose offence was committed while the Act of 1860 was in force, and while that prescribed by the Revised Statutes was suspended, and which offence must be punished, if at all, in the manner pointed out in that Act. Whether it can be so punished or not, depends upon the saving clause in the second section of the Act of April 12, 1862, and the Act of April 24, 1863.

The second section of the Act of April, 1862, declares that no offence committed previous to the time when that Act shall take effect shall be affected by that Act, except that when any punishment shall be mitigated by the provisions of that Act, such provision shall control any judgment to be pronounced after the said Act shall take effect, for any offences committed before that time. And section seven of that Act declares that the following additional section shall be added to title one, chapter one, of the fourth part of the Revised Statutes: "Every person who shall be convicted of murder in the second degree, and of arson in the first degree as defined in that Act, shall be punished by imprisonment in a State prison for any term not less than ten years." By the provisions of the Act of 1860, arson in the first degree was punishable with death and imprisonment at hard labor in a State prison until such punishment of death should be inflicted; and every person convicted of murder in the second degree was to be sentenced

to undergo imprisonment in one of the State prisons, and be kept in confinement at hard labor during natural life. We see, therefore, what punishments were mitigated by the Act of 1862, and that in reference to crimes of murder in the second degree, and arson committed before that Act took effect, they were to be punished with the milder or mitigated punishments prescribed by that Act, instead of those prescribed when the same were committed. All other offences committed previous to the time that Act took effect were to be unaffected by it. The crime of murder in the first degree of which the prisoner has been convicted was, therefore, excepted from and unaffected by that Act, and the prisoner upon his conviction should have been sentenced to the punishment prescribed by the Act of 1860.

Great changes were introduced into the criminal code of this State in relation to the punishment of crimes by the revision of our statute law in 1830. The repealing Act contained a saving clause like that found in the Act of 1862, in these words: "That no offence committed previous to the time when any statutory provisions shall be repealed shall be affected by such repeal, except that where the punishment shall be mitigated by the Revised Statutes such mitigated punishment shall be applicable, though the offence was committed before that time." In *The People* v. *Phelps*, 5 Wend. 19, a question was made as to the application of the Revised Statutes to that case. The offence was committed before they took effect, and the indictment and trial were subsequent. Chief Justice Savage, in delivering the opinion of the court, observed that if this saving clause was applicable to the case, there could be no doubt that the indictment was valid; and that those statutes did operate upon that case, he thought there could be no question. He said: "The character of the offence remains as it was when committed, and the punishment cannot be enhanced by any Act taking effect subsequently; but the proceedings must be conducted under the Revised Statutes. The prosecution was commenced and carried on since the first of January, and during that period the Revised Statutes and no other were in force. Offences committed under the old statutes were liable to certain punishments, and no greater can be inflicted; but the prosecution must be conducted by virtue of the statutes in force when the proceedings are had."

In view of these provisions of the statutes and these authorities, we find that the punishment prescribed by the Act of 1860 can only be inflicted for offences committed while that Act was in force, but that all prosecutions for such offences commenced since the Act of 1862, must be conducted by virtue of the statutes in force when the proceedings are had. The saving clause in the Act of 1862 preserves intact the punishment prescribed by the Act of 1860, for all offences committed after that Act went into effect, and before its repeal, except when by the Act of 1862 the punishment had been mitigated, and in such case the mitigated punishment is to be inflicted. But although a part of the punishment on conviction for the crime of murder in the

first degree, namely, that of imprisonment in the State prison until the death penalty should be executed, was taken away by the Act of 1862, and which might lawfully be done, as it was clearly separable from the other, and was an increase and in addition to the death penalty, yet we see that the punishment of death, for the crime of murder in the first degree, as contemplated by the Act of 1860, is a very different punishment from that inflicted for the same offence by the provisions of the Revised Statutes which were brought into operation by the Act of 1862. But for the saving clause of the Act of 1862, the prisoner could not legally be punished for the crime whereof he has been convicted. The judgment in this case was pronounced on the assumption that the prisoner was to be punished according to the Act of 1862. We think this view of the law was erroneous, and consequently the sentence and judgment were erroneous, and must be reversed. It would follow from these considerations and the authority of the case of *The People* v. *Shepherd*, 25 N. Y. 406, that a wrong judgment having been pronounced, although the trial and conviction were regular, this prisoner could not be subjected to another trial, and would be entitled to his discharge. That would unquestionably be so but for the Act of April 24, 1863. In the case of *Lowenberg, supra*, we held that the provisions of that Act had no application to a case pending in this court at the time it took effect as a law. In the present case that Act became operative before the judgment and sentence were pronounced and given, and before the writ of error was prosecuted to this court. It was, therefore, in force when the writ of error in this case was prosecuted, and its provisions are applicable to the duty imposed upon this tribunal, by virtue of that proceeding. This Act declares that the Appellate Court shall have power upon any writ of error, when it shall appear that the conviction has been legal and regular, to remit the record to the court in which such conviction was had, to pass such sentence thereon as the said Appellate Court shall direct. But for the authority conferred upon this court by this statute, it would have had no power, upon reversal of the judgment of the Supreme Court, either to pronounce the appropriate judgment or remit the record to the Oyer and Terminer to give such judgment. This is well settled by authority. *The King* v. *Bounce*, 7 Adol. and Ellis, 58; *Shepherd* v. *Commonwealth*, 2 Met. 419; *Christian* v. *Commonwealth*, 5 Ib. 530; *The King* v. *Ellis*, 5 Barn. and Cress. 395; *Phillips* v. *Barry*, 1 Lord Raymond, 5; *The People* v. *Taylor*, 3 Denio, 91; *O'Leary* v. *The People*, 4 Parker Crim. R. 187; *Shepherd* v. *People, supra*. But the power to remit the record in the present case is ample, and it was intended by the legislature to confer it under the circumstances now presented. There is no question made as to the legality or regularity of the conviction of the prisoner, and we being of the opinion that the only error committed was in not pronouncing the proper sentence and judgment upon such conviction, it is made our duty by this statute to remit the record to the Kings County Oyer and Terminer to pronounce upon the

conviction the proper judgment. And the court does accordingly direct that the record in this action be remitted to the Court of Oyer and Terminer of Kings County, and that such court do sentence the prisoner to suffer death for the crime whereof he stands convicted, and that he be confined at hard labor in the State prison at Sing-Sing until such punishment of death shall be inflicted. . . .

Judgment reversed, and the record directed to be remitted to the Court of Oyer and Terminer, with directions to sentence the prisoner to suffer death for the crime whereof he stands convicted; and that he be confined at hard labor in the State prison until such punishment of death shall be inflicted.

PEOPLE *v.* HAYES.

NEW YORK COURT OF APPEALS. 1894.

[140 *N. Y.* 484.]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 30, 1893, which affirmed a judgment of the Court of General Sessions of the Peace in and for the city and county of New York entered upon a verdict convicting the defendant of the crime of perjury.

The facts, so far as material, are stated in the opinion.

David B. Hill, for appellant. *Henry B. B. Stapler*, for respondent.

PECKHAM, J. . . . 2. It is also urged that the court had no power to sentence the defendant, because the law which was in force at the time of the sentence was, as to the defendant, an *ex post facto* law.

The perjury is alleged in the indictment to have been committed in 1891, at which time the statute provided that any one convicted of perjury, in any case other than upon the trial of an indictment for a felony, should be punished for not less than two, nor more than ten years. Before the trial the statute was amended (chap. 662, Laws of 1892) by leaving out the minimum limitation of the term of imprisonment, so that the punishment might be imprisonment for a less, but could not be for a greater term than under the statute thus amended.

A statute which permits the infliction of a lesser degree of the same kind of punishment than was permissible when the offence was committed, cannot be termed or regarded as an *ex post facto* law. The leading object in prohibiting the enactment of such a law in this country was to create another barrier between the citizen and the exercise of arbitrary power by a legislative assembly. It was well understood by the framers of our Federal Constitution that the executive was not the only power in a government such as they were about to establish, which would require constitutional limitations. The possible tyranny by a majority of a representative assemblage was well understood and ap-

preciated, and there were for that reason many provisions inserted in the Constitution limiting the exercise of legislative power by the Federal and also by State legislatures.

Bills of attainder and *ex post facto* laws had at that time a quite well-understood meaning. The former was a legislative judgment of conviction, an exercise of judicial power by Parliament without a hearing and in disregard of the first principles of natural justice. Such bills had been passed in England, and the parties thereby condemned had been put to death. The *ex post facto* law was regarded as a law which provided for the infliction of punishment upon a person for an act done, which when it was committed was innocent. 1 Black. Com. p. 46. Enlarging upon this definition as being of the same species and coming within the same principle, a law which aggravated a crime or made it greater than it was when committed, or one which changed the punishment or inflicted a greater punishment than the law annexed to the crime when committed, or a law which changed the rules of evidence and received less or different testimony than was required at the time of the commission of the crime, in order to convict the offender, was included in the definition of an *ex post facto* law. *Calder* v. *Bull*, 3 Dall. U. S. R. 386, per Chase, J., at 390. In the case just cited Mr. Justice Chase said that 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; that it was 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. No Act that mollified the rigor of the criminal law was regarded as an *ex post facto* law, but only a law that created or aggravated the crime, increased the punishment, or changed the rules of evidence in order to secure conviction. The same view of the subject was taken by Denio, J., in *Hartung* v. *People*, 22 N. Y. 95, at 105. See also *Shepherd* v. *People*, 25 Id. 406. Nowhere is it suggested that legislative interference by way of mitigating the punishment of an offence could be regarded as an *ex post facto* law, if applicable to offences committed before its passage. There is no reason for any such holding. It was never supposed that constitutional obstacles would be necessary in order to prevent the improper exercise of legislative clemency. There was little to fear from that quarter upon such a subject. Those who framed the Constitution were not engaged in creating obstacles to be placed in the path of those legislators who desired by legislative enactment to exercise clemency towards offenders, nor were they anxious lest those who were intrusted with power should be disinclined to exercise it with sufficient sternness. Human experience had furnished them with no examples of danger from that direction, and their anxiety on that account cannot be discerned from a perusal of the Federal Constitution. In many, if not in most cases the reasons for mitigating the severity of the punishment for any particular kind of crime would apply with equal force to those cases in which the crime had been committed be-

fore, as well as to those in which the crime might be committed subsequent to the enactment of the law, and we are aware of no policy which prevents such a construction of the constitutional provision as would permit that kind of a retrospective Act. That it materially affects the punishment prescribed for a crime is not the true test of an *ex post facto* law. In regard to punishment it must affect the offender unfavorably before it can be thus determined. It seems to us plain that there can be no reason for any other view.

I do not think that the mere fact of an alteration in the manner of punishment, without reference to the question of mitigation, necessarily renders an act obnoxious to the constitutional provision. I know it is alluded to in the two cases in this State above cited, — that of *Hartung* and of *Shepherd*. In those cases the alteration was not merely in the manner. It was an alteration from capital punishment, to be inflicted in a certain manner and within a certain time after sentence was pronounced, to a punishment of a year's hard labor in State prison and then a possibility of capital punishment thereafter, at any time during the life of the criminal, at the pleasure of the Governor for the time being, with imprisonment in the mean time at hard labor. As Judge Denio said: "The sword is indefinitely suspended over his head, ready to fall at any time." It was said also by the same learned judge that it was not enough to say that most persons would probably prefer such a fate to the former capital sentence, because there were no means of knowing whether the one or the other punishment would be the most severe in a given case, as that would depend upon the disposition and temperament of the convict. I think that where a change is made in the manner of the punishment, if the change be of that nature which no sane man could by any possibility regard in any other light than that of a mitigation of punishment, the Act would not be *ex post facto* where made applicable to offences committed before its passage.

The present case does not involve the question, and it is only mentioned for the purpose of calling attention to it as one which has not yet been squarely decided in this court. . . .

In *Commonwealth* v. *Wyman*, 12 Cush. 237, the Massachusetts Court held that the alteration of the punishment from that of death to imprisonment for life was not *ex post facto* when applied to offences committed prior to the passage of the Act.[1] We have seen that in our

[1] "Nor, although the Act imposing the particular punishment was passed after the offence was committed, was it an *ex post facto* law, within the meaning of the maxim which considers such laws unjust, or contrary to the prohibition of the Constitution. An *ex post facto* law is one which declares an act previously done, criminal and punishable, and which was not so when the act was done, or which declares a much higher punishment than existed at that time. But an Act plainly mitigating the punishment of an offence is not *ex post facto;* on the contrary, it is an Act of clemency. A law, which changes the punishment from death to imprisonment for life, is a law mitigating the punishment, and therefore not *ex post facto*. *Commonwealth* v. *Mott*, 21 Pick. 492; *Calder* v. *Bull*, 3 Dall. 386; 1 Kent Com. (7th ed.) 450; Story Const. § 1339." — SHAW, C. J., for the court, in *Commonwealth* v. *Wyman*, 12 Cush. 237, 239 (1853). — ED.

own State such an alteration, under the peculiarities of our statute, was held to be an *ex post facto* law. I have seen no case where such an alteration as is disclosed by the Act under discussion has been held to be an *ex post facto* law. In the *Hartung Case* the power of the legislature to remit any separable portion of the prescribed penalty was declared, and the very case of the reduction in the term of imprisonment was cited as an instance of legislative power. We are clear there is no constitutional objection to the statute. . . .

The judgment should be affirmed. All concur, except BARTLETT, J., not sitting. *Judgment affirmed.*

DASH *v.* VAN KLEECK.

NEW YORK SUPREME COURT OF JUDICATURE. 1811.

[7 *Johns.* 477.]

THIS was an action of debt for an escape. The cause was tried at the Albany Circuit, in April, 1810, before MR. JUSTICE THOMPSON.

The judge decided that the Act of the 5th April, 1810, concerning escapes, &c. (33d sess. c. 187), passed after issue joined, and before the trial, was no bar to the plaintiff's action; and directed the jury to find a verdict for the plaintiff. The jury found a verdict accordingly, for 478 dollars and 32 cents.

A motion was made to set aside the verdict, and for a new trial, which was argued at the last August term.

Rodman and *Van Vechten*, for the defendant. *Henry*, *contra*.

The judges being divided, now delivered their opinions *seriatim*.

YATES, J. . . . The next question is, whether the alleged escape is cured by the statute of 1810. . . .

The third section of this statute enacts, that nothing contained in the Act, entitled, an Act relative to jails, or in the Act rendering bonds taken for the jail liberties assignable, and for other purposes, shall be so construed as to prevent any sheriff, in case of escapes, from availing himself, as at common law, of a defence arising from a recaption on fresh pursuit, and a returning of the prisoner within the custody of such officer before an action shall be commenced for the escape.

It appears by this section, that such a construction shall be given to those statutes as not to prevent any sheriff from setting up the defence he had at common law; evidently embracing all such cases as have arisen since the statutes mentioned in this Act were passed, and such as might thereafter be presented to the courts; otherwise it was not necessary to state the true interpretation of those statutes; the defence might have been secured to the officer without it.

If those statutes had explicitly avowed the intention of the legislature, and the doctrine of escape now urged had been known and allowed to

have been plainly established by them, legislative interposition in this way would be inconsistent and improper; but the principle had never been recognized by our courts until the decision of *Tillman* v. *Lansing*, which took place in February Term, 1809; and at the ensuing session of the legislature, this law, explaining the true construction of the former statutes, was passed, securing to the sheriff the benefit of the defence, as stated in the above section.

I think this case is clearly distinguishable from a known vested right, to which the doctrine cited from 4 Bac. would apply; that no statute ought to have a retrospect beyond the time of its commencement; but we are convinced that it was the received opinion, after the passing of the statutes relative to jails and jail liberties, the sheriffs might avail themselves of this defence, and that those laws are not so positive as to supersede the necessity, or preclude the right of legislative explanation. Though the maxim of *communis error facit jus* does not strictly apply; yet I am of opinion, under the circumstances of the case, the declaratory Act must control this decision, and that the construction of the legislature must prevail.

There is nothing in the State Constitution to prevent legislative interference; and being in the nature of a tort, and not a contract, this question cannot be affected by the Constitution of the United States, which, in the 10th section declares that no State shall pass an *ex post facto* law, or law impairing the obligation of contracts.

If by an *ex post facto* law is intended all retrospective statutes, as well in relation to civil as criminal matters, then this court ought to pronounce the law in question nugatory, as being against the prohibition in the Constitution of the United States; but I do not think that the definition of an *ex post facto* law can be extended beyond criminal matters; such laws are only intended, as subject the citizen to punishment for an act done before the existence of the law, and declared criminal by such subsequent statute; or, according to Justice Blackstone, in his Commentaries, when, after an action (indifferent in itself) is committed, the legislature for the first time declares it to have been a crime, and inflicts a punishment on the person who has committed it.

It will not be pretended that the operation of this law could in any way impair the obligation of contracts. Hence it is manifest that the Constitution of the United States does not reach this case.

I am, accordingly, of opinion, that the legislature were possessed of competent authority to pass this declaratory Act; and that the defendant is entitled to his defence, as at common law, according to the construction given to the former statutes by this last law, and that, consequently, the verdict must be set aside, and a new trial granted.

KENT, CH. J. . . . 2. The next question is, whether the Act of the 5th of April last created any new plea in bar of the action.

The words of the Act are, that nothing contained in the Act entitled, an Act relative to jails, passed March 30, 1801, or in the Act entitled, an Act rendering bonds taken for the jail liberties assignable, and for

other purposes, passed March 28, 1809, shall be so construed as to prevent any sheriff, coroner, or other officer, in cases of escapes, from availing himself, as at common law, of a defence arising from a recaption on fresh pursuit, and a returning of the prisoner within the custody of such officer, before an action shall be commenced for the escape.

As this Act was passed, not only after the escape in question, but after suit brought, it cannot apply to and govern this case, but in one of two ways. It must be considered either as creating a new rule for the government of the past case, or as declaring the interpretation of the former statutes for the direction of the courts. I think it can be shown, that upon principles of law and the Constitution, the Act cannot be adjudged to operate in either of those points of view; and I should be unwilling to consider any Act as so intended, unless that intention was made manifest by express words, because it would be a violation of fundamental principles, which is never to be presumed.

This Act, according to a very natural and reasonable construction, is prospective, and applies only to escapes happening after the passing of it. If it meant that the provision in the Act giving the plea should apply to past escapes, why did it limit suits for such escapes to six months, and for future escapes to one year? The very great reduction of the time of limitation in the first case, must have been made on the ground of the supposed hardship of the then existing law. There would have been no reason for varying the period of limitation, if the same beneficial plea was intended to apply to both cases. The language of the section in question is strictly and grammatically applicable only to actions to be commenced, — "before an action shall be commenced for the escape." I am persuaded that the Act was understood in the council of revision to read prospectively, or it would not have passed without further consideration. This construction is agreeable to those settled rules which the wisdom of the common law has established for the interpretation of statutes, as it is not inconvenient, nor against reason, and injures no person. A statute is never to be construed against the plain and obvious dictates of reason. The common law, says Lord Coke (8 Co. 118 *a*), adjudgeth a statute so far void; and upon this principle the Supreme Court of South Carolina proceeded, when it held (1 Bay, 93), that the courts were bound to give such a construction to a statute as was consistent with justice, though contrary to the letter of it. The very essence of a new law is a rule for future cases. The construction here contended for on the part of the defendant would make the statute operate unjustly. It would make it defeat a suit already commenced, upon a right already vested. This would be punishing an innocent party with costs, as well as divesting him of a right previously acquired under the existing law. Nothing could be more alarming than such a subversion of principle. A statute ought never to receive such a construction, if it be susceptible of any other, and the statute before us can have a reasonable object and full operation without it. In the case of *Beadleston* v. *Sprague* (6 Johns. Rep. 101), this court unhesi-

tatingly acknowledged the principle that a statute is not to be construed so as to work a destruction of a right previously attached. We are to presume, out of respect to the lawgiver, that the statute was not meant to operate retrospectively; and if we call to our attention the general sense of mankind on the subject of retrospective laws, it will afford us the best reason to conclude that the legislature did not intend in this case to set so pernicious a precedent. How can we possibly suppose, that in so unimportant a case, when there were no strong passions to agitate, and no great interest to impel, that the legislature coolly meant the prostration of a principle which has become venerable for the antiquity and the universality of its sanction, and is acknowledged as an element of jurisprudence?

A review of the cases on this subject may be interesting and instructive.

It is a principle in the English common law, as ancient as the law itself, that a statute, even of its omnipotent Parliament, is not to have a retrospective effect. *Nova constitutio futuris formam imponere debet, et non præteritis.* (Bracton, lib. 4 fol. 228; 2 Inst. 292.) This was the doctrine as laid down by Bracton and Coke; and in *Gilmore* v. *Shuter* (2 Mod. 310; 2 Lev. 227; 2 Jones, 108), it received a solemn recognition in the Court of K. B. In that case a suit was brought after the 24th of June, 1677, upon a parol promise made before that date, but to be performed after that date, and the question was, whether it was void by the statute of frauds and perjuries, which enacted that "from and after the 24th of June, 1677, no action should be brought to charge any person upon any agreement made in consideration of marriage, &c. unless such agreement be in writing," &c. It was admitted that the promise declared on was of the same kind with those mentioned in the statute, but the court agreed unanimously that the statute was to be read by a transposition of the words, for that it was not to be presumed that the Act had a retrospect to take away an action to which the plaintiff was then entitled, and that the other construction would make the Act repugnant to common justice. When we consider that this decision was pronounced as early as the reign of Charles II., we are forcibly impressed with the spirit of equity, and the independence of the English courts. So, again, in the modern case of *Couch* v. *Jefferies* (4 Burr. 2460), which was a *qui tam* suit for a penalty, the question was, whether a statute passed after the commencement of the suit, allowing delinquents, by such a day, to pay a stamp duty, and rid themselves of the penalty, should affect the case of a suit already commenced, and the Court of K. B. unanimously determined that it could not. "It can never be the true construction of this Act," and Lord Mansfield, "to take away this vested right, and punish the innocent pursuer of it with costs."

The maxim in Bracton was probably taken from the civil law, for we find in that system the same principle, that the lawgiver cannot alter his mind to the prejudice of a vested right. *Nemo potest mutare con-*

silium suum in alterius injuriam. (Dig. 50, 17, 75.) This maxim of Papinian is general in its terms; but Dr. Taylor (Elements of the Civil Law, 168), applies it directly to a restriction upon the lawgiver; and a declaration in the Code leaves no doubt as to the sense of the civil law. *Leges et constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari, nisi nominatim, et de præterito tempore, et adhuc pendentibus negotiis cautum sit.* (Cod. 1, 14, 7.) This passage, according to the best interpretation of the civilians, relates not merely to future suits, but to future as contradistinguished from past contracts and vested rights. (Perezii Prælec. h. t.) It is, indeed, admitted that the prince may enact a retrospective law, provided it be done expressly; for the will of the prince, under the despotism of the Roman emperors, was paramount to every obligation. Great latitude was anciently allowed to legislative expositions of statutes; for the separation of the judicial from the legislative power was not then distinctly known or prescribed. The prince was in the habit of interpreting his own laws for particular occasions. This was called the *interlocutio principis;* and this, according to Huber's definition, was, *quando principes inter partes loquuntur, et jus dicunt.* (Prælec. Juris. Rom. vol. ii. 545.) No correct civilian, and especially no proud admirer of the ancient republic (if any such then existed), could have reflected on this interference with private rights and pending suits, without disgust and indignation; and we are rather surprised to find that under the violent and irregular genius of the Roman government, the principle before us should have been acknowledged and obeyed to the extent in which we find it. The fact shows that it must be founded in the clearest justice.

Our case is happily very different from that of the subjects of Justinian. With us the power of the lawgiver is limited and defined; the judicial is regarded as a distinct independent power: private rights have been better understood and more exalted in public estimation, as well as secured by provisions dictated by the spirit of freedom, and unknown to the civil law. Our constitutions do not admit the power assumed by the Roman prince; and the principle we are considering is now to be regarded as sacred. It is not pretended that we have any express constitutional provision on the subject; nor have we any for numerous other rights dear alike to freedom and to justice. An *ex post facto* law, in the strict technical sense of the term, is usually understood to apply to criminal cases, and this is its meaning when used in the Constitution of the United States; yet laws impairing previously acquired civil rights are equally within the reason of that prohibition, and equally to be condemned. We have seen that the cases in the English and in the civil law apply to such rights; and we shall find upon further examination, that there is no distinction in principle, nor any recognized in practice between a law punishing a person criminally, for a past innocent act, or punishing him civilly by divesting him of a lawfully acquired right. The distinction consists only in the degree of the

oppression, and history teaches us that the government which can deliberately violate the one right soon ceases to regard the other.

There has not been, perhaps, a distinguished jurist or elementary writer within the last two centuries who has had occasion to take notice of retrospective laws, either civil or criminal, but has mentioned them with caution, distrust, or disapprobation. Numerous authorities might be cited, but I will select only two, and those no ordinary names. Lord Bacon gives more toleration to retrospective, and particularly to declaratory laws, than can now be admitted under our more precise and accurate distribution and limitation of the powers of government; yet he was, at the same time, duly sensible of their danger and injustice. He confines them to special cases, limits them with solicitude, and speaks of them in general with reproach. *Leges quæ retrospiciunt raro, et magna cum cautione sunt adhibendæ; neque enim placet Janus in Legibus. Cavendum tamen est, ne convellantur res judicatæ. Leges declaratorias ne ordinato, nisi in casibus, ubi leges cum justitia retrospicere possint.* (De Aug. Scient. Lib. 8, c. 3; Aphor. 47–51). Puffendorf lays down, without any qualification, a general and pointed condemnation of all such laws; he says, "a law can be repealed by the lawgiver, but the rights which have been acquired under it, while it was in force, do not thereby cease. It would be an act of absolute injustice to abolish with a law all the effects which it had produced. Suppose, for example, that there exists a law that the father of a family may dispose of his property by will, the legislature may without doubt restrain this unlimited right of disposing by will, but it would be unjust to take away the property acquired by will during the existence of the former law." (Droit de la Nat. L. 1, c. 6, s. 6.)

The Constitution of New Hampshire, established in 1792, has an article in its bill of rights, that "retrospective laws are highly injurious, oppressive, and unjust; and that no such laws should be made, either for the decision of civil causes, or the punishment of offences." It was also an article in the Constitution, established for the French Republic, in the year 1795, that no law, criminal or civil, could have a retroactive effect: "Aucune loi, ni criminelle, ni civile, ne peut avoir d'effet rétroactif." Even French despotism, atrocious as it is in practice, yields, in its laws, to the authority of such a principle; for the same limitation is laid down as a fundamental truth in the code now in force under the sanction of the French empire. (Code civil des Français, No. 2.) And as often as the question has been brought before the courts of justice in this country, they have uniformly said, that the objection to retrospective laws applies as well to those which affect civil rights, as to those which relate to crimes.

In the case of *Osborne* v. *Huger* (1 Bay's Rep. 179), which came before the Supreme Court of South Carolina in 1791, the question arose upon a statute relative to the duty of sheriffs as to civil process; the court rejected the construction of a retrospective operation of the statute, according to its literal meaning; and Judge Burke, in particular,

said that he should not be for construing a law so as to divest a right; and that a retrospective law in that sense would be against the Constitution of the State. The judges of the Supreme Court of the United States, in the case of *Calder* v. *Bull* (3 Dallas, 386), speak in strong terms of disapprobation of all such laws; and in *Ogden* v. *Blackledge* (2 Cranch, 272), they considered the point too plain for argument, that a statute could not retrospect, so as to take away a vested civil right.

This train of authority declaratory of the common sense and reason of the most civilized States, ancient and modern, on the point before us, is sufficient, as I apprehend, to put it at rest; and to cause not only the judicial, but even the legislative authority to bow with reverence to such a sanction.

It is equally inadmissible to consider the Act as declaring how the former statutes were to be construed, as to cases already existing. If this interpretation was to be considered as giving the former Acts a new meaning, it then becomes a new rule, and is to have the same effect, as any other newly created statute. But if it be considered as an exposition of the former Acts for the information and government of the courts in the decision of causes before them, it would then be taking cognizance of a judicial question. This could not possibly have been the meaning of the Act, for the power that makes is not the power to construe a law. It is a well-settled axiom that the union of these two powers is tyranny. Theorists and practical statesmen concur in this opinion. Our government, like all the other free governments upon this continent, and like the only free government, at present, remaining in Europe, consists of departments, and contains a marked separation of the legislative and judicial powers. The constitutions of several of the United States, and among others, those of Massachusetts and Virginia, have an express provision, that the legislative and judicial powers shall be preserved separate and distinct, so that one department shall not exercise the functions belonging to the other. Most of the models of a free and limited Constitution which were produced in Europe, under the impulse of the late revolution, and which had any pretensions to skill or wisdom, and particularly the new constitutions of Poland and France in 1791, and of France in 1795, contained the same provision, in language more or less explicit. And if it be not found in our own Constitution, in terms, it exists there in substance; in the organization and distribution of the powers of the departments, and in the declaration that the "supreme legislative power" shall be vested in the senate and assembly. No maxim has been more universally received and cherished as a vital principle of freedom. And without having recourse to the authority of elementary writers, or to the popular conventions of Europe, we have a most commanding authority, in the sense of the American people, that the right to interpret laws does, and ought to belong exclusively to the courts of justice.

For these reasons, I consider that the case before the court ought

to be decided precisely as if the Act of the 5th of last April had not been passed. . . .

VAN NESS, J., declared himself to be of the same opinion.

Motion denied.[1]

[The opinions of SPENCER, J., concurring in result with YATES, J., and of THOMPSON, J., concurring in result with KENT, C. J., are omitted].

MECHANICS, ETC. SAVINGS BANK, ETC. *v.* ALLEN ET AL.

CONNECTICUT SUPREME COURT OF ERRORS. 1859.

[28 *Conn.* 97.]

BILL for a foreclosure. The plaintiffs were a corporation organized under the Act authorizing the establishment of savings banks and building associations. The mortgage had been made by the defendant Allen, who was at that time a member of the corporation (the other defendant being a second mortgagee), to secure a loan of $1,000, made to him by the plaintiffs on the 16th of February, 1853. For this loan a note had been given by him at the time, payable on demand, with interest, and a bonus of three-fourths of one per cent. per month in addition to the interest. By the statute above mentioned such corporations were authorized to take a bonus in addition to the interest upon loans made to their own members; but it was held by the Supreme Court of Errors, in the year 1855, in the case of *Mutual Savings Bank* v. *Wilcox*, 24 Conn. 147, that the bonus intended by the statute was a single sum to be paid at the time of the loan, and not a monthly percentage as in the present case, and that accordingly the loan in that case was usurious, and subject, under the statute with regard to usury, to a deduction from the principal of all the interest and bonus paid. The savings and building associations throughout the State, having generally, under the construction which they put upon the law, made loans upon monthly bonuses, an Act was passed by the next General Assembly, in May, 1856, known as the "healing Act," which provided that such loans, theretofore made, should not be held, by reason of the taking of a monthly bonus, "usurious, illegal, or in any respect void," but that, if otherwise legal, they were thereby "confirmed and de-

[1] See also *Com.* v. *Homer*, 153 Mass. 343; *Callahan* v. *Callahan*, 36 So. Ca. 454; *Lowe* v. *Harris*, 112 No. Ca. 472. Compare Cooley Const. Lim., 6th ed. 110–113, as to declaratory statutes: "But in any case the substance of the legislative action should be regarded rather than the form; and if it appears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts should accept and act upon it, without too nicely inquiring whether the mode by which the new rule is established is or is not the best, most decorous, and suitable that could have been adopted." Ib. 113. — ED.

cleared to be valid, as to the principal, interest and bonus." It was claimed on the part of the defendants that this Act was unconstitutional and invalid, and that the loan secured by the mortgage was to be regarded as usurious, and that all payments of interest and bonus that had been made upon it were to be applied, under the statute with regard to usury, in reduction of the principal. It was agreed that the sum due upon the mortgage note, if such application was made, was $545, and if not made, and the plaintiffs were entitled to recover the whole amount of principal, interest and bonus, that the sum due was $1,083.10.

Upon these facts the case was reserved by the Superior Court for the advice of this court.

Blackman and *Ives*, for the plaintiffs, *Hooker* and *Harrison*, for the defendants.

McCURDY, J. The restricting of the price to be paid for the use of money is everywhere a statutory regulation. In the absence of unfairness or oppression there is no more inherent wrong in receiving ten dollars for the loan of one hundred dollars for a year than in taking the same sum for the use of any other article.

By the law of 1850, the lender and borrower in certain cases were allowed, in addition to the regular rate of interest, to agree upon a bonus to be paid for the money loaned. According to an understanding of this statute which prevailed throughout the State, it was generally arranged that this bonus should take the form of a monthly percentage, instead of a gross sum in advance. That construction was held in the case of *Mutual Savings Bank, etc.* v. *Wilcox*, 24 Conn. 147, to be erroneous; whereupon the law of 1856 was enacted. It is admitted that this statute applies directly, in its meaning and its terms, to the case before the court, and the only defence is that the law itself is void. There is nothing in the contract in question which this court can say is unfair or unjust. The difficulty in enforcing its execution which was created by the doubtful phraseology of one statute, was removed by the positive provisions of the other, and the parties were thus left to their original agreement, unembarrassed by the mistakes of form.

It is not easy to see how the objection of the respondents can be sustained, except by taking the broad ground that a retroactive law is of course and under all circumstances to be treated as a nullity — a position which we cannot believe any court in this country at the present time would be likely to assume; for healing enactments are found absolutely necessary, continually, and under all governments, to remedy the evils arising from human imperfections.

This subject was thoroughly investigated in the case of *Goshen* v. *Stonington*, 4 Conn. 209, and the questions now raised were elaborately discussed and were supposed to be settled. The retroactive law objected to in that case was far more extensive in its effects than the statute of 1856. It made husbands and wives of persons who, except

for its provisions, were single. It made children legitimate who were otherwise bastards. It altered settlements, and conferred new rights, and imposed new duties and restrictions upon towns and individuals. It changed lines of descent and deranged rules of property. The principle adopted was, in substance, that when a statute is expressly retroactive, and the object and effect of it is to correct an innocent mistake, remedy a mischief, execute the intention of parties, and promote justice, then, both as a matter of right and of public policy affecting the peace and welfare of the community, the law should be sustained.

That decision has been followed in this State in the cases of *Bridgeport* v. *Hubbell*, 5 Conn. 237; *Mather* v. *Chapman*, 6 Id. 55; *Beach* v. *Walker*, Id. 190; *Norton* v. *Pettibone*, 7 Id. 319; *Booth* v. *Booth*, Id. 350; and *Savings Bank* v. *Bates*, 8 Id. 505. The last case is nearly identical with the present.

The case of *Goshen* v. *Stonington* has become a leading one throughout the country, and its reasonings and results have been generally approved, although it must be admitted there are numerous *dicta* and some decisions which seem to militate against them. We deem it unnecessary to review the cases elsewhere, as the decisions in this State are so numerous, uniform, manifestly just, and entirely satisfactory. We advise judgment for the plaintiffs for the full amount of their claim.

In this opinion the other judges concurred.

Judgment for plaintiffs for full amount.[1]

[1] "But it is said that this is a retrospective Act, which gives validity to a void transaction. Admitting that it does so, still, it does not follow that it may not be within the scope of the legislative authority, in a government like that of Rhode Island, if it does not divest the settled rights of property. A sale had already been made by the executrix under a void authority, but in entire good faith (for it is not attempted to be impeached for fraud), and the proceeds, constituting a fund for the payment of creditors, were ready to be distributed as soon as the sale was made effectual to pass the title. It is but common justice to presume that the legislature was satisfied that the sale was *bonâ fide*, and for the full value of the estate. No creditors have ever attempted to disturb it. The sale, then, was ratified by the legislature, not to destroy existing rights, but to effectuate them and in a manner beneficial to the parties. We cannot say that this is an excess of legislative power, unless we are prepared to say that, in a State not having a written constitution [see *supra*, p. 78, n. 1. — ED.], Acts of legislation having a retrospective operation are void as to all persons not assenting thereto, even though they may be for beneficial purposes, and to enforce existing rights. We think that this cannot be assumed as a general principle by courts of justice. The present case is not so strong in its circumstances as that of *Calder* v. *Bull*, 3 Dall. Rep 386, or *Rice* v. *Parkman*, 16 Mass. Rep. 326, in both of which the resolves of the legislature were held to be constitutional." — STORY, J., for the court, in *Wilkinson* v. *Leland*, 2 Pet. 627, 661.

Compare DANIEL, J., for the court, in *Baltimore & Susquehanna Railroad Company* v. *Nesbit*, 10 How. 395, 401. — ED.

WOART *v.* WINNICK.

New Hampshire Superior Court of Judicature. 1826.

[3 *N. H.* 473.][1]

[On demurrer to the defendant's plea of the Statute of Limitations.]

Moody and *Crosby*, for the plaintiff. *Lyford*, for the defendant.

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

The statute of June 30, 1825, entitled "an Act for the limitation of actions and preventing vexatious suits," is, by its express terms, applicable only to actions commenced after its enactment; and the last section of that Act repeals all the statutes, which were previously in force, for the limitation of personal actions. If, therefore, the repealing clause of that statute can take effect with respect to actions which were pending on the 30th June, 1825, there is now no statute of limitations which can be held to be a bar to such actions.

But it is contended on the part of the defendant that the repealing clause of that statute is, so far as regards actions then pending, repugnant to the Constitution of this State, and therefore wholly inoperative; and the question, which this case presents for our decision, is whether that clause in the statute is in that respect warranted by the Constitution.

The clause in the Constitution upon which the defendant relies, is the 23d article in the bill of rights. "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offences." We shall, therefore, proceed to examine that article, and endeavor to ascertain its meaning, and to see in what cases and to what extent it is to be considered as a limitation of the power of the legislature.

It is evident from this article in the bill of rights, that there are different kinds of retrospective laws; for two species are here enumerated — retrospective laws for the decision of civil causes, and retrospective laws for the punishment of offences. We shall, in the first place, advert to retrospective laws for the punishment of offences, or to *ex post facto* laws, as they are usually called; because their nature seems to be better defined and settled in the books, than that of any other species of retrospective laws; and the general principles, which have been settled in relation to that kind, may throw some light upon the nature of retrospective laws for the decision of civil causes, and aid us in determining, whether the repealing clause in the statute, which we are now examining, is a retrospective law for the decision of civil causes, within the meaning of that article in the bill of rights. . . .

[1] The statement of the case is omitted.

It therefore seems that a retrospective law for the punishment of an offence, within the meaning of our bill of rights, must be a law made to punish an act previously done, or to increase the punishment of such act, or in some way to change the rules of law in relation to its punishment, to the prejudice of him who committed it. In other words, it must be a law establishing a new rule for the punishment of an act already done.

The only object of this clause in the bill of rights was to protect individuals against unjust and oppressive punishment. Therefore, while it withholds the power to make retrospective laws for the punishment of offences, it leaves to the legislature the power to make such laws, at its discretion, for the mitigation of punishment.

A very different language is used in the other clause of this article in the bill of rights. No retrospective law should be made for the decision of civil causes. Here the object of the clause is to protect both parties from any interference of the legislature whatever, in any cause, by a retrospective law.

A law for the decision of a cause is a law prescribing the rules by which it is to be decided; —a law enacting the general principles by which the decision is to be governed. And a retrospective law for the decision of civil causes is a law prescribing the rules by which existing causes are to be decided, upon facts existing previous to the making of the law. Indeed, instead of being rules for the decision of future causes, as all laws are in their very essence, retrospective laws for the decision of civil causes are, in their nature, judicial determinations of the rules by which existing causes shall be settled upon existing facts. They may relate to the grounds of the action, or the grounds of the defence, both of which seem to be equally protected by the Constitution. And as, on the one hand, it is not within the constitutional competency of the legislature to annul by statute any legal ground on which a pending action is founded, or to create any new bar by which such an action may be defeated; so, on the other hand, it is believed that no new ground for the support of an existing action can be created by statute, nor any legal bar to such an action be thus taken away. A statute attempting any of these things, seems to us to be a retrospective law for the decision of civil causes within the prohibition of this article in the bill of rights. It is the province of the legislature to provide rules for the decision of future causes. It is the province of courts to determine by what rules existing causes are to be decided.

There are several adjudged cases which seem to us clearly to show that this is the true meaning of the clause in the bill of rights which we have now under consideration. . . . [Here follows an account of the case of *Dash* v. *Van Kleeck*, *supra*, p. 1498.]

In the case of the *Society* v. *Wheeler et al.*, 2 Gallison, 105, a writ of entry was brought in the Circuit Court of the United States in the year 1807, to recover a tract of land in Westmoreland, in this State. The tenants alleged that they had been in possession of the land under

a supposed legal title, more than six years before the commencement of the action, and had made improvements; and they claimed to be allowed for the increased value of the land, a sum equal to such increased value. The jury found the value of the improvement, but the demandants moved for judgment, notwithstanding the verdict with respect to the improvements, on the ground that the statute of June 19, 1805, was, in respect to that case, a retrospective law prohibited by the Constitution, the possession of six years not having elapsed after the making of the statute, and before the commencement of the action. Story, J., held that, "upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective," and that the statute of June 19, 1805, would, if applied to that case, be a retrospective law for the decision of a civil cause, within the prohibition in our Constitution. He therefore held that the statute could apply only to cases where there had been possession for six years after the passage of the statute.

In *Holden* v. *James*, 11 Mass. Rep. 396, it was decided in the Supreme Court of Massachusetts that the legislature could not suspend the operation of a statute of limitations in favor of one individual only. In delivering the opinion of the court, Jackson, J., said, "it would not be an exercise of greater power to enact that Mr. James, the defendant in this suit, should not be held to answer to any suit commenced against him, as administrator, after the expiration of two years from the time of his accepting that trust, than it would be to enact, that he should be held to answer to any such suit commenced within six years. It could not in either case be properly considered a suspending of the law which limits such actions to four years, but it would be enacting a new and different rule for the government of one particular case."

The case of *Walter* v. *Bacon*, 8 Mass. Rep. 468, was debt upon a bond, with a condition that Bacon should continue a true prisoner in the jail at Cambridge. Soon after the bond was made, Bacon went into a private house within the limits of the prison to which he had been committed, and so, according to the decision of the Supreme Court in the case of *Baxter* v. *Taber*, 4 Mass. Rep. 361, committed an escape; and a suit was accordingly brought against him on the bond. After all this the legislature passed an Act declaring that no person, having given bond to continue a true prisoner, should be considered as having committed an escape in consequence of having entered upon any private estate; and the question was, whether that Act could apply to that case? It was decided that the Act might be so applied without any violation of the Constitution of that State. But it appears by the remarks of Sewall, J., in *Patterson* v. *Philbrick*, 9 Mass. Rep. 153, that some of the judges did not concur in the decision; and it is very much to be regretted that the opinions of the learned and able judges who considered the case, do not more fully appear in the report. The

decision seems to be in direct opposition to the principles laid down by Kent, C. J., in *Dash* v. *Van Kleeck*, and approved by Story, J., in *Society* v. *Wheeler*, 2 Gallison, 139. But whether such a law was repugnant to the Constitution of Massachusetts or not, it is unnecessary to inquire in this case. It is believed that such a law so applied, would, without doubt, be considered in this State as a retrospective law for the decision of civil causes, and repugnant to our Constitution.

In the case of *Merrill* v. *Sherburne*, 1 N. H. Rep. 199, a statute, purporting to grant a new trial in a civil cause, after a final judgment had been rendered, was held to be a retrospective law, within the meaning of this clause in the bill of rights, and wholly inoperative.

But it has been decided in this court that an action brought upon a statute to recover a penalty, might be defeated by a repeal of the statute after the action was commenced. *Lewis* v. *Foster*, 1 N H. Rep. 61. In that case, however, no objection was taken by counsel to the validity of the repealing statute; nor was its validity examined by the court.[1] It will, therefore, remain to be decided hereafter, whether such an action can be so defeated consistently with this clause in the bill of rights. For an action of debt to recover a penalty is a civil cause. 1 Gallison, 179; 2 Bos. & Puller, 532, note. And he, who first commences an action for a penalty, has a vested right. 6 John. 101. The Act which repeals the law on which the action is founded, establishes a new rule for the decision of an existing cause; and it will deserve great consideration, whether, with respect to such causes, it must not be adjudged repugnant to the Constitution, and void. But the point yet remains undecided.

We have adverted to these various cases in order to illustrate the general nature of retrospective laws. There is no safer method to ascertain the correctness of a particular principle, than a close examination of it in its application to various particular cases. The more widely this can be done, the more accurately may its soundness be tested. No general principle can be safely established by an examination of its operation in one instance only. The most attentive examination we have been able to give to the clause in the Constitution, which we are now considering, has satisfied us that it was intended to prohibit the making of any law, prescribing new rules for the decision of existing causes, so as to change the ground of the action, or the nature of the defence. We think that such was the intention, because it is fit and proper that the prohibition should go to that extent. Retrospective laws of that kind deserve to be denounced, as they are denounced in our Constitution, as highly injurious, oppressive, and unjust. They have been denounced by the most sound and intelligent jurists and statesmen in every age. We think that such was the intention,

[1] But the point appears clearly to have been made by Smith, C. J., in the minutes of his opinion in the case of *Lewis* v. *Foster*, as preserved in an interesting volume of early New Hampshire decisions. Smith's Reports, 420 (1815).— Ed.

because the establishment of new rules for the decision of existing cases is in its nature an exercise of judicial power — a power which the thirty-seventh article of the bill of rights declares ought to be kept separate from, and independent of, the legislative power; and because the union of the legislative and judicial power in the same branch of the government is, in its very essence, tyranny. We think that such was the intention, because it is most manifestly injurious, oppressive, and unjust, that after an individual has, upon the faith of existing laws, brought his action, or prepared his defence, the legislature should step in, and, without any examination of the circumstances of the cause, arbitrarily repeal the law upon which the action or the defence had been rested. Such an exercise of power is, in our opinion, wholly irreconcilable with the spirit of our institutions, and with the great principles of freedom upon which they are founded.

We will now consider how this doctrine of retrospective laws applies to the case now before us. Woart brought his action against Winnick on the 12th April, 1825, upon a note made in the year 1817. By the law, as it stood when the action was brought, Winnick had a right to insist upon the lapse of six years after the promise, and before the commencement of the action, as a legal defence to the action. But, if the last section of the statute of June 30th, 1825, repeals the statute on which that defence rested, he has now no defence in that respect. That to give the statute that construction and operation, in relation to this cause, would be to make it a law prescribing a new rule for the decision of an existing cause, is much too clear to need elucidation. By the rule of law in force when this action was commenced, this defendant is entitled, upon these pleadings, to judgment. If that rule of law is now repealed, and no longer the rule, the plaintiff is, upon the same pleadings, entitled to judgment.

And we are of opinion that the statute of June 30th, 1825, does not, so far as respects actions then pending, repeal the statutes of limitations which had been previously in force. We think, in the first place, that the legislature had no constitutional authority so to repeal them. And, in the next place, we are satisfied that it was not the intention of the legislature to repeal those statutes with respect to existing actions. We do not believe that this was the intention of any individual in either branch. We draw this conclusion from the circumstance that the statute of June 30th, 1825, adopts not only the principles, but the language of the former statutes of limitation, and makes no change in the rule of law. The object seems to have been merely to bring into one, what was before contained in two statutes, with the addition of one or two new rules of law in relation to actions against executors and administrators. We think that the intention of the legislature was that the rules of law contained in the repealed Acts should remain unaltered, and be applied to all cases, as well those that were pending, as those that were to be afterwards commenced. Upon any other view of the statutes, it would be very questionable whether the statute of

June 30th, 1825, could be now applied, consistently with the Constitution, to any action since commenced, the cause of which existed when that Act was passed. But by considering that Act as merely re-enacting an existing rule, all objection vanishes. It is probable that the sixth section of that statute can be applied only to those who may become executors or administrators after the passage of the statute.

This construction of the repealing clause in the statute is, we concede, contrary to the letter. But it is required by the Constitution. It is in accordance with what we believe to have been the intention of the legislature. It is justified by the soundest rules of construction, and is warranted by many authorities entitled to the highest respect. *Medford* v. *Learned*, 16 Mass. Rep. 215; *Williams* v. *Pritchard*, 4 D. & E. 2; 7 John. 477; *Couts* v. *Jeffries*, 4 Burr, 2460; *Whitman* v. *Hapgood*, 10 Mass. Rep. 437; 2 Gall. 105; 2 Shower, 17; 2 Mod. 310; 2 Lev. 227; 2 Jones 108; 1 Vent. 330; 8 Mass. Rep. 423.

We are therefore of opinion that there must be

Judgment for the defendant.

In *Clark* v. *Clark*, 10 N. H. 380 (1839), on a libel for divorce for desertion from Feb. 28, 1836, grounded on a statute of July 6, 1839, allowing a divorce for three years' desertion, Parker, C. J., for the court, said: — "The 23d article of the Bill of Rights denounces retrospective laws as 'highly injurious, oppressive, and unjust,' and declares that 'no such laws should be made, either for the decision of civil causes, or the punishment of offences.'

"In *Woart* v. *Winnick*, 3 N. H. Rep. 481, this court held, that this clause, so far as it applied to civil causes, 'was intended to prohibit the making of any law prescribing new rules for the decision of existing causes, so as to change the ground of the action, or the nature of the defence.' That was sufficient for the case then under consideration, which was in fact pending when the law then in question was passed. But the considerations there suggested evidently point to a broader application of it than one which would make it operative merely upon actions, or causes, pending in court at the time of the passage of the Act. A law may be retrospective in its operation, if it affect an existing cause of action, or an existing right of defence, by taking away or abrogating a perfect existing right, although no suit or legal proceeding then exists. Of course it is not intended to deny the right of the legislature to vary the mode of enforcing a remedy; or to provide for the more effectual security of existing rights; or to pass laws which change existing rules, under which rights would be acquired by the lapse of a certain period of time, part of which has already passed. The statute of limitations may be changed by an extension of the time, or by an entire repeal, and affect existing causes of action, which by the existing law would soon be barred. In such cases the right of action is perfect, and no right of defence has accrued from the time already elapsed. But if a right has become vested, and per-

fect, a law which afterwards annuls or takes it away, is retrospective. Thus a law which should provide that promissory notes made payable on demand should be payable at the expiration of a year, and that no suit should be maintained upon them until the expiration of that time, if applied to existing contracts of that character, would be a retrospective law for the decision of a civil cause, not only in relation to actions then pending upon such contracts, but also as to all notes of that description then in existence. And so of any other law which impairs vested rights acquired by existing laws. *Merrill* v. *Sherburne*, 1 N. H. Rep. 213. To subject a party to the payment of damages, or to other loss or detriment, upon considerations entirely past, is within the principle. Thus a statute of this State, passed in 1805, made provision, that where there had been peaceable possession and actual improvement of land by virtue of a supposed legal title, under a *bonâ fide* purchase, for more than six years before the commencement of an action for the recovery of it, the tenant should be entitled to the increased value of the premises by virtue of buildings and improvements, if the demandant recovered. In an action brought in 1807, it was held that the Act, applied to a possession existing, and to improvements made, prior to its passage, was a retrospective law, within the clause of the Constitution already cited. *Society* v. *Wheeler*, 2 Gall. R. 105.

"A statute which attempts to confer authority upon the court to grant a divorce, for matters already past, and which, at the time when they occurred, furnished no ground for a dissolution of the marriage, or for other legal proceedings, is, in our view, clearly a retrospective law, and well entitled to the epithets applied to such laws in the Constitution. On the supposition that the past matter, which is thus made the ground of a divorce, was of a character inconsistent with the perfect obligations of the marriage covenant, and such, therefore, as could not be justified, or even excused, in a court of morals; still, if it was not such as subjected the party, when it took place, to any penalty or punishment; or entitled the other party to any remedy; and, especially, if it was not such as then furnished any ground upon which a dissolution of those obligations could be sought or predicated; it must, by a law making it a ground for a divorce, have a different character and operation bestowed upon it. Its legal character would thereby be changed, and its effect enlarged. That which, if not of itself innocent, was not, when it occurred, such a breach of marital obligations as to warrant an interference with them, would be made operative, not only to release one party from the further obligations of what is generally admitted to be a contract, but would be made the means of depriving the other party of the benefit of those obligations, and of rights of property derived from them. It would subject that party to loss and detriment for past acts, altogether by the retrospective operation of the law which authorized and gave effect to the divorce. Such a law cannot enforce the obligations of the marriage, nor is it a provision relating to the remedy merely; for whatever breach may have occurred, the obli-

gation of the contract still remains, and requires a prospective performance of marital duties. But the principle upon which the law must be founded, would, if admitted, dissolve all marriages at the will of the legislative power.

"Desertion for three years, by the husband, coupled with neglect to make suitable provision for the support and maintenance of the wife, where it was in his power so to do, has, for a long period, furnished a sufficient cause for a dissolution of the marriage, in this State. But, under that statute, if the husband had not pecuniary ability, there was no cause for a divorce. The present Act makes desertion alone, by either party, for the term of three years, if without sufficient cause and against the consent of the other, a substantive ground of divorce. It is, therefore, a new cause; and that part of the Act which attempts to make such desertion, then past, sufficient, must, if enforced, impair vested rights, provided there are any vested rights in the existence of a marriage. We shall not add to the length of this opinion, by attempting to show that such rights exist.

"But in order to bring a law within the constitutional provision we are considering, it must be a law for the decision of a civil cause, or for the punishment of an offence.

"All retrospective laws are not within the prohibition, notwithstanding the general terms of the first part of the article. They may be made for the mitigation of punishment. 3 N. H. Rep. 476.

"That a retrospective law for a divorce operates oppressively and unjustly, however, tends to show that it is within the condemnation of the Constitution. . . .

"Considering a petition for a divorce as a civil and private prosecution, so much of the statute as purports to authorize a divorce on account of desertion which had occurred prior to its passage, must be held to be a retrospective law for the decision of a civil cause, and as such within the constitutional prohibition.

"That part of the Act which provides for divorces on account of desertion and refusal to cohabit for three years after its passage, is not objectionable, notwithstanding it may operate upon existing marriages. Regulations intended to enforce the obligations of the contract in future, impair no vested rights. The contract of marriage, it is well understood, is subject to them, and all persons may avoid their operation by an adherence to the duties imposed by the contract itself.

"And we have no doubt that the legislature may so amend the Act that a continuance of a prior desertion, for a period after the passage of the new statute long enough to give a reasonable time for a return, and a resumption of marital duties, shall be a good cause for a dissolution of the marriage.[1] *Libel dismissed.*"

[1] "The broadest construction of the constitutional rules which forbid retrospective legislation, would require that all statutes affecting in any way a civil cause, must be so entirely prospective, that no new rule could be applied in the decision of a cause

which did not exist when the right of action accrued. But a construction so broad as this could not be reasonably held, since the effect would be that no change could be made in the courts or course of justice which would affect the actions or causes of action then existing.

"The courts, therefore, have everywhere recognized a distinction between statutes affecting rights, and those affecting remedies only. The rights of parties cannot be changed by legislation; but no party has a vested right to any particular remedy. Shaw, C. J., 6 Pick. 508. This distinction is discussed by Story, J., Story Const. 236, and the cases decided in the U. S. courts, there collected. The result of the numerous decisions to be found there, and in the Reports of the several States is, that a statute which changes or modifies the remedy of a party for the recovery of his claim, which limits or restricts the process by which it is to be enforced, or changes the tribunal by which it is to be heard, or reduces or enlarges the time within which the action must be prosecuted, is not within the prohibition of the Constitution as a retrospective law, so long as it leaves to the party, practically, a suitable remedy to enforce his rights before a tribunal properly constituted, and with proper process to afford him redress. But if a law, though in form applying to the remedy only, practically deprives either party of any vested right, either of action or defence, it is unconstitutional and void.

"Courts may be changed; one may be abolished and another substituted; or the jurisdiction may be transferred. *Wales* v. *Belcher*, 3 Pick. 508; *Commonwealth* v. *Phillips*, 11 Pick. 28; *Commonwealth* v. *Hampden*, 6 Pick. 501.

"The process may be changed, as by abolishing arrests for debt. *Stocking* v. *Hunt*, 3 Denio, 274; *Hope* v. *Johnson*, 2 Yerg. 125; *Gray* v. *Monroe*, 1 McLean, 528; *Woodfin* v. *Hooper*, 4 Humph. 13; *Fisher* v. *Lackey*, 5 Blackf. 373; *Reed* v. *Bank*, 10 Shep. 318; *Bank* v. *Langworth*, 1 McLean, 35; *Bank* v. *Freese*, 6 Shep. 109.

"New parties may be authorized to maintain suits, as executors, heirs, assignees, &c. *Wilbur* v. *Gilman*, 21 Pick. 250; *Harlan* v. *Sigler*, 1 Mor. 39; *Crawford* v. *Bank*, 7 How. U. S. 279; *Holyoke* v *Hoskins*, 9 Pick. 259.

"The action may be changed; as by substituting case for debt or trespass; or proceedings at law for those in equity, or *vice versa*. *Paschall* v. *Whitsett*, 11 Ala. 472; *Thayer* v. *Seavey*, 2 Fairf. 284; *Bartlett* v. *Lang*, 2 Ala. 401; *Woods* v. *Bruce*, 5 How. Miss. 285. New rules of evidence or practice may be established. *Kendall* v. *Kingston*, 5 Mass. 524; *Knight* v. *Dorr*, 9 Pick. 48; *Ballard* v. *Ridgely*, 1 Mor. 27; *Ingraham* v. *Dooley*, 1 Mor. 28; *Lane, apt.*, 3 Met. 213; *Mc William* v. *Sprague*, 4 How. Miss. 647; *Fales* v. *Wadsworth*, 10 Shep. 553.

"New final process may be established or substituted. *Bemis* v. *Clark*, 11 Pick. 452. New modes of executing such process, or of preserving their lien, new exemptions of property and new modes of relief from imprisonment, may be provided; *Sommers* v. *Johnson*, 4 Ver. 269; *Tarpley* v. *Hamer*, 9 S. & M. 310; *Newton* v. *Tibbats*, 2 Eng. 160; *Bronson* v. *Newbury*, 2 Dong. 38; *Rockwell* v. *Hubbell*, 2 Doug. 197; *Read* v. *Fulham*, 2 Pick. 158.

"And of none of these things has a party any right to complain, as violations of the Constitution, so long as the laws leave to him a competent court, bound to administer justice to him according to the rights the law gave him when his right of action or defence became vested, with means and powers to accomplish its duties, and suitable process of which the party may avail himself.

"It may be deemed settled, that a bar, under the statute of limitations, once established, is a vested right, of which a party cannot be deprived by legislation. *Briggs* v. *Hubbard*, 19 Ver. 86; 3 N. H. Rep. 481; and that a statute which should attempt to establish a new limitation, so that a right of action then vested and perfect will be taken away at once, so that no action can be afterwards maintained upon it, is retrospective and void as to all rights of action so affected. *Bruce* v. *Schuyler*, 4 Gilm. 221; *Maltby* v. *Cooper*, 1 Mor. 59; 4 N. H. Rep. 16; 2 Gall. 139; 4 N. H. Rep. 287; 10 N. H. Rep. 380.

"And this rule, we think, must be equally applied to all those cases where, though the statute does not in terms interpose an instantaneous bar, yet the time of limitation

KENT *v.* GRAY.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1873.

[53 *N. H.* 576.]

DEBT, by "Richard P. Kent, George A. Cossitt, and George O. Rogers, the health officers of the town of Lancaster, who sue this action as well for the county of Coös as for themselves," against Hosea Gray, for penalties under Gen. Stats., ch. 101, sec. 8. At the July term, 1872, it was decided, on demurrer, that sec. 1 of ch. 248, Gen. Stats., authorized the action to be brought by one person only, and that it could not be maintained by three plaintiffs. The action was brought before 1872. Chapter 39 of the Laws of 1872 provides, — "In all civil proceedings, when two or more are joined as plaintiffs, the writ or other process may be amended by striking out the name of any plaintiff before the evidence is closed, or the case is submitted;" and "this Act shall take effect upon its passage and apply to existing suits." At the November term, 1872, the plaintiffs moved to amend the writ by striking out the names of two of the plaintiffs; and the motion was reserved.

Ray & Drew, and *Crawford*, for the plaintiffs. *Burns & Heywood*, *Fletcher & Heywood*, and *G. A. Bingham*, for the defendant.

DOE, J. Can the Act of 1872 be constitutionally applied to penal suits existing at the time of its passage?

In *Rich* v. *Flanders*, 39 N. H. 304, it was held by a majority of the court that the legislature could, by a general Act, remove the common-law disability of parties to testify in pending as well as future suits. The objection to retrospective laws is declared, in article 23 of the Bill of Rights, to be, that they "are highly injurious, oppressive,

is made so short that practically the party is deprived of the right to which he is by law entitled.

"What limitation is thus short in practice must, of course, be determined upon the circumstances of each case. In all such cases it must be understood that no legislature could have intended to violate the Constitution, or to tread under foot the great principles of justice. And such a proviso, limiting the construction of the statute, must be implied as will prevent injustice, and give to all parties a reasonable opportunity for the prosecution of their rights. *Briggs* v. *Hubbard*, 19 Ver. 86; *Dash* v. *Van Kleeck*, 7 Johns. 477.

"Subject to these qualifications, the statutes of limitation may be changed at the pleasure of the legislative power, either by enlarging or restricting the period within which suits may be brought; and it is wholly immaterial whether the time of limitation has already expired in part or not, provided a sufficient time remains before any claim in question becomes barred, to enable the claimant by the use of reasonable diligence to save his claim by a suit. *Smith* v. *Morrison*, 22 Pick. 430; *Call* v. *Hagger*, 8 Mass. 423; *Pearce* v. *Patton*, 7 B. Mon. 162; *Beal* v. *Nason*, 2 Shep. 344.

"As there can be no doubt that this statute allowed ample time to the plaintiff to bring his action, the objection he takes to the second plea cannot prevail, and there must be judgment on the demurrer for the defendants." — BELL, J., for the court, in *Willard* v. *Harvey*, 24 N. H. 344, 352. — ED.

and unjust." The objection is substantial, not formal, — reasonable, not technical; and the reason of the objection, like the reason of all law, is to be considered in interpretation and administration. The reason of the constitutional prohibition of retrospective legislation is, the material and substantial injury, oppression, and injustice caused by its practical operation.

Taking the prohibition in the reasonable and equitable sense, explicitly announced in the Bill of Rights as a prohibition of the injustice of retrospectively converting right into wrong or wrong into right, and applying it in that sense to the case of *Rich* v. *Flanders*, it might be argued that, in allowing both parties to testify, there was no such transmutation, but merely a grant of equal rights to both parties by an impartial enlargement of the bounds of competent evidence on each side of the issue, not changing the issue, or the right to be established, or the wrong to be redressed, or the form or substance of the remedy; that, giving both parties the additional means of showing the truth, and proving and disproving the right asserted or the wrong complained of, and demonstrating what was right and what was wrong, was neither an injury, nor oppression, nor injustice, in a moral or legal sense, and, therefore, not within the constitutional prohibition; that allowing the parties to testify did not alter the character or effect of competent evidence, but only increased its quantity; that neither party had a vested right in the exclusion of evidence and the suppression of the truth, on the trial of an unaltered issue, upon the determination of which depended the vindication of an unaltered right by an unaltered remedy, or the discharge of the defendant from an unaltered claim, on unaltered grounds, in an unaltered process; that there could be no right upon which the additional testimony of the parties would have an injurious, oppressive, or unjust effect, in the sense of the words as used in the Bill of Rights; that the objection to such an impartial increase of the bulk of competent evidence, leaving the general character and weight of evidence unchanged, stands upon two presumptions not recognized by law, — 1. That the parties will testify falsely; 2. That the tribunal trying the facts will be incompetent to perform its duty, — or, that the more light a competent tribunal has, the more unable it will be to see the truth; that the constitutional prohibition is to be construed by the principles of natural justice on which it professes to rest, and which it professes to guarantee and enforce; that no principle of justice is violated by removing from both parties a disability to tell their own stories; that the Act allowing parties to testify was an enabling and not a disabling Act; that it merely enabled each party to put himself and the other party on the stand, and throw more light on their unaltered controversy; that it would be a very different thing if the legislature should undertake to give artificial weight to a certain class of evidence in a pending suit, as by declaring certain proof to be *prima facie* evidence (*Chappell* v. *Purday*, 12 M. & W. 303, 306, where Lord Abinger thought the legislature did not intend, by an *ex post facto* law, to give

one party to a suit already commenced so great an advantage over his adversary) ; that it would also be a very different thing if the legislature should undertake, by a disabling Act, to render a competent witness incompetent in a pending suit; that it might be injurious, oppressive, and unjust, by a retrospective statute, to deprive a party to a pending suit of the means of showing the truth ; that to destroy the competency of a witness might unjustly defeat the party having the burden of proof, — might unjustly defeat either party, — by depriving him of evidence of the truth on which he relied and had a right to rely ; that, although the court could decide the constitutional question only upon general principles of justice, and not by examining all the evidence in each case, and ascertaining whether the exclusion of a certain witness would unjustly affect the verdict and the right in controversy, it could not be presumed that the exclusion would have no unjust effect; that, although the court could not decide the constitutional question by investigating the proceedings in each case, and ascertaining whether, as a matter of fact, either party had been properly induced to prosecute or defend the suit by his reliance upon the testimony of a particular witness, it could not be presumed that the prosecution or defence had not been properly caused by a reliance upon all the testimony that was competent when the suit was commenced ; that it would apparently be unjust to deprive either party of evidence of the truth, by the competency of which he had been induced to incur expense in the prosecution or defence, although the removal of an unjust disability of a witness would not be unjust ; that neither party can justly rely upon the inability of his adversary to prove, by his own testimony, the truth of a controverted fact ; that the only escape from the conclusion reached in *Rich* v. *Flanders* is by way of the possibility of the tribunal being deceived by the testimony of the parties, and of injustice being done in consequence of the inability of the tribunal to discern the truth ; and that such a possibility is no more ground for holding the application of the enabling Act to pending suits to be unconstitutional, than it would be for holding every change of the tribunal inapplicable to pending suits, by reason of the possibility that the new tribunal might not ascertain the truth which, perhaps, the old tribunal would have ascertained.

An argument of that kind might be made, in support of the doctrine of *Rich* v. *Flanders*, on very narrow ground. We are not to be understood as saying that it is only on such a ground that the doctrine of that case can be supported ; but it is suggested that, if such a ground can be maintained, it would be sufficient for that case.

In the present case, at the time of the passage of the Act of 1872, there were three plaintiffs ; and they, jointly constituting the party plaintiff, had no right of action against the defendant, and he was under no liability to them. This state of things the legislature undertook to change, by allowing two of the plaintiffs to withdraw, — a proceeding which, if successfully followed, would, so far as these parties

are concerned, change no cause of action into a good cause of action, and operate as a substantial creation of a new suit that could be maintained, in place of an old one that could not. This is going far beyond impartially giving both parties additional means of proof. We see nothing in the doctrine of *Rich* v. *Flanders* that sustains legislation of this character.

There is much authority for holding, in general terms, that a right to have one's controversies determined by existing rules of evidence is not a vested right; that rules of evidence pertain to the remedies which the State provides for its citizens; that, like other rules affecting the remedy, they must at all times be subject to modification by the legislature; that changes affecting the remedy may lawfully be made applicable to existing causes of action; that the changes are not retrospective, because they are to be applied in future trials, and are not to affect previous trials. Cooley, Const. Lim. 367. But general statements of this kind are to be taken with the broad qualification that the changes must not infringe the general principles of justice. Retrospective laws are unconstitutional and void, because they are injurious, oppressive, and unjust. That is the plain and simple rule laid down in the Bill of Rights. And any generalization founded on the distinction between right and remedy, is attended with some danger, because of the difficulty of drawing that distinction so accurately as not to impair the force of the constitutional prohibition. Undoubtedly, a remedy may be changed, in some sense, and to some extent, without affecting a right, — that is, there may be a change in the remedy that is not injurious, oppressive, and unjust: but it is equally clear that a remedy may be so changed as to affect a right injuriously, oppressively, and unjustly, within the meaning of the prohibition.

A statute is not necessarily just and valid because it affects the remedy. The question is, not whether it affects the remedy, but whether it affects the remedy in a certain sense, and the remedy only. This point is forcibly illustrated in the dissenting opinion of Bell, C. J., in *Rich* v. *Flanders*, 39 N. H. 347, 348. If a statute, in terms made applicable to pending suits, should provide that no deed should be received in evidence unless the attesting witnesses were fifty years of age at the time of the trial, and if the retrospective character of such a statute were the only objection to its validity, it would not be made valid by the fact that it affected the remedy. It could not be applied to pending suits, or to deeds duly executed before its passage, because it would unjustly affect rights as well as remedies. Legal evidence of title could not be justly destroyed, however strongly the statute might profess to be exclusively aimed at the remedy. The principles of justice, declared by the prohibition of retrospective laws, are not evaded by words, names, and pretences. And when we have merely ascertained that a statute affects the remedy in some sense or other, we have made very little progress in the inquiry whether it affects a right, that is, whether it is unjust on general principles. If a certain change

can be made in the remedy, it is because it can be justly made: if a change cannot be made in the right, it is because it cannot be justly made.

A statute abolishing the action of assumpsit, and substituting for it the action of debt, might be applied, without injustice, to existing causes of action not in suit; but it could not be constitutionally applied to oppress a plaintiff in a pending suit in assumpsit. Having incurred expense in bringing a proper suit, and pursuing a remedy provided by law, it would be unjust to turn him out of court, render a judgment against him for the defendant's costs, and leave him to another remedy, in the pursuit of which he might again be defeated in the same manner by another statute. In one sense, such legislation would affect the remedy only; but, in the constitutional sense, it would be retrospective, injurious, oppressive, and unjust, and, therefore, unconstitutional; and it is not apparent how the constitutional sense, in such a case, would be elucidated by a distinction between a right and a remedy. The injustice would be manifest; and the test given by the bill of rights is, not the distinction between right and remedy, but the distinction between right and wrong. On other subjects, the ground of judicial decision is not ordinarily understood to be so broad as the general principles of justice; but, on this subject of retrospective legislation, those principles are the constitutional ground amply supported by the authorities. Cooley, Const. Lim. 369–383. It is said that a defendant has no vested right in a defence based upon an informality not affecting his substantial equities, and that formal defects and irregularities may be cured by retrospective legislation. Cooley Const. Lim. 370, 383. That is merely saying that the whole subject stands on the ground of substantial equity. What are formal and what are substantial defects, in particular cases, may not be an easier problem than the application of the general equitable principle. In whatever form the question is put, it is not easy to lay down a universal rule (any narrower than the general principle), by which such an answer can be readily obtained, in every case, as the principle requires. It is natural that courts, pressed by the difficulty and inconvenience of deciding causes on so broad a principle, and accustomed to the guidance of more limited rules and specific precedents, should seek some path more restricted, sharply defined, and easily followed, than the unbounded expanse of justice. But it may be doubted whether some of the attempts made to lay out such a path have not tended to disseminate contracted and obscure views of the principle on which the constitutional prohibition is based, and to embarrass its operation.

Without undertaking to establish a rule for the disposition of other cases of a different kind, we think the application of the Act of 1872 to this case would be an inroad upon the conservative constitutional ideas that have prevailed in this State. In *Woart* v. *Winnick*, 3 N. H. 473, 481, 482, it was held that the legislature cannot prescribe new rules for the decision of existing causes, so as to change the ground of

the action or the nature of the defence; that it is most manifestly injurious, oppressive, and unjust, that, after an individual has, upon the faith of existing laws, brought his action, or prepared his defence, the legislature should step in, and, without any examination of the circumstances of the cause, arbitrarily repeal the law upon which the action or the defence had been rested; that such an exercise of power is wholly irreconcilable with the spirit of our institutions, and with the great principles of freedom upon which they are founded; and that a repeal of a statute of limitations could not be applied to a pending suit to take away a defence that had accrued at the time of the repeal. Suppose the general statement, that the nature of the defence cannot be changed, is to be understood with the qualification that the defence is based upon substantial equity, and not upon a mere informality: the defence here is, that the suit is brought by several persons on a joint cause of action which does not exist; that the cause of action, created by the statute, is vested by the statute in the one person who first brings a suit for the penalty; that, as the right of action vests in that one person, it has not vested in these three plaintiffs, Kent, Cossitt, and Rogers, either jointly or severally; that it has not vested in Kent alone, nor in Cossitt alone, nor in Rogers alone, because neither of them alone brought the suit, and there is no fact or fiction, recognized by law, that can, in this suit, confer on either one of them a right of action which is not yet his, and which the law confers only on the one person who brings the suit; that the defendant is not now liable to the plaintiffs, or either of them; and that, to allow two of them to withdraw, and the other one to prosecute the suit, would render the defendant liable to a person to whom he is not now liable, — would impose upon him a liability that has no existence in law or in fact. Is this a defence of substance and equity, or of form and technicality? The defence of the statute of limitations is, in some cases, inequitable in point of fact; but it was held, in *Woart* v. *Winnick*, that, as a matter of law, it is a defence which it is inequitable to take away by retroactive legislation. Looking at the origin, nature, and object of the cause of action in a penal suit of this kind, and the method in which it accrues to one person, we are unable to say that the defence in this case is not an equitable one within the meaning and protection of the Bill of Rights. And, giving effect to the prohibition in the sense of it as expounded by the letter and spirit of our numerous decisions, and the general understanding of the legal profession, we are of opinion that the Act of 1872 cannot be applied to this suit, and that the amendment desired by the plaintiffs cannot be made. *Motion denied.*

HART *v.* HENDERSON.

SUPREME COURT OF MICHIGAN. 1868.

[17 *Mich.* 218.][1]

[EJECTMENT. Trial without jury, and judgment for the plaintiff. The case comes up on a detailed finding of facts and of conclusions of law by the court below.]

Dart and *Wiley*, for plaintiff in error. *Huntington* and *Root*, for defendant in error.

COOLEY, C. J. Henderson, as it appears from the record, brought ejectment against Hart for a lot of land in the city of Lansing, claiming to recover under a tax sale made for delinquent taxes of 1863.

The taxes for which this sale was made amounted to $22.19, of which three items, amounting to $7.57, were conceded by the parties on the trial to have been illegally assessed, and the circuit judge so found. Whether the other taxes were legal or not is not found. The tax deed was clearly void, and being so, it would not, under the statute, be evidence of the correctness of any of the taxes, and Henderson, under the common-law rule, would be compelled to show their validity by affirmative evidence.

Under these circumstances, the circuit judge felt bound, under "An Act to provide for the recovery of taxes paid on real estate by persons claiming title thereto in certain cases," approved March 20, 1865 (Laws, 1865, p. 575), to render judgment against Hart for the full amount of the taxes for which his land had been sold, including the costs of advertisement and sale, and twenty-five per centum interest thereon; at the same time that he rendered judgment in Hart's favor on the main issue in the ejectment suit. And the only question before us is as to the correctness of this pecuniary judgment.

The first section of the Act referred to is as follows:[2] [It is given in a note below.]

[1] The statement of facts is omitted. — ED.

[2] SECTION 1. The People of the State of Michigan enact, That in all suits and controversies involving the title to land claimed by either party, under a conveyance executed by the Auditor General for non-payment of the taxes assessed thereon, if such deed shall prove to be invalid for any cause, other than such as are enumerated in section three of this Act, the lien thereon for State, county, and township taxes, or for either of them, or for any portion of either of them, which may have been rightfully assessed, shall not be discharged thereby, but shall remain in full force, and shall be transferred by said deed to, and vested in the grantee therein named, his heirs and assigns; and the owner of such lands shall not thereby be acquitted from the payment of the taxes for which the same was sold, but the party in such action or controversy, holding and claiming title under such Auditor General's deed, shall be entitled to judgment or decree in the same action, against the adverse party, for the sum paid upon such sale for the purchase of said land, and for the sum of all taxes paid upon such lands subsequent to such sale, by such purchaser, his heirs and assigns, with interest on each of said sums from the time of payment, at the rate of twenty-five per cent. per

The true construction of this section is matter of some doubt. It is not very clear whether its purpose is to give a remedy only for those taxes which are "rightfully assessed," or for the whole sum paid upon the sale, whether the land was properly chargeable with them or not. The latter construction would clearly make the Act unconstitutional. While it is unquestionably within the power of the legislature to cure irregularities in the proceedings for the assessment and collection of any taxes which are authorized by law, and to perpetuate their lien upon the land until paid, it is not within its province to declare that a demand which is asserted against a citizen, without authority of law, shall constitute a lien upon his property, and that he shall be precluded from asserting his rights in the courts in regard to the property, except subject to a judgment for the unlawful demand. Curative statutes may cover any mere irregularity in the course of proceeding for the enforcement of a lawful demand; but they can never cure a want of jurisdiction, either in tax proceedings or those of any other description. Nothing is a tax simply because of being called so; but any proceedings by which a man's property is to be taken from him on a claim which has no other basis than the naked declaration of the legislature that it shall constitute a demand against him, is unconstitutional and void, as not being "according to the law of the land," but, on the other hand, wholly unwarranted by legal principles. In this case, the circuit judge was to render judgment upon his finding of facts. That finding did not show that any of the taxes were legal, but it did show affirmatively that more than a third of them were illegal. Under these circumstances, there was nothing to show that Hart's land was legally chargeable with anything, and no judgment should therefore have been rendered against him. The judgment in favor of Henderson must, therefore, be reversed, with costs of this court.

The other justices concurred.[1]

annum, and all legal costs, and such costs of suit as the court may award, which judgment or decree may be enforced as in other cases, and shall remain a lien on such land until paid; and the land, or so much thereof as shall be necessary, may be sold for the payment thereof, with costs, if sold within such reasonable time as the court may order.

[1] "Any statute authorizing the sale of a man's property for taxes which had not been levied, or where the property was exempt from taxation, or where the property had not been assessed, or where the taxes had been duly paid, would unquestionably be a taking in excess and outside of the taxing power, and such taking would not be with 'due process of law.' So any statute which should attempt to cure such substantial defects, or should attempt to debar the owner from proving, in defence or assertion of his right, that a pretended tax sale was wanting in any of these essential prerequisites, would violate the constitutional prohibition and could not be enforced.

"But outside of these fundamental and quasi-jurisdictional requirements, and with reference to the time and manner in which the tax proceedings shall be conducted, the legislative discretion is supreme and cannot be judicially controlled. As the legislature may, in advance, prescribe and direct the time and manner in which these shall be done, it may likewise provide that failure to comply with such directions shall not defeat the sale, and may constitutionally provide that the tax deed shall be conclusive evidence that such directions were complied with, as to time, manner, and every other

In *The People* v. *The Supervisors of Ingham County*, 20 Mich. 95, 103 (1870), Christiancy, J., for the court, said: "The legislature, then, having complete power to discontinue this road without the intervention of any other officers or board, might, if they saw fit to delegate it to such officers or board, have prescribed in advance such terms, conditions, or special proceedings as they chose to prescribe; or they might have conferred the full power upon such board or officers without any restrictions or conditions. In short, it would have been clearly competent to have authorized the Board of Supervisors in advance in this very instance, to have discontinued this road by the very proceeding which the board in fact adopted. And if they could have authorized this in advance, they can equally ratify and legalize the act when done, and that without any reference to the question, whether the board had jurisdiction at the time of doing the act.

"It is upon this principle alone, that various taxes for township bounties to soldiers could be sustained, based upon votes of the inhabitants or the action of township officers wholly unauthorized by law at the time of such votes or action; as in the case of *Crittenden* v. *Robertson*, 13 Mich. 58; *Miller* v. *Grandy*, Id. 540; *People* v. *Supervisor of Blackman*, 14 Mich. 336; *People* v. *Supervisor of Onondaga*, 16 Id. 254. But in the case of all these taxes the legislature, as in the present case, might itself have authorized in advance the proceedings subsequently ratified, or might themselves have done the act in question, without any such proceeding. There are cases in which the act in question is, in its nature, such as cannot be done directly by the legislature itself, but is required to be done, or considered and determined upon, by some tribunal or officer, in which it has been properly enough held that such tribunal or officer must have acquired the jurisdiction to act, before it would be competent for the legislature by a retroactive statute to cure any defects or irregularities in their action.

"But these are cases in which the legislature could not themselves have done the act in question, or could not in advance have given the jurisdiction to do the act, in the manner in which it has been done. If any cases have gone beyond this in requiring jurisdiction for such a purpose, I see no sound principle upon which they can rest. See Cooley Const. Limitations, 381 to 383, and Id. 371.

"I think, therefore, the Act of March 10, 1869, legalizing the action of the board in discontinuing the part of the road here in question must have the same complete effect in this case as if it had been previously passed, and authorized in advance the very course of action

matter originally within the legislative discretion. Broadly stated, the doctrine is that the legislature may make the tax deed conclusive evidence of compliance with every requirement which the legislature might, originally, in the exercise of its discretion, have dispensed with." — Fenner, J., for the court, in *In re Douglas*, 41 La Ann. 765, 767. Compare *Willis* v. *Hodson*, 29 Atl. Rep. 604 (Md. 1894); *Williams* v. *Milwaukee Assoc.*, 79 Wis. 524; *Mitchell* v. *Clark*, 110 U. S. 633, 640. — Ed.

adopted by the board; and that it renders the action legal and valid.

"I think also that this Act is in principle equivalent in its operation to an Act of the legislature directly discontinuing the road by their own authority, which they had a clear right to do.

"The circumstance that the Act was passed after the institution of this suit, and while it was pending, though it may show an exercise of the legislative power not generally to be commended, has not been recognized by the authorities as sufficient to invalidate the Act. See the work of my brother Cooley on Const. Limitations (p. 381), where the authorities are collected." [1]

FORSTER *v.* FORSTER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1880.

[129 *Mass.* 559.]

GRAY, C. J. By the Gen. Sts. c. 12, §§ 28–30, the collector, before selling real estate for taxes, is required to publish and post a notice of the time and place of sale, containing, among other things, a substantially accurate description of the several rights, lots, or divisions of the estate to be sold. By § 33, if the taxes are not paid, he is required, at the time and place appointed for the sale, to sell by public auction so much of the real estate, or the rents and profits of the whole estate for such term of time, as shall be sufficient to discharge the taxes and necessary intervening charges; he is allowed at his option to sell the whole or any part of the land; and is directed, after satisfying the taxes and charges, to pay the residue of the proceeds of the sale, if any, to the owner of the land.

In *Wall* v. *Wall*, 124 Mass. 65, decided on February 8, 1878, it was adjudged by this court that the collector had no authority to sell an undivided interest in the land, so as to constitute the purchaser tenant in common with the owner; and that, when the only previous notice was that the land, or such undivided part thereof as might be necessary, would be sold, any sale, although of the entire parcel of land, was void.

On May 6, 1878, the legislature passed a statute, to take immediate effect, in these words: "No sale heretofore made of real estate taken for taxes shall be held invalid by reason of the notice of sale having contained the words 'or such undivided portions thereof as may be necessary,' or the words 'or such undivided portions of them as may

[1] See *People* v. *Supervisors*, 26 Mich. 22 (1872), — COOLEY, J., for the court: "The whole may be summed up in a single sentence: that the legislature cannot make valid, retrospectively, what they could not originally have authorized." — ED.

be necessary;' provided, however, that this Act shall not apply to any case wherein proceedings at law or in equity have been commenced involving the validity of such sale, nor to any real estate which has been alienated since the eighth day of February of the current year and before the passage of this Act." St. of 1878, c. 229.

The principal question presented and argued in each of these six cases is whether this statute is constitutional, as applied to sales, no suit involving the validity of which had been commenced before its passage, and where the real estate sold had not been alienated between February 8, 1878, and the passage of the Act.

After mature advisement, and careful examination of the numerous cases cited at the bar, and giving due weight to the strong presumption in favor of the validity of every Act of the legislative department, all the judges feel themselves compelled by their judicial duty to declare that the statute in question exceeds the constitutional authority of the legislature in two important respects.

First. The statute assumes to take away private property, without due process of law, and without compensation. While it is doubtless the duty of the citizen to pay all taxes legally assessed upon him for the support of the government, yet the validity of proceedings taking his land against his will in discharge of his tax depends upon no considerations of equity, but upon a strict compliance, on the part of the municipal officers, with the regulations previously prescribed by statute for the double purpose of securing the payment of the tax and of protecting the citizen against unnecessary sacrifice of his property. *Williams* v. *Peyton*, 4 Wheat. 77. The statutes under which the sales in question were made, were framed to carry out this purpose by authorizing the collector to sell the whole land, or, if it was capable of division, any part of it; but giving him no power to sell an undivided interest therein. The notices given did not conform to those statutes, because they left it in doubt whether the collector intended to sell the whole of the land, as he lawfully might, or to sell an undivided part thereof, which he had no right to do. When such a notice is the only notice given, it cannot be presumed that the land brought an adequate price at the sale; for persons who might be ready to purchase the whole land might well be unwilling to purchase an undivided share which would make them tenants in common with a stranger, and might for that cause not attend the sale; and by reason of their absence, and for want of their bids, the price obtained might be the less, even if the collector should finally determine, at the moment of the sale, to put up and sell the whole lot.

Second. The statute is an attempt to exercise judicial power by the legislature. It does not change the law for the future, nor establish a uniform rule for the past. While it undertakes to confirm past sales, made upon an illegal and insufficient notice, if no litigation has arisen concerning their validity, and the land has not been alienated since the decision of this court in *Wall* v. *Wall*, it leaves sales already in

litigation, or of lands which have been alienated since that decision, in the same condition in which they were before the statute was enacted. Its purport is to let the law, as declared by the decision of this court, apply to all future sales, and to all past sales coming within the two excepted classes; but, as to all other sales already made, to reverse the rule of law so declared, and to overrule that decision. It in effect declares that the title to land shall depend upon the questions, whether a suit to recover it has or has not been already commenced; whether the person who owned it at the time of the sale for taxes, relying on the terms of the statutes under which the sale was made, as showing that his title was unaffected thereby, or on the decision of this court as establishing that title, has kept his land, or has parted with it; and whether his grantee succeeded to his title before or since that decision. To illustrate: illegal sales for taxes have been made of two lots of land; the owner of one of them has brought an action to recover it before the passage of the statute; the owner of the other has not; the first recovers his land, the second loses it. Again: the owner of the one lot had alienated it before the decision in *Wall* v. *Wall*, or has kept it himself; the owner of the other lot has alienated it since that decision; in the first lot, the title of the owner or of his grantee is defeated; in the second, the title of the grantee is good.

We find it impossible to reconcile this statute with the fundamental principles, declared in the Constitution of the Commonwealth, that every subject has the right to be protected in the enjoyment of his property according to standing laws; that his property shall not be appropriated, even to public uses, without paying him a reasonable compensation therefor; that he shall not be deprived of his property or estate, but by the judgment of his peers or the law of the land; and that the legislative department shall never exercise the judicial power. Declaration of Rights, arts. 10, 12, 30. . . .

The other cases in which retrospective statutes have been sustained in this court and in the Supreme Court of the United States (without considering whether all of the latter which arose in other States could have been decided in the same way under the Constitution of this Commonwealth) are distinguishable from the cases at bar, and may be classified as follows:

1st. Cases of statutes confirming sales of land under order of court for an adequate consideration, where there was a want of jurisdiction in the court, or the deed was irregularly made to another person than the actual bidder, or the sale was after the time limited in the license, or the confirming statute was passed upon the petition of all parties having the legal title. *Wilkinson* v. *Leland*, 2 Pet. 627, 661, and 10 Pet. 294; *Kearney* v. *Taylor*, 15 How. 494; *Cooper* v. *Robinson*, 2 Cush. 184, 190; *Sohier* v. *Massachusetts General Hospital*, 3 Cush. 483.

2d. Cases of statutes confirming conveyances by an executor or trustee under a will, where the only objection was to the manner of his

previous appointment and giving bond, which might perhaps not be open to be contested in a collateral proceeding, even if no such statute had been passed. *Weed* v. *Donovan*, 114 Mass. 181; *Bradstreet* v. *Butterfield*, *ante*, 339; *Bassett* v. *Crafts*, *ante*, 513. Such statutes are somewhat analogous to statutes confirming deeds acknowledged before a person acting as a magistrate, whose commission as such had expired, which could not have been questioned collaterally, he being an officer *de facto*. *Brown* v. *Lunt*, 37 Maine, 423; *Denny* v. *Mattoon*, 2 Allen, 384; *Sheehan's Case*, 122 Mass. 445, 447; *Hussey* v. *Smith*, 99 U. S. 20, 24.

3d. Cases of statutes curing defects in the execution of private deeds and instruments, so as to give them effect according to the intention of the parties and the equities of the case. *Randall* v. *Kreiger*, 23 Wall. 137; *Wildes* v. *Vanvoorhis*, 15 Gray, 139; *Denny* v. *Mattoon*, 2 Allen, 377, 378, 383.

4th. Cases of statutes confirming votes of towns for municipal or public purposes, which are within the paramount control of the legislature. *Thomson* v. *Lee County*, 3 Wall. 327; *Beloit* v. *Morgan*, 7 Wall. 619; *New Orleans* v. *Clark*, 95 U. S. 644; *Guilford* v. *Supervisors of Chenango*, 3 Kernan, 143; *Allen* v. *Archer*, 49 Maine, 346; *Freeland* v. *Hastings*, 10 Allen, 570.

5th. Cases of statutes confirming informal or irregular assessments of taxes, so that they might be collected in the future, but not undertaking to give force to illegal seizures or sales of property already made. *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Grim* v. *Weissenberg School District*, 57 Penn. St. 433; *Hart* v. *Henderson*, 17 Mich. 218.

6th. Cases in which the only point before the court was whether the statute in question contravened the Constitution of the United States, as being an *ex post facto* law, or a law impairing the obligation of contracts. *Calder* v. *Bull*, 3 Dall. 386; *Satterlee* v. *Matthewson*, 2 Pet. 380; *Watson* v. *Mercer*, 8 Pet. 88; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Baltimore & Susquehanna Railroad* v. *Nesbit*, 10 How. 395; *Carpenter* v. *Pennsylvania*, 17 How. 456; *Florentine* v. *Barton*, 2 Wall. 210.

The other cases in the courts of various States, cited in argument, afford no precedent for the action of the legislature in the statute before us, depend much upon the constitutions and usages of the several States, and cannot be examined in detail without extending this opinion to too great a length.

The result is, that in *Forster* v. *Forster* the bill in equity by the owner of the land, to remove a cloud upon the title by reason of a sale for taxes under a defective notice, is maintained. *Davis* v. *Boston*, *ante*, [129 Mass.] 377. *Decree for the plaintiff.*

In *New Orleans* v. *Clark*, 95 U. S. 644, 650 (1877), Mr. Justice Field, for the court, said: "This was an action upon several coupons

for interest annexed to bonds issued by the late city of Carrollton, in Louisiana, to the Jefferson City Gas-Light Company, a corporation created under the laws of that State, for laying gas-pipes through certain streets of the city, and introducing gas for the use of its citizens. The bonds were indorsed by the president of the company, with its guaranty, for the payment of their principal and interest. His authority to make this guaranty, so far as it relates to the interest, was denied by the company; but the Circuit Court held that the admissions and evidence in the case showed a *prima facie* case of liability.

"The bonds were issued pursuant to an ordinance of the city, which provided for the payment of the interest thereon, but made no provision for the payment of the principal; and for this omission, and because they were issued in aid of a private corporation, their validity was questioned by the city of New Orleans, upon which the liabilities of Carrollton were cast upon its annexation to that city; and as it was contended in answer to this position that the legislature had subsequently, in the Act of annexation, legalized the issue, the power of the legislature to do this was denied, but the Circuit Court held that the legislature possessed the power; and the city of New Orleans was adjudged bound to pay the bonds.

"The record shows that the bonds were issued after the work had been done for which the contract was made and the gas had been introduced into the city, and that they were transferred to the plaintiff for a valuable consideration. . . .

"An Act of the Legislature of Louisiana, passed in March, 1855, had declared that the constituted authorities of incorporated towns and cities in the State should not thereafter 'have power to contract any debt or pecuniary liability, without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt or contract.' This enactment imposed a restriction upon the creation of liabilities by municipal bodies, which could not be disregarded. It was intended to keep their expenditures within their means; and its efficacy in that respect would be entirely dissipated, if debts contracted in violation of it were held legally binding upon the municipalities.

"Assuming, then, that the bonds were invalid for the omission stated, they still represented an equitable claim against the city. They were issued for work done in its interest, of a nature which the city required for the convenience of its citizens, and which its charter authorized. It was, therefore, competent for the legislature to interfere and impose the payment of the claim upon the city. The books are full of cases where claims, just in themselves, but which, from some irregularity or omission in the proceedings by which they were created, could not be enforced in the courts of law, have been thus recognized and their payment secured. The power of the legislature to require the payment of a claim for which an equivalent has been received, and from the payment of which the city can only escape on

technical grounds, would seem to be clear. Instances will readily occur to every one, where great wrong and injustice would be done if provision could not be made for claims of this character. For example, services of the highest importance and benefit to a city may be rendered in defending it, perhaps, against illegal and extortionate demands; or moneys may be advanced in unexpected emergencies to meet, possibly, the interest on its securities when its means have been suddenly cut off, without the previous legislative or municipal sanction required to give the parties rendering the services or advancing the moneys a legal claim against the city. There would be a great defect in the power of the legislature if it could not in such cases require payment for the services, or a reimbursement of the moneys, and the raising of the necessary means by taxation for that purpose. A very different question would be presented, if the attempt were made to apply the means raised to the payment of claims for which no consideration had been received by the city.

"The Act of 1874, which annexed Carrollton to New Orleans, provided that all property, rights, and interests of every kind of the former city should be vested in the latter, and that the debts and liabilities of Carrollton, 'including the funding and improvement bonds, and the bonds issued to the Jefferson City Gas-Light Company, and known as gas bonds,' should be assumed and paid by the city of New Orleans; and that city was in terms declared liable therefor. Independently of this legislation, the liabilities of Carrollton would have devolved with its property upon New Orleans on the annexation to that city, so far, at least, that they could be enforced against the inhabitants and property brought by the annexation within its jurisdiction. *Broughton* v. *Pensacola*, 93 U. S. 266. Equitable claims which had existed against the dissolved city would continue as before, and be equally subject to legislative recognition and enforcement, or their payment might be required, as in this case, by the Act of annexation. The power of taxation which the legislature of a State possesses may be exercised to any extent upon property within its jurisdiction, except as specially restrained by its own or the Federal Constitution; and its power of appropriation of the moneys raised is equally unlimited. It may appropriate them for any purpose which it may regard as calculated to promote the public good. Of the expediency of the taxation or the wisdom of the appropriation it is the sole judge. The power which it may thus exercise over the revenues of the State it may exercise over the revenues of a city, for any purpose connected with its present or past condition, except as such revenues may, by the law creating them, be devoted to special uses; and, in imposing a tax, it may prescribe the municipal purpose to which the moneys raised shall be applied. A city is only a political subdivision of the State, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature.

In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent which it could exercise directly; and it does this only in another way when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent. *The People ex rel. Blanding* v. *Burr*, 13 Cal. 343; *Town of Guilford* v. *Supervisors of Chenango County*, 18 Barb. (N. Y.) 615; s. c. 13 N. Y. 143.

"The Constitution of Louisiana of 1868, which provides that no retroactive law shall be passed, does not forbid such legislation. A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law, — no more so than an appropriation Act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligation of the State, or of any of its subordinate agencies, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion. *Judgment affirmed.*" [1]

In *Tabor* v. *Ward*, 83 N. C. 291, 293 (1880), in an action on a bond given in 1866, the plaintiff was excluded as a witness, on the ground that, although competent under the laws of the State as they existed when this bond was given, he was made incompetent by a statute of 1879. On exceptions, the ruling was affirmed. Ashe, J., for the court, said: "The mischief in the law intended to be remedied by the Act of 1879 was, that in actions upon judgments and sealed notes, where payment was pleaded, the plaintiff, after the Act of 1866 and section 343 of the Code, might be a witness for himself or might use the defendant as a witness to rebut the presumption of payment arising from the lapse of time. The Act of 1879 was passed to remedy that defect in the law. There can be no doubt about the intention of the legislature, and it is the duty of the court to so construe the Act as to effectuate that intention. . . .

"But it is insisted on the part of the plaintiff, that if this construction be given to the Act of 1879, then it would be obnoxious to the objection of being retrospective, and that retrospective laws are not countenanced by the Constitution of this State. *Ex post facto* laws are forbidden by section twenty-three, article one, of the State Constitution, but they refer exclusively to crimes. There is no provision in the Constitution of this State nor in the Constitution of the United States which prohibits the passage of retroactive laws, as distinguished from those that are *ex post facto*, unless they are such as impair the obliga-

[1] And so *Cole* v. *N. Y.*, 102 N. Y. 48; *O'Hara* v. *The State*, 112 N. Y. 146. — Ed.

tion of contracts or disturb vested rights. Retroactive laws are not only not forbidden by the State Constitution, but they have been sustained by numerous decisions in our own State. See *State* v. *Bond*, 4 Jones, 9; *State* v. *Bell*, Phil. 76; *State* v. *Pool*, 5 Ired. 105, and *Hinton* v. *Hinton*, Phil. 410, where it was expressly held 'that retroactive legislation is not unconstitutional, and that retroactive legislation is competent to affect remedies not rights.'

"It is well settled by a long current of judicial decisions, State and Federal, that the legislature of a State may at any time modify the remedy, even take away a common law remedy altogether, without substituting any in its place, if another efficient remedy remains, without impairing the obligation of the contract. And whatever belongs to the remedy may be altered, provided the alteration does not impair the obligation of the contract. Cooley, Const. Lim. 350. Laws which change the rules of evidence relate to the remedy only. They are at all times subject to modification and control by the legislature and changes thus made may be made applicable to existing causes of action. *Howard* v. *Moot*, 64 N. Y. Rep. 262; Cooley, 353. They are incident to the remedy, and if the remedy may be abolished or modified, *a fortiori* may the rules of evidence be changed or abrogated.

"Retrospective laws would certainly be in violation of the spirit of the Constitution, if they destroyed or impaired vested rights. But there is no vested right involved in our case to be affected by the retrospective operation of the Act of 1879. We have seen that rules of evidence are incidents to the remedy, and one can have no vested right in a rule of evidence when he could have no such right in the remedy, and it is held in Bishop's Cr. Law, § 214, *Com.* v. *Com'rs*, 6 Pick. 501, and *Washington Toll Bridge Co.* v. *Com'rs*, 81 N. C. 491, that there is no such thing as a vested right in any particular remedy. There is no error and the judgment is affirmed." [1]

[1] See *Rich* v. *Flanders*, 39 N. H. 304; *Southwick* v. *Southwick*, 49 N. Y. 510, 517; *Hopt* v. *Utah*, *supra*, p. 1469, n. — Ed.

NOTE.

The subjects of this chapter are further illustrated, incidentally, in the next one.

CHAPTER IX.

STATE LAWS IMPAIRING THE OBLIGATION OF CONTRACTS.[1]

RAILWAY COMPANY *v.* ROCK.

SUPREME COURT OF THE UNITED STATES. 1866.

[4 *Wall.* 177.]

THIS was a motion by Mr. Templin to dismiss a writ of error to the Supreme Court of Iowa, issued under the twenty-fifth section of the Judiciary Act, which gives authority to the Supreme Court of the United States to review final judgments in the highest court of a State "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 of the United States, and the decision is in favor of such validity; or where is drawn in question the construction of any clause of the Constitution, &c., of the United States, and the decision is against the title, right, &c., specially set up or claimed under such clause."

The case was thus:

Rock, on behalf of himself and the other resident tax-payers of Iowa County, filed his bill in the proper State court against the Missouri and Mississippi Railroad Company, plaintiff in error, and Wallace, county judge of the said county. He prayed that certain bonds, purporting to be the bonds of the County of Iowa, which he alleged to be then in the possession of the plaintiff in error, should be declared void, and that plaintiff should be enjoined from negotiating them; and that the

[1] From Madison's *Debates in the Federal Convention*, 5 Ell. Deb. 546 [Sept. 14]. "MR. GERRY 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 the Congress ought to be laid under the like prohibitions. He made a motion to that effect. He was not seconded."

In *Mitchell* v. *Clark*, 110 U. S. 633, 643, MILLER, J., for the court, said. "It is no answer to this to say that [the Act of Congress] interferes with the validity of contracts, for no provision of the Constitution prohibits Congress from doing this, as it does the States."

For the way in which the clause of the United States Constitution relating to this subject (Art. I. s. 10, *supra*, 408) came to be adopted, see the passages from 5 Elliott's Debates, *supra*, p. 1433. All that relates to this matter, in the Debates, is there given. — ED.

county judge should be enjoined from levying or collecting any tax to pay said bonds or the interest on them.

The bill of complainant asked for relief on two grounds: 1. That the county judge disregarded the requirements of a certain statute set forth in the bill, in the submission to the vote of the people of the question of issuing the bonds. 2. That the county judge and the Railroad Company to whom they were first issued, were guilty of fraud in the issue of the bonds.

The court decreed as prayed by Rock, and the Railroad Company appealed to the Supreme Court of Iowa, which affirmed that decree.

More than two years after this affirmance, the Chief Justice of that court certified that, upon the hearing in that case, there was drawn in question: 1. The validity of the Constitution of the State of Iowa as being repugnant to the Constitution of the United States. 2. That clause of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of contracts. 3. That clause of the Constitution of the United States which provides that said Constitution shall be the supreme law of the land. And it was further certified, that the decision was against the right claimed under the Constitution of the United States and the several clauses thereof.

The ground of the motion made to dismiss was, that it nowhere appeared by the record that the question of the repugnancy of the laws and Constitution of Iowa to the Constitution and laws of the United States was passed upon; and that the certificate of the judge would not of itself conclude the court on that matter.

Messrs. Grant and *Cook* against the motion.

Mr. Justice Miller delivered the opinion of the court.

After a very careful examination of the record of the case, we are unable to discover that either the validity of the Constitution of the State of Iowa, or the clauses of the Constitution of the United States mentioned in the certificate, are involved in that record, or were decided by the court. It is probable that counsel, in the argument of the case in the Supreme Court of Iowa, insisted that these matters were involved, and that the Chief Justice felt bound to certify, when requested, that they were drawn in question. But if the record does not show that they were necessarily drawn in question, this court cannot take jurisdiction to reverse the decision of the highest court of a State, upon the ground that counsel brought them in question in argument.

In *Lawter* v. *Walker*, 14 How. 149, a case was brought here on a certificate from the State court. It was dismissed for want of jurisdiction. The court said: "The twenty-fifth section of the Judiciary Act requires something more definite than such a certificate to give to this court jurisdiction. The conflict of the State law with the Constitution of the United States, and a decision by a State court in favor of its validity, must appear on the face of the record before it can be re-examined in this court. It must appear in the pleadings of the suit, or

from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the ruling of the court. It must be that such a question was necessarily involved in the decision, and that the State court would not have given judgment without deciding it." To the same effect is the case of *Mills* v. *Brown*, 16 Pet. 525.

The bill of complainant claims relief on two grounds:

1. That the county judge disregarded the requirements of the statute, in the submission to the vote of the people of the question of issuing the bonds.

2. That the county judge and the Railroad Company, to whom they were first issued, were guilty of fraud in the issue of the bonds.

The court may have held the bonds void on the latter ground, and may have based its decree on that allegation. If so, there can be no pretence that such a ground involves any question of the Constitution of the United States or of the State of Iowa.

In the argument of counsel before us, no attempt is made to show that any provision of the Constitution of the State of Iowa conflicts in any way with the Constitution of the United States. The whole case, in the language of the brief, is put upon the ground that the "Supreme Court of Iowa has made a decision in this case which impairs the obligation of contracts;" and the argument goes upon the fundamental error that this court can, as an appellate tribunal, reverse the decision of a State court, because that court may hold a contract to be void which this court might hold to be valid. If this were the law, every case of a contract held by the State court not to be binding, for any cause whatever, can be brought to this court for review, and we should thus become the court of final resort in all cases of contract, where the decisions of State courts were against the validity of the contracts set up in those courts.

This, obviously, was not the purpose of the Judiciary Act. It must be the Constitution, or some law of the State, which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States; and the decision of the State court must sustain the law or Constitution of the State in the matter in which the conflict is supposed to exist, or the case for this court does not arise. No such thing appears in the case before us, which is the case of a citizen of Iowa, suing a corporation of Iowa, in the Iowa courts, their rights being determined either upon a construction of local law in no way in conflict with the Federal Constitution, or else upon a simple question of fraud.

The writ of error must be *Dismissed.*[1]

[1] And so *Knox* v. *Exchange Bank*, 12 Wall. 379; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388; *St. Paul &c., Ry.* v. *Todd Co.*, 142 U. S. 282. Compare *Delmas* v. *Ins. Co.* 14 Wall. 661.

In *N. O. Waterworks Co.* v. *La. Sugar Ref. Co.*, 125 U. S. 18, GRAY, J., for the court, said: "In order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation

of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.

"This court, therefore, has no jurisdiction to review a judgment of the highest court of a State, on the ground that the obligation of a contract has been impaired, unless some legislative act of the State has been upheld by the judgment sought to be reviewed. The general rule, as applied to this class of cases, has been clearly stated in two opinions of this court, delivered by Mr. Justice Miller. . . . [Here follow passages from *R. R. Co.* v. *Rock*, 4 Wall. 177, and *Knox* v. *Exch. Bk.* 12 Wall. 379.]

"As later decisions have shown, it is not strictly and literally true, that a law of a State, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the legislature in the ordinary course of legislation, or in the form of a constitution established by the people of the State as their fundamental law. In *Williams* v. *Bruffy*, 96 U. S. 176, 183, it was said by Mr. Justice Field, delivering judgment, 'Any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court' (Rev. Stat. § 709); and it was therefore held that a statute of the so-called Confederate States, if enforced by one of the States as its law, was within the prohibition of the Constitution.

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States. For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power. *United States* v. *New Orleans*, 98 U. S. 381, 392; *Meriwether* v. *Garrett*, 102 U. S. 472. . . .

"But the ordinance now in question involved no exercise of legislative power. The legislature, in the charter granted to the plaintiff, provided that nothing therein should 'be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his or their own use.' The legislature itself thus defined the class of persons to whom, and the object for which, the permission might be granted. All that was left to the city council was the duty of determining what persons came within the definition, and how and where they might be permitted to lay pipes, for the purpose of securing their several rights to draw water from the river, without unreasonable interfering with the convenient use by the public of the lands and highways of the city. The rule was established by the legislature, and its execution only committed to the municipal authorities. The power conferred upon the city council was not legislative, but administrative, and might equally well have been vested by law in the mayor alone, or in any other officer of the city. *Railroad Co.* v. *Ellerman*, 105 U. S. 166, 172; *Day* v. *Green*, 4 Cush. 433, 438. The permission granted by the city council to the defendant company, though put in the form of an ordinance, was in effect but a license, and not a by-law of the city, still less a law of the State. If that license was within the authority vested in the city council by the law of Louisiana, it was valid; if it transcended that authority, it was illegal and void. But the question whether it was lawful or unlawful depended wholly on the law of the State, and not at all on any provision of the Constitution or laws of the United States. . . .

"The result of the authorities, applying to cases of contracts the settled rules, that in order to give this court jurisdiction of a writ of error to a State court, a Federal question must have been, expressly or in effect, decided by that court, and, therefore, that when the record shows that a Federal question and another question were presented to that court and its decision turned on the other question only, this court has no jurisdiction, may be summed up as follows: When the State court decides against a right

EUSTIS *v.* BOLLES.

SUPREME COURT OF THE UNITED STATES. 1893.

[150 *U. S.* 361.][1]

Mr. Conrad Reno (with whom was *Mr. William A. Macleod* on the brief), for plaintiffs in error.

Mr. Edwin B. Hale (with whom was *Mr. James B. Richardson* on the brief), for defendants in error.

MR. JUSTICE SHIRAS, after stating the case as above reported, delivered the opinion of the court.

It is settled law that, to give this court jurisdiction of a writ of error to a State court, it must appear affirmatively, not only that a Federal question was presented for decision by the State court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock* v. *Memphis*, 20 Wall. 590; *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S. 635.

It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.

In *Klinger* v. *Missouri*, 13 Wall. 257, 263, this court, through Mr. Justice Bradley, said: "The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the State court might have been based

claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction. When the existence and the construction of a contract are undisputed, and the State court upholds a subsequent law, on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction. When the State court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract, and, if it is of opinion that it did not confer the rights affirmed by the State court, and therefore its obligation was not impaired by the subsequent law, may on that ground affirm the judgment. So, when the State court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld. But when the State court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction." — ED.

[1] The statement of facts is omitted. — ED.

either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction."

In *Johnson* v. *Risk*, 137 U. S. 300, the record showed that, in the Supreme Court of Tennessee, two grounds of defence had been urged, one of which involved the construction of the provisions of the Federal Bankrupt Act of March 2, 1867, and the other the bar of the Statute of Limitations of the State of Tennessee; and this court held that "where, in an action pending in a State court, two grounds of defence are interposed, each broad enough to defeat a recovery, and only one of them involves a Federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the Federal question; and if this does not affirmatively appear, the writ of error will be dismissed, unless the defence which does not involve a Federal question is so palpably unfounded that it cannot be presumed to have been entertained by the State court."

Different phases of the question were presented, and the same conclusion was reached in *Murray* v. *Charleston*, 96 U. S. 432, 441; *Jenkins* v. *Lœwenthal*, 110 U. S. 222; *Hale* v. *Akers*, 132 U. S. 554.

In this state of the law we are met, at the threshold in the present case, with the question whether the record discloses that the Supreme Judicial Court of Massachusetts decided adversely to the plaintiffs in error any claim arising under the Constitution or laws of the United States, or whether the judgment of that court was placed on another ground, not involving Federal law, and sufficient of itself to sustain the judgment.

The defendants in the trial court depended on a discharge obtained by them under regular proceedings, under the insolvency statutes of Massachusetts. This defence the plaintiffs met by alleging that the statutes, under which the defendants had procured their discharge, had been enacted after the promissory note sued on had been executed and delivered, and that, to give effect to a discharge obtained under such subsequent laws, would impair the obligation of a contract, within the meaning of the Constitution of the United States. Upon such a state of facts, it is plain that a Federal question, decisive of the case, was presented, and that if the judgment of the Supreme Judicial Court of

Massachusetts adjudged that question adversely to the plaintiffs, it would be the duty of this court to consider the soundness of such a judgment.

The record, however, further discloses that William T. Eustis, represented in this court by his executors, had accepted and receipted for the money which had been awarded him, as his portion, under the insolvency proceedings, and that the court below, conceding that his cause of action could not be taken away from him, without his consent, by proceedings under statutes of insolvency passed subsequently to the vesting of his rights, held that the action of Eustis, in so accepting and receipting for his dividend in the insolvency proceedings, was a waiver of his right to object to the validity of the insolvency statutes, and that, accordingly, the defendants were entitled to the judgment.

The view of the court was that, when the composition was confirmed, Eustis was put to his election whether he would avail himself of the composition offer, or would reject it and rely upon his right to enforce his debt against his debtors notwithstanding their discharge.

In its discussion of this question the court below cited and claimed to follow the decision of this court in the case of *Clay* v. *Smith*, 3 Pet. 411, where it was held that the plaintiff, by proving his debt and taking a dividend under the bankrupt laws of Louisiana, waived his right to object that the law did not constitutionally apply to his debt, he being a creditor residing in another State. But in deciding that it was competent for Eustis to waive his legal rights, and that accepting his dividend under the insolvency proceedings was such a waiver, the court below did not decide a Federal question. Whether that view of the case was sound or not, it is not for us to inquire. It was broad enough, in itself, to support the final judgment, without reference to the Federal question.

The case of *Beaupré* v. *Noyes*, 138 U. S. 397, 401, seems to cover the present one. There the plaintiff in error complained that an assignment of property, not accompanied by delivery and an actual change of possession, was, as to him, fraudulent; and as his contention to that effect was denied to him, he claimed he was denied a right arising under an authority exercised under the United States. But this court said: "Whether the State court so interpreted the territorial statute as to deny such right to the plaintiffs in error, we need not inquire, for it proceeded, in part, upon another and distinct ground, not involving any Federal question, and sufficient, in itself, to maintain the judgment, without reference to that question. That ground is that there was evidence tending to show that the defendants acquiesced in and assented to all that was done, and waived any irregularity in the mode in which the assignee conducted the business; and that the question, whether the defendants so acquiesced and assented with knowledge of all the facts, and thereby waived their right to treat the assignment as fraudulent, was properly submitted to the jury. The State court evidently intended to hold that, even if the assignment was

originally fraudulent, as against the creditors, by reason of Young," the assignor, remaining in apparent possession, "it was competent for the plaintiffs in error to waive the fraud and treat the assignment as valid. . . . That view does not involve a Federal question. Whether sound or not, we do not inquire. It is broad enough, in itself, to support the final judgment, without reference to the Federal question."

Having reached the conclusion that we are not called upon to determine any Federal question, nor to consider whether the State court was right or wrong in its decision of the other question in the case, it only remains to inquire whether that conclusion requires us to affirm the judgment of the court below, or to dismiss the writ of error. An examination of our records will show that, in similar cases, this court has sometimes affirmed the judgment of the court below, and sometimes has dismissed the writ of error. This discrepancy may have originated in a difference of views as to the precise scope of the questions presented. However that may be, we think that, when we find it unnecessary to decide any Federal question, and when the State court has based its decision on a local or State question, our logical course is to dismiss the writ of error. This was the judgment pronounced in *Klinger* v. *Missouri*, 13 Wall. 257; *N. O. Waterworks* v. *Louisiana Sugar Co.*, 125 U. S. 18; *Kreigher* v. *Shelby Railroad*, 125 U. S. 39; *De Saussure* v. *Gaillard*, 127 U. S. 216; *Hale* v. *Akers*, 132 U. S. 554; *Hopkins* v. *McLure*, 133 U. S. 380; *Johnson* v. *Risk*, 137 U. S. 300, 307; and in numerous other cases which it is unnecessary to cite.

Accordingly, our judgment is that, in the present case, the writ of error must be *Dismissed.*

GELPCKE *v.* DUBUQUE.

SUPREME COURT OF THE UNITED STATES. 1863.

[1 *Wall.* 175][1]

[THE action in this case was brought in the District Court of the United States for Iowa, which appears to have been sitting as a circuit court under a statute of March 3, 1849 (9 Stat. at Large, 410, 412, s. 6). The plaintiffs sought to recover the amount of certain unpaid coupons on bonds of the defendant.]

Mr. S. V. White and *Mr. Allison*, for the bond-holders. *Mr. Bissell*, for the city of Dubuque.

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.

[1] The statement of facts is omitted. — ED.

The Act incorporating the city, approved February 24, 1847, provides as follows: [See the note below [1]].

An Act approved January 28th, 1857, contains these provisions: [See the note below [2]].

By these enactments, if they are valid, ample authority was given to the city to issue the bonds in question. The city acted upon this authority. The qualifications coupled with the grant of power contained in the 27th section of the Act of Incorporation are not now in question. If they were, the result would be the same. When a corporation has power, under any circumstances, to issue negotiable securities, the *bonâ fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper. If there were any irregularity in taking the votes of the electors or otherwise in issuing the bonds, it is remedied by the curative provisions of the Act of January 28, 1857.

Where there is no defect of constitutional power, such legislation, in cases like this, is valid. This question, with reference to a statute containing similar provisions, came under the consideration of the Supreme Court of Iowa, in *McMillen* v. *Boyles*, 6 Iowa, 305; and again in *McMillen et al.* v. *The County Judge and Treasurer of Lee County*, Id. 391. The validity of the Act was sustained. Without these rulings we should entertain no doubt upon the subject. *Wilkinson* v. *Leland*, 2 Peters, 627; *Satterlee* v. *Matthewson*, 2 Id. 380; *Baltimore & S. R. Co.* v. *Nesbit et al.*, 10 Howard, 395; *Whitewater Valley Canal Co.* v. *Vallette*, 21 Id. 425.

It is claimed "that the Legislature of Iowa had no authority under the Constitution to authorize municipal corporations to purchase stock in railroad companies, or to issue bonds in payment of such stock."

[1] "SECT. 27. That whenever, in the opinion of the city council, it is expedient to borrow money for any public purpose, the question shall be submitted to the citizens of Dubuque, the nature and object of the loan shall be stated, and a day fixed for the electors of said city to express their wishes, the like notice shall be given as in cases of election, and the loan shall not be made unless two-thirds of all the votes polled at such election shall be given in the affirmative."

"By an Act approved January 8th, 1851, the Act of Incorporation was 'so amended as to empower the city council to levy annually a special tax to pay interest on such loans as are authorized by the 27th section of said Act.'"

[2] "That the city of Dubuque is hereby authorized and empowered to aid in the construction of the Dubuque Western and the Dubuque, St. Peter's & St. Paul Railroad Companies, by issuing $250,000 of city bonds to each, in pursuance of a vote of the citizens of said city, taken in the month of December, A. D. 1856. Said bonds shall be legal and valid, and the city council is authorized and required to levy a special tax to meet the principal and interest of said bonds, in case it shall become necessary from the failure of funds from other sources."

"The proclamation, the vote, and bonds issued or to be issued, are hereby declared valid, and the said railroad companies are hereby authorized to expend the money arising from the sale of said bonds, without the limits of the city and county of Dubuque, in the construction of either of said roads, and neither the city of Dubuque, nor any of the citizens, shall ever be allowed to plead that said bonds are invalid."

In this connection our attention has been called to the following provisions of the Constitution of the State: [See the note below [1]].

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 County* 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,

[1] "ART. 1, § 6. All laws of a general nature shall have a uniform operation."

"ART. 3, § 1. The legislative authority of the State shall be vested in a Senate and House of Representatives, which shall be designated as the General Assembly of the State of Iowa," &c.

"ART. 7. The General Assembly shall not in any manner create any debt or debts, liability or liabilities, which shall, singly or in the aggregate, exceed the sum of one hundred thousand dollars, except," &c. The exceptions stated do not relate to this case.

"ART. 8, § 2. Corporations shall not be created in this State by special laws, except for political or municipal purposes, but the General Assembly shall provide by general laws for the organization of all other corporations, except corporations with banking privileges, the creation of which is prohibited. The stock-holders shall be subject to such liabilities and restrictions as shall be provided by law. The State shall not, directly or indirectly, become a stock-holder in any corporation."

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 Howard, 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 Howard, 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.

Judgment and mandate accordingly.[1]

[1] In a like case, *Township* v. *Talcott*, 19 Wall. 666, 678 (1873), SWAYNE, J., for the court, said: "The National Constitution forbids the States to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective States, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the

[Mr. Justice Miller gave a dissenting opinion, in the course of which he said:] "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, 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*,

framers of the Constitution in providing for the creation of an independent Federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery."

In *Douglass* v. *Co. of Pike*, 101 U. S. 677, 687 (1879), Waite, C. J., for the court, said: "We recognize fully, not only the right of a State court, but its duty to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones; and ordinarily we will follow them, except so far as they affect rights vested before the change was made. The rules which properly govern courts in respect to their past adjudications, are well expressed in *Boyd* v. *Alabama*, 94 U. S. 645, where we spoke through Mr. Justice Field. If the Township Aid Act had not been repealed by the new Constitution of 1875 (art. 9, sect. 6), which took away from all municipalities the power of subscribing to the stock of railroads, the new decisions would be binding in respect to all issues of bonds after they were made; but we cannot give them a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing. We always regret to find ourselves in conflict with the courts of the States in matters affecting local law, but when necessary we cannot refrain from acting on our own judgment without abrogating our constitutional jurisdiction."

For valuable comments on the doctrine of this class of cases, sometimes misstated by judges, and often misunderstood by others, see *Burgess* v. *Seligman*, 107 U. S. 20, 32 (1882). While giving at p. 34 a list of "the principal cases," Bradley, J., for the court, said: "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 *Pleasant Township* v. *Ætna Life Ins. Co.*, 138 U. S. 67, 71 (1890), Brewer, J., for the court, said: "We would not weaken in the least the authority of the case of *Douglass* v. *County of Pike*, *supra*. There comes, incidentally, into this case that which is abundant justification of the rule there announced. The city of Cincinnati, under the authority of the Act of 1869, issued many millions of bonds. These bonds are current in the market, indorsed by the legislative Act authorizing the city to issue them, by the vote of the people of the city in favor of their issue, and by the judicial declaration of the highest court of the State that the Act of the Legislature was constitutional and valid. With such triple authentication, and relying upon the case of *Douglass* v. *County of Pike*, *supra*, well may the bond-holders expect of this court a judgment against the city, even if there should be a subsequent decision of the Supreme Court of Ohio against the constitutionality of such Act, and although the personal opinions of the members of this court should be in harmony with that adjudication. In other words, whatever may be thought of the constitutionality of a statute, if it were a new question, there may, by concurrence of legislative, judicial, and popular action, become impressed upon bonds issued thereunder an unimpeachable validity. But this is not such a case."

11 Wheaton, 361; *McCluny* v. *Silliman*, 3 Peters, 277; *Van Rensselaer* v. *Kearney*, 11 Howard, 297; *Webster* v. *Cooper*, 14 Id. 504; *Elmendorf* v. *Taylor*, 10 Wheaton, 152; *The Bank* v. *Dudley*, 2 Peters, 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, 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 later 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."[1]

[1] In *Butz* v. *Muscatine*, 8 Wall. 575, 587 (1869), a similar case, MR. JUSTICE MILLER, in a dissenting opinion, said: "These frequent dissents in this class of subjects are as distasteful to me as they can be to any one else. But when I am com-

pelled, as I was last spring, by the decisions of this court, to enter an order to commit to jail at one time over a hundred of the best citizens of Iowa, for obeying, as they thought their oath of office required them to do, an injunction issued by a competent court of their own State, founded, as these gentlemen conscientiously believed, on the true interpretation of their own statute, an injunction which, in my own private judgment, they were legally bound to obey, I must be excused if, when sitting here, I give expression to convictions which my duty compels me to disregard in the Circuit Court."

From *The Case of Gelpcke* v. *Dubuque*, 4 Harv. Law Rev. 311 (1891). — "The court, speaking through Mr. Justice Swayne, while plainly indicating its approval of the older [State] decisions, and its disapproval of the last one, and while stating its own view that the new opinion had not settled the law, nevertheless declined to go into the question of whether the earlier decisions were right, or to examine the question at all, or to follow any rule which required them, in such a case as the present, to adhere to the decision of the State courts; and they proceeded to lay down the important principle that where the law of the State was settled, at the time the bonds were issued, in favor of the legal validity of the bonds, they could not afterwards be held invalid, even by a court which should be of opinion that the former construction of the Constitution was wrong. This proposition, first established in the present case, has since, against much opposition and criticism, been steadily followed in the Supreme Court. Indeed, within a few years after the decision of the present case, which was at the December term, 1863, the Supreme Court declared that the question was no longer open to controversy before them. . . .

"Is this proposition, then, in the case of *Gelpcke* v. *Dubuque*, a sound one and rightly applied? In order to determine that question we must first take several matters clearly into account.

"There is a well-known difference in the ways in which cases may be brought into the United States courts. (*a*) They may come there because the case involves a question under the Constitution, treaties, or laws of the United States. In such cases the United States Supreme Court is the ultimate tribunal of appeal, whether the case has come up from a State court or from an inferior court of the United States. It has no duty of following the laws of the States, for it is now administering the law of its own government. If, in such a case, there be a question of impairing the obligation of a contract, and the State court has held that there is no contract to be impaired, the Supreme Court may re-examine that question with entire freedom, although it involve the construction of the Constitution or statutes of the State; it is not in any way bound to follow the decision of the State court. Such an unfettered power is necessary in order to the full exercise of the jurisdiction of the Supreme Court. In the case of the *Ohio Company* v. *Debolt*, 16 How., at p. 432, on error to the Supreme Court of Ohio, Chief Justice Taney, speaking, probably, for a majority of the court, remarked: 'The duty imposed upon this court to enforce contracts . . . would be vain and nugatory if we were bound to follow those changes in judicial decisions which the lapse of time and the change in judicial officers will often produce. The writ of error to a State court would be no protection to a contract if we were bound to follow the judgment which the State court had given, and which the writ of error brings up for revision here.' (*b*) But there is another ground for coming into the courts of the United States. A case may come there, as this one did, not because of any question arising under the Constitution or laws of the United States, but simply because the plaintiff and defendant are citizens of different States or countries. In such a case the court is administering the law of the State. In this sort of case the general rule is, that, since the court is applying the law of the State, it will follow, in determining what that law is and in construing it, the decisions of its highest court. If the question has not ever come up in the State court, or if there be no settled rule there, the United States court must, of course, decide for itself. But, even after such an independent decision has been made, if the highest court of the State should arrive at a different conclusion, the United States court will, in general, change from its own previous de-

cision, and will adopt that of the State courts. *Green* v. *Neal's Lessee*, 6 Pet. 291; *Carroll County Supervisors* v. *United States*, 18 Wall. 71. Nothing could more plainly mark the secondary character of the jurisdiction of United States courts in this region of it.

"But there are various qualifications of these doctrines. The most conspicuous of them is the principle of *Swift* v. *Tyson*, 16 Pet. 1 (1842), in which the novel and much-contested doctrine was laid down, that upon questions of what is called general commercial law, the courts of the United States did not undertake to follow the State courts.[1] This declaration was not required for the decision of that case, but it has been followed, and is an established rule of the United States jurisprudence. Its soundness in point of principle is, possibly, open to question; at any rate, it is undergoing much criticism at the present day. The same principle is laid down as regards the construction of ordinary language (*Lane* v. *Vick*, 3 How. 464, 476); but in that case there was a strong dissenting opinion of McKinley, J., concurred in by Taney, C. J. Again, when the United States court has already decided a question, and a later decision of the State differs from this, the United States court may at least wait awhile before changing its own decision. *Shelby* v. *Guy*, 11 Wheat. 361. And, finally, it was long ago intimated that a United States court would not follow the State decisions where these were regarded as biased, and unjust to citizens of other States. It will easily appear that in some sense and to some extent there should be a recognition of such a principle as the one just named; all State courts must keep within the line of reason in order to make it just that the United States courts should follow them. Yet, notwithstanding all these qualifications, it is still true, and is recognized as the sound general principle in the class of cases now under discussion, that the courts of the United States will follow the decisions of the State courts in ascertaining and construing their own law. The declarations to this effect are many and emphatic. *Elmendorf* v. *Taylor*, 10 Wheat. 152, 159, 160; *Webster* v. *Cooper*, 14 How. 488, 502–505; *Nesmith* v. *Sheldon*, 7 How. 812; *Williamson* v. *Berry*, 8 How. 495, 558; *Leffingwell* v. *Warren*, 2 Black, 599.

"It is with one of the qualifications of this rule that we are concerned in this case, namely, the one arising out of the danger to citizens of other States from local prejudice. I have said that some power of varying from the decisions of the States must necessarily exist, as regards this sort of case; that, at least, the local courts must keep within the limits of reason. Shall the range of the United States court, in differing from the local tribunals, go farther than that, and how much farther?

"In *Rowan* v. *Runnels*, 5 How. 139 (a case coming up from the Circuit Court of the United States for Mississippi), Chief Justice Taney remarks: 'We ought not to give to them [the decisions of State courts] a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this court, were lawfully made. For if such a rule were adopted, . . . it is evident that the provision in the Constitution of the United States which secures to the citizens of another State the right to sue in the courts of the United States, might become utterly useless and nugatory.' This is the assertion of a right, which is, indeed, an obvious one, to depart from the State court's construction of the local law, in so far as is necessary to prevent the annulling of that protection for citizens of other States which the Constitution was intended to secure. For, although the courts of the United States in this sort of case have to apply the State law, it is to be remarked that they *are* courts of the United States, and not courts of the State. Why is it that a United States court is given this duty of administering the law of another jurisdiction? Why did the States allow it? Why was it important that the United States should have it? It was because, in controversies between its own citizens and those of other States or countries, it might be expected that the courts of any

[1] Not at all a doctrine that they will not conform to the *statutes* of the States. *Watson* v. *Tarpley*, 18 Howard, 517, seems to be clearly bad. Observe how considerable a modification it is, of the doctrine often attributed to the Federal courts, that they recognize the right of the State to end all controversy by legislation. See *Lake Shore, &c. Ry. Co.* v. *Prentice*, 147 U. S. 101, 106.

given State would not be free from bias. Accordingly we read, in No. 80 of the Federalist, the very striking statement of Hamilton as regards the danger that might come from unjust decisions of the several States as against foreigners and citizens of other States, and the importance of that jurisdiction of the Federal courts which we are now considering: —

"'The responsibility for an injury,' he says, 'ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the Federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. . . . The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is perhaps not less essential to the peace of the Union than that which has been just examined. History gives us a horrid picture of the dissensions and private wars which distracted and desolated Germany prior to the institution of the Imperial Chamber by Maximilian, towards the close of the fifteenth century; and informs us, at the same time, of the vast influence of that institution in appeasing the disorders and establishing the tranquillity of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body. . . . It may be esteemed the basis of the Union that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.' And if it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.'

"To come back, now, to the question how far the United States courts may go in refusing to follow the decisions of the State courts. Shall they be limited merely to the prevention of results which would be absurd and irrational, or may they properly go farther? As I have already said, in this class of cases, as in all others, whenever a question develops which involves the law of the United States, the United States court must, as touching that, act independently, although its ground of jurisdiction over the case was originally merely the citizenship of the parties. But suppose no question of that kind to arise. That is the fact in the present case; this case, if originally brought in a State court, could not have been carried up to the Supreme Court of the United States, because it does not involve any question of a 'law' impairing the obligation of contracts. *Railroad Company* v. *McClure*, 10 Wall. 511. The lower United States courts, as we have seen, deal with such cases, because they have concurrent jurisdiction with the State courts on the ground of the citizenship of the parties; and, having regard to the reason that they are given this concurrent jurisdiction, namely, the danger of injury to citizens of other States or countries, by reason of the bias of the State courts, it may be laid down that wherever State courts are likely to be under a local bias, adverse to the citizens of other States or countries, the United States courts must hold themselves at liberty to depart from the decisions of the local courts in construing and applying the local law and the local Constitution, to look into the question for themselves, and to adopt their own rules of administration. This appears to be only a just assertion of the power intended to be given to these courts by the Constitution of the United States, in dealing with the class of cases now under consideration. To this effect is the reasoning of Mr. Justice Bradley, speaking for the court, in *Burgess* v. *Seligman*, 107 U. S. 20 (1882).

"Assuming this to be so, we have thus far only determined that the United States courts will look into such questions for themselves. The statement of Chief Justice

Taney in the case of *Rowan* v. *Runnels*, above quoted, did not go beyond this. But in the case of *Gelpcke* v. *Dubuque*, the Supreme Court flatly refused to look into the merits of the question at all; and, in declining to follow the later decision of the Iowa court, a rule was laid down which established the validity of the bonds, irrespective of any opinion whether, as an original question, they were lawfully and constitutionally issued or not. The Supreme Court, quoting substantially an *obiter* remark of Taney, C. J., in *Ohio Co.* v. *Dobolt*, 16 How., at p. 432, put forward this proposition: '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 cannot be impaired by any subsequent action of legislation or decision of its courts altering the construction of the law.' 1 Wall. 206.

"Has the United States court any right to say this, — to announce that it will not look into the question, whether the bonds were originally authorized by the State Constitution or not? Any right to say that although, in this court's judgment, it may be true, as an original question, that they were issued in violation of the State Constitution, the court will still hold them to be valid?

"With a certain qualification, I think that it has. The laying down of some rule of administration is legitimate, for the court, as we see, has the right to look into the question for itself; and all courts, in regulating the exercise of their functions, lay down, from time to time, rules of presumption and rules of administration. It is a usual, legitimate, necessary practice. It is, to be sure, judicial legislation; but it is impossible to exercise the judicial function without such incidental legislation. If this rule in *Gelpcke* v. *Dubuque* be understood, as it was probably meant, as being subject to a certain qualification, it appears to me good. It will not do, of course, to allow the United States courts, through the medium of any principle of presumption or judicial administration, or anything else, to sanction a violation of the State Constitution or the State laws. There might be a case wherein the violation of the Constitution was gross and palpable, and such that those who took part in it, whether in making contracts or doing anything else, must be held to have known what they were doing; and in such a case no court would be justified in laying down a rule that would protect these parties. But courts often have to recognize, especially in the region of constitutional law, that there is more than one reasonable and allowable interpretation of a thing. It is familiar that they will not set aside the interpretation put upon the Constitution by a co-ordinate legislature, in enacting a law, unless the mistake be very plain indeed, — so plain (in the ordinary phrase used in such cases) as to be beyond reasonable doubt. If the rule be understood in this sense only, that any contract which was held good at the time of making it by the highest court of the State, and which came within a permissible interpretation of the State Constitution and law, will be sustained in the United States courts, I think that it is a sound one, and should be upheld. It is a rule which the State court should accept; and if the adoption of it by the United States court lead to resistance on the part of the State authorities, that is a result which must be submitted to and dealt with as may be possible. Such temporary consequences were probably anticipated when the Constitution was formed. But it may be confidently expected that so just a rule will ultimately commend itself to all courts.[1] It will be observed that the rule is one regulating the administration of a particular jurisdiction of the United States courts. It does not necessarily follow that this same rule should be applied in any other class of cases.

"Since the rule must be attended with the qualification above named, the question next arises whether the doctrine which was laid down in the earlier decisions in Iowa gives a construction to the Constitution of that State which is a rational, a permissible one. I have no doubt that it does. Indeed, it appears to me that the Supreme Court of the United States is right in saying that this view was the just and sound interpretation of that Constitution. And it may now be added also that the Supreme Court of

[1] It is adopted in *Haskett* v. *Maxey et al.*, 134 Ind. 182 (1892), and *Farrier* v. *N. Eng. Mortg. Sec. Co.*, 88 Ala. 275, and 92 Ib. 176; s. c. Wambaugh's Study of Cases, 308; affirmed in *Jones* v. *Iron Co.*, 95 Ala. 551, 563 (1891); *Vt. & Can. R. R. Co.* v. *Vt. Cent. R. R. Co.*, 63 Vt 1 (1890); *Harris* v. *Jex*, 55 N. Y. 421 (1874); s. c. *infra*.

WALES *v.* STETSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1806.

[2 *Mass.* 143.][1]

AN action of trespass for passing a turnpike gate without payment of toll, and for cutting down the gate. The defence was that the plaintiffs were unlawfully obstructing an existing highway. The case was submitted on agreed facts.

The Attorney-General (*Sullivan*), for the plaintiff; *J. Richardson*, for the defendant.

The opinion of the court was delivered by PARSONS, C. J. After considering the several points made in this cause by the counsel, we are satisfied that the question submitted must be decided according to the legal construction of the Act incorporating the proprietors of this turnpike. We are not prepared to deny a right in the General Court to discontinue, by statute, a public highway. It is an easement common to all the citizens who are represented in the legislature. The authorizing of the erection of bridges over navigable waters is, in fact, an exercise of a similar right. We are also satisfied that the rights legally

Iowa, within seven or eight years after the decision of the Supreme Court of the United States in the present case, came back again to the doctrine of the earlier cases, and that this is now the fixed law of the State. *Stewart* v. *Supervisors*, 30 Iowa, 193. It is enough, however, to say that the view was one which might reasonably be held.

"It will be observed that the decision of this case does not at all turn upon the clause of the Constitution of the United States relating to impairing the obligation of contracts; and it should be added that it does not in any degree turn upon a theory that the United States courts have any special rights conferred upon them by the fact that the case relates to a contract. These courts are not the special protectors of contracts, excepting under the clause in the Constitution of the United States forbidding State legislation which impairs their obligation. The true ground is that the courts of the United States are charged with a special duty, in litigation between citizens of different States; that the nature of this special duty requires these courts sometimes to exercise a perfectly independent judgment in construing and applying the laws and constitutions of the States; and that the rule of administration applicable to the exercise of this function, laid down by the Supreme Court of the United States in *Gelpcke* v. *Dubuque*, is a just and wholesome one."

As regards the very interesting topic involved in the case of *Gelpcke* v. *Dubuque*, see Holland's Jurisp. (6th ed.) 61, Bigelow's note in 1 Story's Eq. Jur. (13th ed.) 523, Wambaugh's Study of Cases, 78 and 315 n.; and the various articles called out by the case, such as those by Hon. Henry Reed, in 9 Am. Law Rev. 381, by Hon. J. B. Heiskell, in 22 Am. Law Rev. 190, by Mr. Conrad Reno, in 23 Am. Law Rev. 190, and by Mr. Wm. H. Rand, Jr., in 8 Harv. Law Rev. 328. See also the careful discussions by Mr. W. M. Meigs, in 29 Cent. Law Journal, 465, 485, and by Mr. George W. Pepper, in his little treatise entitled "Border Land of Federal and State Decisions" (Philadelphia, T. & J. W. Johnson & Co., 1889). For some of these citations I am indebted to my colleague, Professor Wambaugh. — ED.

[1] The statement of facts is shortened. — ED.

vested in this, or in any corporation, cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the Act of incorporation.[1] . . . But before we construe the statute as giving an authority to obstruct a former highway by erecting a gate thereon, it should appear that such construction is necessary to give a reasonable effect to the statute. In this case no such necessity appears; but from the case as stated, it appears that the corporation might have exercised their right to erect a gate, and to receive the toll, as empowered by the statute, without impeding the travel on the old highway. . . . Let the plaintiff be called.

[The case of *Fletcher* v. *Peck*, 6 Cranch, 87 (1810), which is given *supra*, p. 114, should here be examined.] [2]

[1] In the Massachusetts "Act [of March 3, 1809] for defining the General Powers and Duties of Manufacturing Companies" (St. 1808, c. 65, § 7), it was provided that "The Legislature may from time to time, upon due notice to any corporation, make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly to repeal any Act or part thereof, establishing any corporation, as shall be deemed expedient." — Ed.

[2] The opinion of Johnson, J., in *Fletcher* v. *Peck*, which was omitted before, proceeded as follows: "In this case I entertain, on two points, an opinion different from that which has been delivered by the court. I do not hesitate to declare that a State does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity. A contrary opinion can only be maintained upon the ground that no existing legislature can abridge the powers of those which will succeed it. To a certain extent this is certainly correct; but the distinction lies between power and interest, the right of jurisdiction and the right of soil.

"The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. In fact, a power to produce its own annihilation is an absurdity in terms. It is a power as utterly incommunicable to a political as to a natural person. But it is not so with the interests or property of a nation. Its possessions nationally are in nowise necessary to its political existence; they are entirely accidental, and may be parted with in every respect similarly to those of the individuals who compose the community. When the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon; it has passed from them; is vested in the individual; becomes intimately blended with his existence, as essentially so as the blood that circulates through his system. The government may indeed demand of him the one or the other, not because they are not his, but because whatever is his is his country's.

"As to the idea, that the grants of a legislature may be void because the legislature are corrupt, it appears to me to be subject to insuperable difficulties. The acts of the supreme power of a country must be considered pure for the same reason that all sovereign acts must be considered just; because there is no power that can declare them otherwise. The absurdity in this case would have been strikingly perceived, could the party who passed the Act of Cession have got again into power, and declared themselves pure, and the intermediate legislature corrupt.

"The security of a people against the misconduct of their rulers must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions. Nor would it be difficult, with the same view, for laws to be framed which would bring the conduct of individuals under the review of adequate tribunals, and make them suffer under the consequences of their own immoral conduct.

"I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the Constitution of the United States, relative to laws impairing the obligation of contracts. It is much to be regretted that words of less equivocal signification had not been adopted in that article of the Constitution. There is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the Acts of the State legislatures. Whether the words, 'Acts impairing the obligation of contracts,' can be construed to have the same force as must have been given to the words 'obligation and *effect* of contracts,' is the difficulty in my mind.

"There can be no solid objection to adopting the technical definition of the word 'contract,' given by Blackstone. The etymology, the classical signification, and the civil-law idea of the word, will all support it. But the difficulty arises on the word 'obligation,' which certainly imports an existing moral or physical necessity. Now a grant or conveyance by no means necessarily implies the continuance of an obligation beyond the moment of executing it. It is most generally but the consummation of a contract, is *functus officio* the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done.

"I enter with great hesitation upon this question, because it involves a subject of the greatest delicacy and much difficulty. The States and the United States are continually legislating on the subject of contracts, prescribing the mode of authentication, the time within which suits shall be prosecuted for them, in many cases affecting existing contracts by the laws which they pass, and declaring them to cease or lose their effect for want of compliance, in the parties, with such statutory provisions. All these Acts appear to be within the most correct limits of legislative powers, and most beneficially exercised, and certainly could not have been intended to be affected by this constitutional provision; yet where to draw the line, or how to define or limit the words, 'obligation of contracts,' will be found a subject of extreme difficulty.

"To give it the general effect of a restriction of the State powers in favor of private rights, is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the States in the exercise of that right which every community must exercise, of possessing itself of the property of the individual, when necessary for public uses; a right which a magnanimous and just government will never exercise without amply indemnifying the individual, and which perhaps amounts to nothing more than a power to oblige him to sell and convey, when the public necessities require it.

"The other point on which I dissent from the opinion of the court is relative to the judgment which ought to be given on the first count. . . .

"To me it appears that the interest of Georgia in that land amounted to nothing more than a mere possibility, and that her conveyance thereof could operate legally only as a covenant to convey or to stand seised to a use." . . .

In *Green* v. *Biddle*, 8 Wheat. 1, 91 (1823), WASHINGTON, J., for the court, said: "The principles laid down in that case [*Fletcher* v. *Peck*] are, that the Constitution of the United States embraces all contracts, executed or executory, whether between individuals or between a State and individuals; and that a State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals. Kentucky, therefore, being a party to the compact [of 1789, between Virginia and Kentucky] which guaranteed to claimants of land lying in that State, under titles derived from Virginia, their rights as they existed under the laws of Virginia, was incompetent to violate that contract by passing any law which rendered those rights less valid and secure." Compare *Wharton* v. *Wise*, 153 U. S. 155 (1894), and *Cov. & Cinc. Bridge Co.* v. *Ky.*, 154 U. S. 204, 223 (1894).

In *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 572 (1837), MCLEAN, J., said: "What was the evil against which the Constitution intended to provide, by declaring that no State shall pass any law impairing the obligation of contracts? What is a contract, and what is the obligation of a contract?

"A contract is defined to be an agreement between two or more persons to do or not to do a particular thing. The obligation of a contract is found in the terms of the agreement, sanctioned by moral and legal principles.

"The evil which this inhibition on the States was intended to prevent, is found in the history of our Revolution. By repeated Acts of legislation in the different States, during that eventful period, the obligation of contracts was impaired. The time and mode of payment were altered by law; and so far was this interference of legislation carried, that confidence between man and man was wellnigh destroyed. Those proceedings grew out of the paper system of that day; and the injuries which they inflicted, were deeply felt in the country at the time the Constitution was adopted. The provision was designed to prevent the States from following the precedent of legislation, so demoralizing in its effects, and so destructive to the commercial prosperity of a country. If it had not been otherwise laid down in the case of *Fletcher* v. *Peck*, 6 Cranch, 125, I should have doubted whether the inhibition did not apply exclusively to executory contracts. This doubt would have arisen as well from the consideration of the mischief against which this provision was intended to guard, as from the language of the provision itself.

"An executed contract is the evidence of a thing done; and it would seem, does not necessarily impose any duty or obligation on either party to do any act or thing. If a State convey land which it had previously granted, the second grant is void; not, it would seem to me, because the second grant impairs the obligation of the first, for in fact it does not impair it: but because, having no interest in the thing granted, the State could convey none. The second grant would be void in this country, on the same ground that it would be void in England, if made by the king. This is a principle of the common law; and is as immutable as the basis of justice. It derives no strength from the above provision of the Constitution; nor does it seem to me to come within the scope of that provision.

"When we speak of the obligation of a contract, the mind seems necessarily to refer to an executory contract; to a contract, under which something remains to be done, and there is an obligation on one or both of the parties to do it. No law of a State shall impair this obligation, by altering it in any material part. This prohibition does not apply to the remedy, but to the terms used by the parties to the agreement, and which fix their respective rights and obligations. The obligation, and the mode of enforcing the obligation, are distinct things. The former consists in the acts of the parties, and is ascertained by the binding words of the contract. The other emanates from the law-making power, which may be exercised at the discretion of the legislature, within the prescribed limits of the Constitution. A modification of the remedy for a breach of the contract, does not, in the sense of the Constitution, impair its obligation. The thing to be done, and the time of performance, remain on the face of the contract in all their binding force upon the parties; and these are shielded by the Constitution, from legislative interference."

In *Church* v. *Kelsey*, 121 U. S. 282 (1886), it was insisted by counsel that "as the Constitution of a State is the 'fundamental contract made between the collective body of citizens of the State and each individual citizen,' a State statute which violates a State Constitution is a 'law impairing the obligation of contracts' within the meaning of that term as used in Art. I. § 10, clause 1, of the Constitution of the United States." But it was held (WAITE, C. J.) that "A State constitution is not a contract within the meaning of that clause of the Constitution of the United States which prohibits the States from passing laws impairing the obligation of contracts."

In *Garrison* v. *City of New York*, 21 Wall. 196, 203 (1874), the court (FIELD, J.), said: "There is, therefore, no case presented in which it can be justly contended that a contract has been impaired. It may be doubted whether a judgment not founded upon an agreement, express or implied, is a contract within the meaning of the constitutional prohibition. It is sometimes called by text-writers a contract of record, because it establishes a legal obligation to pay the amount recovered, and, by fiction

of law, where there is a legal obligation to pay, a promise to pay is implied. It is upon this principle, says Chitty, that an action in form *ex contractu* will lie on a judgment of a court of record. But it is not perceived how this fiction can convert the result of a proceeding, not founded upon an agreement express or implied, but upon a transaction wanting the assent of the parties, into a contract within the meaning of the clause of the Federal Constitution which forbids any legislation impairing its obligation. The purpose of the constitutional prohibition was the maintenance of good faith in the stipulations of parties against any State interference. If no assent be given to a transaction, no faith is pledged in respect to it, and there would seem in such case to be no room for the operation of the prohibition." So held also in *La.* v. *Mayor, etc. of N. O.*, 109 U. S. 285 (1883), in the case of a judgment, in an action of tort for damages caused by a mob.

Compare *Crenshaw* v. *U. S.*, 134 U. S. 99.

In *Morley* v. *Lake Shore & Mich. So. Ry. Co.*, 146 U. S. 162, 167 (1892), SHIRAS, J., for the court, said: "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 constitu-

BEERS *v.* THE STATE OF ARKANSAS. PLATENIUS *v.* SAME. GAUNE *v.* SAME.

SUPREME COURT OF THE UNITED STATES. 1857.

[20 *How.* 527.]

THESE three cases depended upon the same principle. . . . The case is stated in the opinion of the court.

It was argued by *Mr. Pike*, for the plaintiff in error, and by *Mr. Hempstead*, for the defendant.

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

This was an action of covenant, brought in the Circuit Court for Pulaski County, in the State of Arkansas, to recover the interest due

tional 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 *McConn* v. *New York Central, &c. Railroad*, 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; s. c. sub nom. *Middleton* v. *Hill*, 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 Anne [of usury], or to be got at this way, for this is no contract or assurance, a judgment being *redditum in invitum*.' *Bush and Others* 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 cannot 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 those cases, as in this, the court was dealing with the contention that the judgments themselves were contracts *proprio vigore*. . . .

"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. . . . [Here follows the passage given *supra*, p. 683.]

"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*."

[The dissenting opinion of HARLAN, J., for himself and JUSTICES FIELD and BREWER, is omitted.] — ED.

on sundry bonds issued by the State, and which the State had failed to pay according to its contract.

The Constitution of the State provides, that "the General Assembly shall direct by law in what courts and in what manner suits may be commenced against the State." And in pursuance of this provision, a law was accordingly passed; and it is admitted that the present suit was brought in the proper court, and in the manner authorized by that law.

The suit was instituted in the Circuit Court on the 21st of November, 1854. And after it was brought, and while it was pending in the Circuit Court, the legislature passed an Act, which was approved on the 7th of December, 1854, which provided, "that in every case in which suits or any proceedings had been instituted to enforce the collection of any bond or bonds issued by the State, or the interest thereon, before any judgment or decree should be rendered, the bonds should be produced and filed in the office of the clerk, and not withdrawn until final determination of the suit or proceedings, and full payment of the bonds and all interest thereon; and might then be withdrawn, cancelled, and filed with the State treasurer, by order of the court, but not otherwise." And the Act further provided, that in every case in which any such suit or proceeding had been or might be instituted, the court should, at the first term after the commencement of the suit or proceeding, whether at law or in equity, or whether by original or cross bill, require the original bond or bonds to be produced and filed; and if that were not done, and the bonds filed and left to remain filed, the court should, on the same day, dismiss the suit, proceeding, or cross bill.

Afterwards, on the 25th of June, 1855, the State appeared to the suit, by its attorney, and, without pleading to or answering the declaration of the plaintiff, moved the court to require him to file immediately in open court the bonds on which the suit was brought, according to the Act of Assembly above mentioned; and if the same were not filed, that the suit be dismissed.

Upon this motion, after argument by counsel, the court passed an order directing the plaintiff to produce and file in court, forthwith, the bonds mentioned and described in the declaration. But he refused to file them, and thereupon the court adjudged that the suit be dismissed, with costs. This judgment was afterwards affirmed in the Supreme Court of the State, and this writ of error is brought upon the last-mentioned judgment.

The error assigned here is, that the Act of December 7, 1854, impaired the obligations of the contracts between the State and the plaintiff in error, evidenced by and contained in each of the said bonds, and the indorsement thereon, and was therefore null and void, under the Constitution of the United States. The objection taken to the validity of the Act of Assembly cannot be maintained. It is an Act to regulate the proceedings and limit the jurisdiction of its own courts in suits where the State is a party defendant, and nothing more.

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.

Arkansas, by its Constitution, so far waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts, and delegated to its General Assembly the power of directing in what courts, and in what manner, the suit might be commenced. And if the law of 1854 had been passed before the suit was instituted, we do not understand that any objection would have been made to it. The objection is, that it was passed after this suit was instituted, and contained regulations with which the plaintiff could not conveniently comply. But 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 latter power, the State violated no contract with the parties; it merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred in suits when the State consented to be a party defendant.

Nor has the State court, in the judgment brought here for review, decided anything but a question of jurisdiction. . . . The writ of error must therefore be dismissed, for want of jurisdiction in this court.[1]

[1] In *R. R. Co.* v. *Tenn.*, 101 U. S. 337, WAITE, C. J., for the court, said: "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 some-

In *Louisiana* v. *Jumel*, 107 U. S. 711 (1882), in a suit by holders of bonds of the State of Louisiana, against certain officers of the State, on a writ of error to the Circuit Court of the United States for the Eastern District of Louisiana, Waite, C. J., for the court, said: "We have no doubt it was the intention of the State of Louisiana to enter into a formal contract with each and every holder of bonds so issued under the Act of 1874, to levy and collect an annual tax of five and one-half mills on the dollar of the assessed value of all the real and personal property in the State, and to apply the revenue derived therefrom to the payment of the principal and interest of the bonds, and to no other purpose. By the obligation so entered into it was also agreed that the tax levied by the Act and confirmed by the Constitution should be a continuing annual tax until the bonds, principal and interest, were paid in full; that the appropriation of the revenue derived therefrom should be a continuing annual appropriation, and that no further authority than that contained in the Act should be required to enable the taxing officers to levy and collect the tax, or the disbursing officers to pay out the money as collected in discharge of the obligation of the bonds. Whatever may be ordinarily the effect of a promise or a pledge of faith by a State, the language employed in this instance shows unmistakably a design to make these promises and these pledges so far contracts that their obligation would be protected by the Constitution of the United States against impairment.

thing 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."

Compare *Baltzer* v. *State*, 104 N. C. 265 (1889); *Carr* v. *State*, 26 N. E. Rep. 778, 779 (Ind., 1891). — Ed.

"It is equally manifest that the object of the State in adopting the 'Debt Ordinance' in 1879 was to stop the further levy of the promised tax, and to prevent the disbursing officers from using the revenue from previous levies to pay the interest falling due in January, 1880, as well as the principal and interest maturing thereafter.

"The bonds and coupons which the parties to these suits hold have not been reduced to judgment, and there is no way in which the State, in its capacity as an organized political community, can be brought before any court of the State, or of the United States, to answer a suit in the name of these holders to obtain such a judgment. It was expressly decided by the Supreme Court of the State in *State, ex rel. Hart* v. *Burke*, 33 La. An. 498, that such a suit could not be brought in the State courts, and under the Eleventh Amendment of the Constitution no State can be sued in the courts of the United States by a citizen of another State. Neither was there when the bonds were issued, nor is there now, any statute or judicial decision giving the bond-holders a remedy in the State courts or elsewhere, either by *mandamus* or injunction, against the State in its political capacity, to compel it to do what it has agreed should be done, but which it refuses to do.

"These, then, are suits by creditors at large, of the class provided for in the Act of 1874, to compel, by judicial process, the officers of the State to enforce the provisions of the Act, when the State, by an amendment to its Constitution, has undertaken to prohibit them from doing so, and when the court, if it requires an officer to proceed, cannot protect him with a judgment to which the State is a party. The persons sued are the executive officers of the State, and they are proceeded against in their official capacity. The money in the treasury is the property of the State, and not in any legal sense the property of the bond or coupon holders. If it be lost or destroyed, the loss will fall alone on the State or its agents, and the bond-holders will be entitled to payment in full from other sources. True, the money was raised to pay this particular class of debts, and the agreement was that it should not be used for any other purpose; but, notwithstanding this, the State has undertaken to appropriate it to defray the expenses of the government. In this way the State has violated its contract, and, if it could be sued, might perhaps be made to set aside its wrongful appropriation of the money already in hand, and raise more by taxation, if necessary.

"That the Constitution of 1879 on its face takes away the power of the executive officers to comply with the terms of the Act of 1874 cannot be denied. As against everything but the outstanding bonds and coupons, this Constitution is the fundamental law of the State, and it is only invalid so far as it impairs the obligation of the contract on the faith of which the bonds and coupons were taken by their respective holders. The question, then, is whether the contract can be enforced, notwithstanding the Constitution, by coercing the agents and officers

of the State, whose authority has been withdrawn in violation of the contract, without the State itself in its political capacity being a party to the proceedings.

"The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done. . . .

"The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its Act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power. *Judgment affirmed.*"

[Justices Field and Harlan gave dissenting opinions.]

THE STATE OF NEW JERSEY *v.* WILSON.

Supreme Court of the United States. 1812.

[7 *Cranch*, 164.]

This case was submitted to this court, upon a statement of facts, without argument.

March 3d. All the judges being present,

Marshall, C. J., delivered the opinion of the court as follows: —

This is a writ of error to a judgment rendered in the court of last resort in the State of New Jersey, by which the plaintiffs allege they

are deprived of a right secured to them by the Constitution of the United States. The case appears to be this : —

The remnant of the tribe of Delaware Indians, previous to the 20th February, 1758, had claims to a considerable portion of lands in New Jersey, to extinguish which became an object with the government and proprietors under the conveyance from King Charles II. to the Duke of York. For this purpose a convention was held in February, 1758, between the Indians and commissioners appointed by the government of New Jersey ; at which the Indians agreed to specify particularly the lands which they claimed, release their claim to all others, and to appoint certain chiefs to treat with commissioners on the part of the government for the final extinguishment of their whole claim.

On the 9th of August, 1758, the Indian deputies met the commissioners and delivered to them a proposition reduced to writing, the basis of which was, that the government should purchase a tract of land on which they might reside, in consideration of which they would release their claim to all other lands in New Jersey south of the river Raritan. This proposition appears to have been assented to by the commissioners ; and the legislature, on the 12th of August, 1758, passed an Act to give effect to this agreement.

This Act, among other provisions, authorizes the purchase of lands for the Indians, restrains them from granting leases or making sales, and enacts "that the lands to be purchased for the Indians aforesaid shall not hereafter be subject to any tax, any law, usage, or custom to the contrary thereof, in any wise notwithstanding."

In virtue of this Act, the convention with the Indians was executed. Lands were purchased and conveyed to trustees for their use, and the Indians released their claim to the south part of New Jersey.

The Indians continued in peaceable possession of the lands thus conveyed to them until some time in the year 1801, when, having become desirous of migrating from the State of New Jersey, and of joining their brethren at Stockbridge, in the State of New York, they applied for, and obtained an Act of the Legislature of New Jersey authorizing a sale of their land in that State.

This Act contains no expression in any manner respecting the privilege of exemption from taxation which was annexed to those lands by the Act under which they were purchased and settled on the Indians.

In 1803, the commissioners under the last-recited Act sold and conveyed the lands to the plaintiffs, George Painter and others.

In October, 1804, the legislature passed an Act repealing that section of the Act of August, 1758, which exempts the lands therein mentioned from taxes. The lands were then assessed, and the taxes demanded. The plaintiffs, thinking themselves injured by this assessment, brought the case before the courts in the manner prescribed by the laws of New Jersey, and in the highest court of the State, the validity of the repealing Act was affirmed and the land declared liable to taxation. The cause is brought into this court by writ of error, and

the question here to be decided is, does the Act of 1804 violate the Constitution of the United States?

The Constitution of the United States declares that no State shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

In the case of *Fletcher* v. *Peck*, it was decided in this court on solemn argument and much deliberation, that this provision of the Constitution extends to contracts to which a State is a party, as well as to contracts between individuals. The question then is narrowed to the inquiry whether in the case stated a contract existed, and whether that contract is violated by the Act of 1804.

Every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, the terms stipulated, the consideration agreed upon, which is a tract of land with the privilege of exemption from taxation; and then in consideration of the arrangement previously made, one of which this Act of Assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it.

It is not doubted but that the State of New Jersey might have insisted on a surrender of this privilege as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the State, with all its privileges and immunities. The purchaser succeeds, with the assent of the State, to all the rights of the Indians. He stands, with respect to this land, in their place and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it. [The formal Judgment of the Court is omitted.][1]

[1] In *Com.* v. *Bird*, 12 Mass. 442 (1815), the defendant having served in the militia, was exempted from further militia duty by virtue of a statute in existence when he entered the service, and of a later statute. These statutes were repealed, and the defendant was required to serve. The court (JACKSON, J.), in holding the repeal valid, said: "The only question, therefore, is, whether the legislature had power, under these circumstances, to revoke the exemption formerly enjoyed by Bird, and to require him to do duty among the conditional exempts. We are not prepared to say that any one set of legislators can control their successors to this extent in a case of such vital importance to the Commonwealth. There may undoubtedly be cases in which it might be deemed a breach of the public faith to revoke such exemptions; and it is not to be supposed that the legislature would do it in any case without very powerful motives. But we are not authorized to weigh those motives, or to suffer them to have any influence on our decision, when the law is clearly and unequivocally expressed.

THE TRUSTEES OF DARTMOUTH COLLEGE *v.* WOODWARD.

SUPREME COURT OF THE UNITED STATES. 1819.

[4 *Wheat.* 518.][1]

Webster and *Hopkinson*, for the plaintiffs in error. *Holmes* and the *Attorney-General*, *contra.*

MARSHALL, C. J. This is an action of trover, brought by the Trustees of Dartmouth College against William H. Woodward, in the State Court of New Hampshire, for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled.

A special verdict, after setting out the rights of the parties, finds for the defendant, if certain Acts of the Legislature of New Hampshire, passed on the 27th of June and on the 18th of December, 1816, be valid, and binding on the trustees without their assent, and not repugnant to the Constitution of the United States; otherwise, it finds for the plaintiffs.

The Superior Court of Judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the Acts to which the verdict refers violate the Constitution of the United States?

This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative Act is to be examined; and the opinion of the highest law tribunal of a State is to be revised, — an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity with which it was formed. On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared that, in no doubtful case, would it pronounce a legislative Act to be contrary to the Constitution. But the American people have said, in the Constitution of the United States, that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." In the same instrument they have also said, "that the judicial power shall extend to all cases in law and equity arising under the Constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the Constitution of our country has placed beyond legislative control; and,

"We cannot in this case allow the exemption claimed by the respondent, without deciding that the legislature cannot, under any circumstances, require the services of an individual who has once been exempted. . . . This would be carrying those exemptions to an extent that never could have been contemplated, either by the legislature who granted them or by the citizen who performed the conditions prescribed by the law. We can therefore see no sufficient cause to quash these proceedings." — ED.

[1] The statement of facts is omitted. — ED.

however irksome the task may be, this is a duty from which we dare not shrink.

The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three Acts of the Legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled "An Act to amend the charter and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this Act 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, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The President of the Senate, the Speaker of the House of Representatives of New Hampshire, and the Governor and Lieutenant-Governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the Governor and Council of New Hampshire, who are also empowered to fill all vacancies which may occur. The Acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that Act into effect.

The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the Acts which have been stated.

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the Crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

The points for consideration are, 1. Is this contract protected by the Constitution of the United States? 2. Is it impaired by the Acts under which the defendant holds?

1. On the first point it has been argued that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a State for State purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws

respecting divorces. That the clause in the Constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the Constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt, and to restrain the legislature in future from violating the right to property. That anterior to the formation of the Constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the State legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the Constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It has never been understood to restrict the general right of the legislature to legislate on the subject of divorces.[1] Those Acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When any State legislature shall pass an Act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an Act be constitutional.

The parties in this case differ less on general principles, less on the true construction of the Constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially

[1] And so *Hunt* v. *Hunt*, 131 U. S. [Appendix], clxv. (1879) — Ed.

depends. If the Act of Incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry whether those whom they have legally empowered to represent them forever may not assert all the rights which they possessed while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives in the eye of the law as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter.

It becomes then the duty of the court most seriously to examine this charter, and to ascertain its true character.

From the instrument itself it appears that about the year 1754 the Rev. Eleazer Wheelock established at his own expense, and on his own estate, a charity school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England for carrying on and extending his undertaking. In this pious work he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others trustees of the money which had been and should be contributed; which appointment Dr. Wheelock confirmed by a deed of trust authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut River, in the western part of New Hampshire; that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English, and the proprietors in the neighborhood having made large offers of land on condition that the college should there be placed. Dr. Wheelock then applied to the Crown for an Act of Incorporation, and represented the expediency of appointing those whom he had, by his last will, named as trustees in America to be members of the proposed corpora-

tion. "In consideration of the premises," "for the education and instruction of the youth of the Indian tribes," &c., "and also of English youth and any others," the charter was granted, and the trustees of Dartmouth College were by that name created a body corporate, with power, for the use of the said college, to acquire real and personal property, and to pay the president, tutors, and other officers of the college such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power by his last will to appoint a successor, who is to continue in office until disapproved by the trustees. In case of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, being one of the trustees, shall exercise the office until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies which may be created in their own body by death, resignation, removal, or disability; and also to make orders, ordinances, and laws for the government of the college, the same not being repugnant to the laws of Great Britain or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees.

This charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college, was conveyed to and vested in the corporate body.

From this brief review of the most essential parts of the charter, it is apparent that the funds of the college consisted entirely of private donations. It is, perhaps, not very important who were the donors. The probability is that the Earl of Dartmouth and the other trustees in England were, in fact, the largest contributors. Yet the legal conclusion from the facts recited in the charter would probably be, that Dr. Wheelock was the founder of the college.

The origin of the institution was, undoubtedly, the Indian charity school established by Dr. Wheelock at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent; and the trustees, who received the money, were appointed by and act under his authority. It is not too much to say that the funds were obtained by him in trust, to be applied by him to the purposes of his enlarged school. The charter of incorporation was granted at his instance. The persons named by him in his last will as the trustees of his charity school compose a part of the corporation, and he is declared to be the founder of the college and its president for life. Were the inquiry material, we should feel some hesitation in saying that Dr. Wheelock was not, in law, to be considered as the founder (1 Bl. Com. 481) of this institution, and as possessing all the rights appertaining to that character. But be this as it may, Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation

of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds the salaries of the tutors are drawn, and these salaries lessen the expense of education to the students. It is then an eleemosynary (1 Bl. Com. 471) and, as far as respects its funds, a private corporation.

Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority?

That education is an object of national concern and a proper subject of legislation, all admit. That there may be an institution founded by government and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

Dr. Wheelock, as the keeper of his charity school, instructing the Indians in the art of reading and in our holy religion, sustaining them at his own expense and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the legislature have supposed that his private funds, or those given by others, were subject to legislative management because they were applied to the purposes of education. When, afterwards, his school was enlarged, and the liberal contributions made in England and in America enabled him to extend his cares to the education of the youth of his own country, no change was wrought in his own character or in the nature of his duties. Had he employed assistant tutors with the funds contributed by others, or had the trustees in England established a school with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been private tutors; and the fact that they were employed in the education of youth could not have converted them into public officers concerned in the administration of public duties, or have given the legislature a right to interfere in the management of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute their trust uncontrolled by legislative authority.

Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn, for its foundation is purely private and eleemosynary, — not from the application of those funds; for money may be given for education, and the persons receiving it do not, by

being employed in the education of youth, become members of the civil government. Is it from the Act of Incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power or a political character than immortality would confer such power or character on a natural person. It is no more a State instrument than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the government has given it the power to take and to hold property in a particular form and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason?

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 of the grant. In most eleemosynary institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable or public-spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design securely and certainly without an incorporating Act. They apply to the government, state their beneficent object, and offer to advance the

money necessary for its accomplishment, provided the government will confer on the instrument which is to execute their designs the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating Act neither gives nor prevents this control. Neither, in reason, can the incorporating Act change the character of a private eleemosynary institution.

We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured? The counsel for the defendant have insisted that the beneficial interest is in the people of New Hampshire. The charter, after reciting the preliminary measures which had been taken, and the application for an Act of Incorporation, proceeds thus: "Know ye, therefore, that we, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and also that the best means of education be established, in our province of New Hampshire, for the benefit of said province, do, of our special grace," etc. Do these expressions bestow on New Hampshire any exclusive right to the property of the college, any exclusive interest in the labors of the professors? Or do they merely indicate a willingness that New Hampshire should enjoy those advantages which result to all from the establishment of a seminary of learning in the neighborhood? On this point we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate that the "benefit intended for the province" is that which is derived from "establishing the best means of education therein;" that is, from establishing in the province Dartmouth College as constituted by the charter. But if these words, considered alone, could admit of doubt, that doubt is completely removed by an inspection of the entire instrument.

The particular interests of New Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these New Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was "most subservient to the great ends in view," and because liberal donations of land were offered by the proprietors on condition that the institution should be there established. The real advantages from the location of the college are, perhaps, not less considerable to those on the west than to those on the east side of Connecticut River. The clause which constitutes the incorporation, and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, "and also of English youth and any others." So that the objects of the contributors and the incorporating Act were the same, — the promotion of Christianity and of education generally, not the interests of New Hampshire particularly.

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 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. 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.

On what safe and intelligible ground can this exception stand? There is no expression in the Constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the Constitution not warranted by its words? Are contracts of this description of a character to excite so little interest that we must exclude them from the provisions of the Constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration as to compel us, or rather permit us to say, that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they can ap-

pear in court at all, can appear only to complain of the trustees. In all other situations, they are identified with, and personated by, the trustees, and their rights are to be defended and maintained by them. Religion, charity, and education are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend by the corporation. Are they of so little estimation in the United States that contracts for their benefit must be excluded from the protection of words which in their natural import include them? Or do such contracts so necessarily require new modelling by the authority of the legislature that the ordinary rules of construction must be disregarded in order to leave them exposed to legislative alteration?

All feel that these objects are not deemed unimportant in the United States. The interest which this case has excited proves that they are not. The framers of the Constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science by reserving to the government of the Union the 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." They have so far withdrawn science and the useful arts from the action of the State governments. Why, then, should they be supposed so regardless of contracts made for the advancement of literature as to intend to exclude them from provisions made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the Constitution; neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent as to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind to enable us to determine that one great inducement to these gifts is the conviction felt by the giver that the disposition he makes of them is immutable. It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time that an Act of Incorporation constitutes no security for the institution; believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive, hope that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there

can be but little reason to imagine that the framers of our Constitution were strangers to it; and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy and repeated interferences produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful to justify the construction which makes it.

The motives suggested at the bar grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government, and the presumption that, if allowed to continue themselves, they now are, and must remain forever, what they originally were. Hence is inferred the necessity of applying to this corporation, and to other similar corporations, the correcting and improving hand of the legislature.

It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees, deriving their power from a regal source, must necessarily partake of the spirit of their origin; and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college, and to guide the students. Before we inquire into the influence which this argument ought to have on the constitutional question, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter by the Crown, but at whose suggestion were they named? By whom were they selected? The charter informs us. Dr. Wheelock had represented, "that, for many weighty reasons, it would be expedient that the gentlemen whom he had already nominated in his last will to be trustees in America, should be of the corporation now proposed." When, afterwards, the trustees are named in the charter, can it be doubted that the persons mentioned by Dr. Wheelock in his will were appointed? Some were probably added by the Crown, with the approbation of Dr. Wheelock. Among these is the Doctor himself. If any others were appointed at the instance of the Crown, they are the Governor, three members of the Council, and the Speaker of the House of Representatives of the Colony of New Hampshire. The stations filled by these persons ought to rescue them from any other imputation than too great a dependence on the Crown. If in the revolution that followed, they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation which suspicion might excite would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Wheelock, and those who were added to his nomination, most probably with his approbation, were among the most eminent and respectable individuals in New Hampshire.

The only evidence which we possess of the character of Dr. Wheelock is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his en-

deavors, would lead to the opinion that he united a sound understanding to that humanity and benevolence which suggested his undertaking. It surely cannot be assumed that his trustees were selected without judgment. With as little probability can it be assumed that, while the light of science and of liberal principles pervades the whole community, these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement; that, while the human race is rapidly advancing, they are stationary. Reasoning *a priori*, we should believe that learned and intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors, men as well fitted for the government of a college as those who might be chosen by other means. Should this reasoning ever prove erroneous in a particular case, public opinion, as has been stated at the bar, would correct the institution. The mere possibility of the contrary would not justify a construction of the Constitution which should exclude these contracts from the protection of a provision whose terms comprehend them.

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 restric-

tions 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.

[The concurring opinions of WASHINGTON, J., and STORY, J., are omitted.] JOHNSON, J., concurred, for the reasons stated by the Chief Justice; LIVINGSTON, J., concurred for the reasons stated by the Chief Justice and WASHINGTON and STORY, JJ.; DUVALL, J., dissented.[1]

[1] For the history of this case, see Farrar's Report of it, in both stages, (Portsmouth, N. H., 1819,) and the valuable, but ill-digested book, Shirley on *The Dartmouth College Causes* (St. Louis: G. I. Jones & Co., 1879). In 65 N. H. 473, there is "what is intended to be an exact reprint of the case and arguments as printed in 1819 in Farrar's Report and 1 N. H. 111." For this reference I am indebted to my colleague, Hon. Jeremiah Smith. For a learned criticism and exposition of the case, see an article by the Hon. Charles Doe, the present Chief Justice of New Hampshire, in 6 Harv. Law Rev. 161, 213, entitled, "A New View of the Dartmouth College Case." See also articles in 8 Am. Law Rev. 189 and 28 *Ib.* 376, 440.

"I have seen the rule which denies to the several States the power to make any laws impairing the obligation of contracts criticised as if it were a mere politico-economical flourish; but in point of fact there is no more important provision in the whole Constitution. Its principle was much extended by a decision of the Supreme Court, which ought now to interest a large number of Englishmen, since it is the basis of the credit of many of the great American railway incorporations. But it is this prohibition which has in reality secured full play to the economical forces by which the achievement of cultivating the soil of the North American Continent has been performed; it is the bulwark of American individualism against democratic impatience and socialistic fantasy. We may usefully bear in mind that until this prohibition, as interpreted by the Federal courts, is got rid of, certain communistic schemes of American origin, which are said to have become attractive to the English laboring classes because they are supposed to proceed from the bosom of a democratic community, have about as much prospect of obtaining practical realization in the United States as the vision of a Cloud-cuckoo-borough to be built by the birds between earth and sky." — MAINE, *Popular Government* (Essay IV.), 247.

"It is under the protection of the decision in the Dartmouth College Case that the

In *Cary Library* v. *Bliss*, 151 Mass. 364, 375 (1890), — the facts are briefly stated *supra*, p. 1043, — Knowlton, J., for the court, said: "It is quite clear that, upon grounds of mere expediency, and in the absence of an emergency requiring it, the court could not decree such a change in the administration of the trust as is contemplated by this statute; and it becomes necessary to inquire whether the principles of law which limit the authority of the court in a case of this kind are equally applicable to the action of the legislature under our Constitution.

"The acceptance by the town of Maria Cary's proposition contained in her letter created a contract, which was executed on her part by the payment of the money, and which continued binding on the town and the trustees as to their conduct in reference to the charity. Prior to the decision in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, it was uncertain what construction would be given by the Supreme Court of the

most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country at large, and upon the legislation of the country, than the States to which they owe their corporate existence. Every privilege granted or right conferred — no matter by what means or on what pretence — being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless, or corrupt legislation; and a clause of the Federal Constitution, whose purpose was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil." — Cooley, *Const. Lim.* (6 ed.) 335 n.

"The doctrine that a charter confers a contractual right which cannot be violated consistently with the Constitution of the United States, does not necessarily extend to every stipulation which it contains, and the recent course of decision tends to confine it within narrower bounds. It is essential to the obligation of a contract to give or surrender, that the subject-matter should be susceptible of alienation and that there should be power to convey; and if the question were open in this country, it might be contended that these requisites are wanting when the legislature is the grantor, and the thing disposed of a right or privilege which concerns the State and should be exercised for the general good. Such a grant is a law as well as a contract, and therefore subject to modification or repeal; and viewed merely as a contract, relates to matters which are public and cannot be vested absolutely in an individual. The line might perhaps have been drawn between the privileges which could be bestowed by the Crown, and the privileges which could not be conferred without an Act of Parliament, and the former viewed as property and irrevocable, conformably to the analogy of the English law. Charters like that of Dartmouth College, and indeed all others, would have been secure under such a rule as regards the inviolability of the corporation, together with everything which it held or acquired that was susceptible of ownership. But while the State might have conferred an exemption from taxation or the right of eminent domain consistently with this view, or provided that there should be but one railroad or slaughter-house in an extensive district, the grant would not have operated as a contract, or been beyond the reach of repeal.

"It was, notwithstanding, held to follow from the Dartmouth College Case, that the grant of an exclusive right to build a bridge, construct a railway, or supply a city with gas or water, is an integral part of the contract, which the legislature can no more revoke than they can declare that the grantees shall no longer act as a body corporate. . . . The State was stripped under this interpretation of prerogatives that are commonly regarded as inseparable from sovereignty, and might have stood, like Lear, destitute before her offspring, had not the police power been dexterously declared paramount, and used as a means of rescinding improvident grants." — 1 Hare, *Am. Const. Law*, 606, 607. — Ed.

United States to the word 'contracts' in Section 10 of Article I. of the Constitution of the United States, which provides that no State shall pass any 'law impairing the obligation of contracts.' It was settled by that case that the word is to be interpreted broadly and liberally, so as to include all obligations which should be enforced and held sacred growing out of agreements, express or implied, for which there is a valuable consideration. There can be no doubt that the money of Maria Cary was paid under a contract, within the meaning of that word in this clause of the Constitution. The principles by which the courts of England and of this country have been controlled, in the decisions to which we have referred, are those rules of common right which protect men in their transactions with one another. Among them is that fundamental one which is embodied in this provision of the Constitution. If it applies to a change in the administration of a charitable trust such as has been attempted in the present case, it controls the action of the legislature as effectually as that of the courts.

"We think it does apply. The town impliedly agreed with Maria Cary to conform to the terms of her letter. The trustees also agreed that, so long as they continued to be members of the board, they would execute their trust according to her stipulations. She indicated a general purpose to devote her money to this charity, even if it should become impossible to administer it in the manner proposed, and she impliedly agreed that the court might make any reasonable modification of her scheme which might at any time become necessary. The town might become a city, and the board of selectmen or the school committee might be abolished by law, or many other things might occur which would render it impossible or impracticable literally to follow her directions. She impliedly agreed that in such a case the court or the legislature might modify her method to adapt it to changed conditions. But she did not agree that any material change might be made unless there should be an exigency for it.

"It does not appear to be necessary to depart from the plan of administration adopted by the original donor. There seems to be no practical difficulty in conforming literally to the scheme at first proposed. Under these circumstances, none of the parties can be relieved from the obligations of their contract without the consent of all the others. The statute makes no provision for obtaining the consent of any party except the town. Besides Maria Cary, many others have made gifts for the library, of which some were given in terms to the trustees of the Cary Library, some to Cary Library, and some to the town. It is to be presumed that these persons knew on what trusts the library was established and was to be managed, and that they made their gifts to be held under the same trusts. In connection with each of the gifts, the donor, the town, and the trustees impliedly became parties to the same contract in regard to the management of the library as that made with Mrs. Cary. *Hadley* v. *Hopkins Academy*, 14 Pick. 240, 262; *Edwards* v. *Jagers*, 19 Ind.

407, 415. So far as appears, George W. Robinson is the only donor who has consented to a change of the contract. If it be assumed that Alice B. Cary, the residuary legatee of Maria Cary, has assented by petitioning for the passage of the statute and becoming one of the corporators and a trustee, her assent is not equivalent to the assent of the original donor. Two of the gifts of Maria Cary were made in her lifetime, and the contract was fully executed on her part. Her residuary legatee does not legally represent her desire to secure a permanent benefit to the inhabitants of Lexington. Her representative succeeds only to her rights of property. . . .

"We are of opinion that the statute which we are considering impairs the obligation of the contract under which this charity is administered. The principles which lie at the foundation of the Dartmouth College Case, and of other similar decisions, are decisive of the question before us. *Louisville* v. *University of Louisville*, 15 B. Mon. (Ky.) 642; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Allen* v. *McKeen*, 1 Sumner, 276; *New Gloucester School Fund* v. *Bradbury*, 2 Fairf. 118; *Regents of University of Maryland* v. *Williams*, 9 Gill & J. 365, 408; *Norris* v. *Abingdon Academy*, 7 Gill & J. 7; *Brown* v. *Hummel*, 6 Penn. St. 86, 96. The law laid down in these cases, that a charter establishing an eleemosynary corporation is a contract which cannot be changed by the legislature without the consent of the parties to it, is a mere extension of the doctrine which gives a similar effect to the written statement of a scheme that is made the foundation of donations to unincorporated trustees of a public charity."

STURGES *v.* CROWNINSHIELD.

SUPREME COURT OF THE UNITED STATES. 1819.

[4 *Wheat.* 117; 4 *Curtis's Decisions*, 362.][1]

THIS was an action of *assumpsit*, brought in the Circuit Court of Massachusetts, against the defendant, as the maker of two promissory notes, both dated at New York, on the 22d of March, 1811, for the sum of $771.86 each, and payable to the plaintiff, one on the 1st of August, and the other on the 15th of August, 1811. The defendant pleaded his discharge under "An Act for the benefit of insolvent debtors and their creditors," passed by the Legislature of New York, the 3d day of April, 1811. After stating the provisions of the said Act, the defendant's plea averred his compliance with them, and that he was discharged, and a certificate given to him the fifteenth day of February,

[1] The case is taken from Curtis's Decisions. — ED.

1812. To this plea there was a general demurrer, and joinder. At the October term of the Circuit Court, 1817, the cause came on to be argued and heard on the said demurrer, and the following questions arose, to wit: —

1. Whether, since the adoption of the Constitution of the United States, any State has authority to pass a bankrupt law, or whether the power is exclusively vested in the Congress of the United States?

2. Whether the Act of New York, passed the third day of April, 1811, and stated in the plea in this case, is a bankrupt Act, within the meaning of the Constitution of the United States?

3. Whether the Act aforesaid is an Act or law impairing the obligation of contracts, within the meaning of the Constitution of the United States?

4. Whether the plea is a good and sufficient bar of the plaintiff's action?

And after hearing counsel upon the questions, the judges of the Circuit Court were opposed in opinion thereupon; and upon motion of the plaintiff's counsel, the questions were certified to the Supreme Court, for their final decision.

Daggett and *Hopkinson*, for the plaintiff. *Hunter* and *D. B. Ogden*, *contra*.

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

This case is adjourned from the court of the United States, for the first circuit and the district of Massachusetts, on several points on which the judges of that court were divided, which are stated in the record, for the opinion of this court. The first is: —

Whether, since the adoption of the Constitution of the United States, any State has authority to pass a bankrupt law, or whether the power is exclusively vested in the Congress of the United States? . . .

Without entering further into the delicate inquiry respecting the precise limitations which the several grants of power to Congress, contained in the Constitution, may impose on the State legislatures, than is necessary for the decision of the question before the court, it is sufficient to say, that, until the power to pass uniform laws on the subject of bankruptcies be exercised by Congress, the States are not forbidden to pass a bankrupt law, provided it contain no principle which violates the 10th section of the first article of the Constitution of the United States.

This opinion renders it totally unnecessary to consider the question whether the law of New York is, or is not, a bankrupt law.

We proceed to the great question on which the cause must depend. Does the law of New York, which is pleaded in this case, impair the obligation of contracts, within the meaning of the Constitution of the United States? This Act liberates the person of the debtor, and discharges him from all liability for any debt previously contracted, on his surrendering his property in the manner it prescribes. In discussing the question whether a State is prohibited from passing such a law as

this, our first inquiry is into the meaning of words in common use. What is the obligation of a contract? and what will impair it?

It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it.

The words of the Constitution, then, are express, and incapable of being misunderstood. They admit of no variety of construction, and are acknowledged to apply to that species of contract, an engagement between man and man, for the payment of money, which has been entered into by these parties. Yet the opinion that this law is not within the prohibition of the Constitution, has been entertained by those who are entitled to great respect, and has been supported by arguments which deserve to be seriously considered.

It has been contended, that as a contract can only bind a man to pay to the full extent of his property, it is an implied condition that he may be discharged on surrendering the whole of it.

But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents, and integrity, constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation.

It has been argued, that the States are not prohibited from passing bankrupt laws, and that the essential principle of such laws is to discharge the bankrupt from all past obligations; that the States have been in the constant practice of passing insolvent laws, such as that of New York, and if the framers of the Constitution had intended to deprive them of this power, insolvent laws would have been mentioned in the prohibition; that the prevailing evil of the times, which produced this clause in the Constitution, was the practice of emitting paper money, of making property which was useless to the creditor a discharge of his debt, and of changing the time of payment by authorizing distant instalments. Laws of this description, not insolvent laws, constituted, it is said, the mischief to be remedied; and laws of this description, not insolvent laws, are within the true spirit of the prohibition.

The Constitution does not grant to the States the power of passing bankrupt laws, or any other power; but finds them in possession of it, and may either prohibit its future exercise entirely, or restrain it so

far as national policy may require. It has so far restrained it as to prohibit the passage of any law impairing the obligation of contracts. Although, then, the States may, until that power shall be exercised by Congress, pass laws concerning bankrupts, yet they cannot constitutionally introduce into such laws a clause which discharges the obligations the bankrupt has entered into. It is not admitted that, without this principle, an Act cannot be a bankrupt law; and if it were, that admission would not change the Constitution, nor exempt such Acts from its prohibitions.

The argument drawn from the omission in the Constitution to prohibit the States from passing insolvent laws, admits of several satisfactory answers. It was not necessary, nor would it have been safe, had it even been the intention of the framers of the Constitution to prohibit the passage of all insolvent laws, to enumerate particular subjects to which the principle they intended to establish should apply. The principle was the inviolability of contracts. This principle was to be protected in whatsoever form it might be assailed. To what purpose enumerate the particular modes of violation which should be forbidden, when it was intended to forbid all? Had an enumeration of all the laws which might violate contracts been attempted, the provision must have been less complete, and involved in more perplexity than it now is. The plain and simple declaration, that no State shall pass any law impairing the obligation of contracts, includes insolvent laws and all other laws, so far as they infringe the principle the convention intended to hold sacred, and no further.

But a still more satisfactory answer to this argument is, that the convention did not intend to prohibit the passage of all insolvent laws. To punish honest insolvency by imprisonment for life, and to make this a constitutional principle, would be an excess of inhumanity which will not readily be imputed to the illustrious patriots who framed our Constitution, nor to the people who adopted it. The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the State may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation. . . .

The argument which has been pressed most earnestly at the bar, is, that although all legislative Acts which discharge the obligation of a contract without performance, are within the very words of the Constitution, yet an insolvent Act, containing this principle, is not within its spirit, because such Acts have been passed by colonial and State legislatures from the first settlement of the country, and because we know

from the history of the times, that the mind of the convention was directed to other laws, which were fraudulent in their character, which enabled the debtor to escape from his obligation, and yet hold his property; not to this, which is beneficial in its operation.

Before discussing this argument, it may not be improper to premise that, although the spirit of an instrument, especially of a Constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous that all mankind would, without hesitation, unite in rejecting the application. This is certainly not such a case. It is said the colonial and State legislatures have been in the habit of passing laws of this description for more than a century; that they have never been the subject of complaint, and, consequently, could not be within the view of the general convention.

The fact is too broadly stated. The insolvent laws of many, indeed, of by far the greater number of the States, do not contain this principle. They discharge the person of the debtor, but leave his obligation to pay in full force. To this the Constitution is not opposed.

But, were it even true that this principle had been introduced generally into those laws, it would not justify our varying the construction of the section. Every State in the Union, both while a colony and after becoming independent, had been in the practice of issuing paper money; yet this practice is, in terms, prohibited. If the long exercise of the power to emit bills of credit did not restrain the convention from prohibiting its future exercise, neither can it be said that the long exercise of the power to impair the obligation of contracts, should prevent a similar prohibition. It is not admitted that the prohibition is more express in the one case than in the other. It does not, indeed, extend to insolvent laws by name, because it is not a law by name, but a principle which is to be forbidden; and this principle is described in as appropriate terms as our language affords.

Neither, as we conceive, will any admissible rule of construction justify us in limiting the prohibition under consideration, to the particular laws which have been described at the bar, and which furnished such cause for general alarm. What were those laws?

We are told they were such as grew out of the general distress

following the war in which our independence was established. To relieve this distress paper money was issued; worthless lands, and other property of no use to the creditor, were made a tender in payment of debts; and the time of payment, stipulated in the contract, was extended by law. These were the peculiar evils of the day. So much mischief was done, and so much more was apprehended, that general distrust prevailed, and all confidence between man and man was destroyed. To laws of this description therefore, it is said, the prohibition to pass laws impairing the obligation of contracts ought to be confined.

Let this argument be tried by the words of the section under consideration. 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.

It remains to inquire, whether the prohibition under consideration could be intended for the single case of a law directing that judgments should be carried into execution by instalments?

This question will scarcely admit of discussion. If this was the only remaining mischief against which the Constitution intended to provide, it would undoubtedly have been, like paper money and tender laws, expressly forbidden. At any rate, terms more directly applicable to the subject, more appropriately expressing the intention of the convention, would have been used. It seems scarcely possible to suppose that the framers of the Constitution, if intending to prohibit only laws authorizing the payment of debts by instalment, would have expressed that intention by saying, "no State shall pass any law impairing the obligation of contracts." No men would so express such an intention. No men would use terms embracing a whole class of laws, for the purpose of designating a single individual of that class. No court can be justified in restricting such comprehensive words to a particular mischief to which no allusion is made.

The fair, and we think, the necessary construction of the sentence, requires, that we should give these words their full and obvious meaning. A general dissatisfaction with that lax system of legislation which followed the war of our Revolution, undoubtedly directed the mind of the convention to this subject. It is probable that laws such as those which have been stated in argument, produced the loudest complaints, were most immediately felt. The attention of the convention, therefore, was particularly directed to paper money, and to Acts which enabled the debtor to discharge his debt otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed. But, in the opinion of the convention, much

more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The convention appears to have intended to establish a great principle, that contracts should be inviolable. The Constitution, therefore, declares, that no State shall pass "any law impairing the obligation of contracts."

If, as we think, it must be admitted that this intention might actuate the convention; that it is not only consistent with, but is apparently manifested by, all that part of the section which respects this subject; that the words used are well adapted to the expression of it; that violence would be done to their plain meaning by understanding them in a more limited sense; those rules of construction, which have been consecrated by the wisdom of ages, compel us to say, that these words prohibit the passage of any law discharging a contract without performance.

By way of analogy, the statutes of limitations, and against usury, have been referred to in argument; and it has been supposed that the construction of the Constitution, which this opinion maintains, would apply to them also, and must therefore be too extensive to be correct.

We do not think so. Statutes of limitations relate to the remedies which are furnished in the courts. They rather establish, that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance. If, in a State where six years may be pleaded in bar to an action of *assumpsit*, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed to be within it, there could be little doubt of its unconstitutionality.

So with respect to the laws against usury. If the law be, that no person shall take more than six per centum per annum for the use of money, and that, if more be reserved, the contract shall be void, a contract made thereafter reserving seven per cent, would have no obligation in its commencement; but if a law should declare that contracts already entered into, and reserving the legal interest, should be usurious and void, either in the whole or in part, it would impair the obligation of the contract, and would be clearly unconstitutional.

This opinion is confined to the case actually under consideration. It is confined to a case in which a creditor sues in a court, the proceedings of which the legislature, whose Act is pleaded, had not a right to control, and to a case where the creditor had not proceeded to execution against the body of his debtor, within the State whose law attempts to absolve a confined insolvent debtor from his obligation. When such a case arises it will be considered.

It is the opinion of the court, that the Act of the State of New York, which is pleaded by the defendant in this cause, so far as it attempts to discharge this defendant from the debt in the declaration mentioned,

is contrary to the Constitution of the United States, and that the plea is no bar to the action.[1]

[1] See JOHNSON, J., in *Ogden* v. *Saunders*, *infra*, p. 1590.

In *M'Millan* v. *M'Neill*, 4 Wheat. 209 (1819), the case which immediately follows *Sturges* v. *Crowninshield*, the report is as follows: "Error to the District Court of Louisiana. This was a suit brought by M'Neill, the plaintiff below, against M'Millan, the defendant below, to recover a sum of money paid for the defendant's use, under the following circumstances: M'Millan, residing in Charleston, South Carolina, transacting business there as a partner of the house of trade of Sloane & M'Millan, of Liverpool, on the 8th of October and 9th of November, 1811, imported foreign merchandise, on which he gave bonds at the custom-house, with M'Neill and one Walton, as sureties. These bonds were payable the 8th of April, and 9th of May, 1812, and were paid, after suit and judgment, by M'Neill, on the 23d of August and 23d of September, 1813. Some time afterwards, M'Millan removed to New Orleans; where, on the 23d of August, 1815, the district court of the first district of the State of Louisiana, having previously taken into consideration his petition, under a law of the State of Louisiana, passed in 1808, praying for the benefit of the *cessio bonorum*, and a full and entire release and discharge, as well in his person as property, from all debts, dues, claims, and obligations, then existing, due, or owing by him, the said M'Millan, and it having appeared fully and satisfactorily, that the requisite proportion of his creditors, as well in number as amount, had accepted the cession of his goods, and had granted a full and entire discharge, as well with respect to his person as to his future effects, it was then and there ordered, adjudged, and decreed, by the said court, that the proceedings be homologated and confirmed, and that the said M'Millan be acquitted, released, and discharged, as well his person as his future effects, from the payment of any and all debts, dues, and demands, of whatever nature, due and owing by him, previous to the day of the date of the commencement of said proceedings, to wit, previous to the 12th day of August, 1815. The house of trade of Sloane and M'Millan, of Liverpool, having failed, a commission of bankruptcy issued against both the partners in England, on the 28th of September, 1812; and on the 28th of November, 1812, they both obtained certificates of discharge, signed by the commissioners, and sanctioned by the requisite proportion of creditors in number and value, and confirmed by the Lord Chancellor of Great Britain, according to the bankrupt laws of England. On the 1st of July, 1817, the present suit was instituted by M'Neill, describing himself as a citizen of South Carolina, against M'Millan, described as a citizen of Louisiana, in the District Court of the United States for the district of Louisiana (having circuit court powers) to recover the sum of 700 dollars, which M'Neill had paid under the judgments on the custom-house bonds, in South Carolina. To this suit M'Millan pleaded in bar his certificates, under the Louisiana and English bankrupt laws; to which plea the plaintiff below demurred, the defendant joined in demurrer, and the court gave judgment for the plaintiff; from which judgment the cause was brought by writ of error, to this court. *Ingersoll, C. J.*, for the plaintiff in error, no counsel appearing for the defendant in error. MARSHALL, C. J., delivered the opinion of the court, that this case was not distinguishable, in principle, from the preceding case of *Sturges* v. *Crowninshield*. That the circumstance of the State law, under which the debt was attempted to be discharged, having been passed before the debt was contracted, made no difference in the application of the principle. And that, as to the certificate under the English bankrupt laws, it had frequently been determined, and was well settled, that a discharge under a foreign law was no bar to an action on a contract made in this country. *Judgment affirmed.*"

For an explanation of this case, see *Ogden* v. *Saunders*, *infra*, p. 1601 n.

In *Farmers' and Mech. Bank of Pa.* v. *Smith*, 6 Wheat. 131 (1821), on error to the Supreme Court of Pennsylvania, in an action of *assumpsit*, the defendant pleaded a discharge under an insolvency law of that State passed after the contract was made; and also that both parties were always citizens of Pennsylvania. The plaintiff de

OGDEN *v.* SAUNDERS.

SUPREME COURT OF THE UNITED STATES. 1827.

[12 *Wheat.* 213. 7 *Curtis's Decisions,* 132.][1]

ERROR to the District Court of the United States for Louisiana.

This was an action of *assumpsit*, brought in the court below, by the defendant in error, Saunders, a citizen of Kentucky, against the plaintiff in error, Ogden, a citizen of Louisiana. The plaintiff below declared upon certain bills of exchange, drawn on the 30th of September, 1806, by one Jordan, at Lexington, in the State of Kentucky, upon the defendant below, Ogden, in the city of New York (the defendant then being a citizen and resident of the State of New York), accepted by him at the city of New York, and protested for non-payment.

The defendant below pleaded several pleas, among which was a certificate of discharge under the Act of the Legislature of the State of New York, of April 3, 1801, for the relief of insolvent debtors, commonly called the Three Fourths Act.

The jury found the facts in the form of a special verdict, on which the court rendered a judgment for the plaintiff below, and the cause was brought by writ of error before this court. The question which arose under this plea as to the validity of the law of New York as being repugnant to the Constitution of the United States, was argued at February Term, 1824, by *Clay*, *D. B. Ogden*, and *Haines*, for the plaintiff in error, and by *Webster* and *Wheaton*, for the defendant in error, and the cause was continued for advisement until the present term. It was again argued at the present term (in connection with several other causes standing on the calendar, and involving the general question of the validity of the State bankrupt, or insolvent laws), by *Webster* and *Wheaton*, against the validity, and by the *Attorney-General*, *E. Livingston*, *D. B. Ogden*, *Jones*, and *Sampson* for the validity.

The learned judges delivered their opinions as follows: —

WASHINGTON, J. The first and most important point to be decided in this cause turns essentially upon the question, whether the obligation of a contract is impaired by a State bankrupt or insolvent law, which discharges the person and the future acquisitions of the debtor

murred. Judgment below for the defendant. *Hopkinson*, for the plaintiff; *Sergeant*, for the defendant. MARSHALL, C. J., delivered the opinion of the court, that this case was not distinguishable from its former decisions on the same subject, except by the circumstances that the defendant, in the present case, was a citizen of the same State with the plaintiffs at the time the contract was made in that State, and remained such at the time the suit was commenced in its courts. But that these facts made no difference in the cases. The Constitution of the United States was made for the whole people of the Union, and is equally binding upon all the courts and all the citizens.— ED.

[1] The case is taken from Curtis's Decisions.— ED.

from his liability under a contract entered into in that State after the passage of the Act.

This question has never before been distinctly presented to the consideration of this court, and decided, although it has been supposed by the judges of a highly respectable State court that it was decided in the case of *M'Millan* v. *M'Neal*, 4 W. 209. That was the case of a debt contracted by two citizens of South Carolina, in that State, the discharge of which had a view to no other State. The debtor afterwards removed to the territory of Louisiana, where he was regularly discharged, as an insolvent, from all his debts, under an Act of the Legislature of that State passed prior to the time when the debt in question was contracted. To an action brought by the creditor in the District Court of Louisiana, the defendant plead in bar his discharge, under the law of that territory, and it was contended by the counsel for the debtor in this court, that the law under which the debtor was discharged, having passed before the contract was made, it could not be said to impair its obligation. The cause was argued on one side only, and it would seem from the report of the case, that no written opinion was prepared by the court. The Chief Justice stated that the circumstance of the State law under which the debt was attempted to be discharged having been passed before the debt was contracted, made no difference in the application of the principle which had been asserted by the court in the case of *Sturges* v. *Crowninshield*, 4 W. 122. The correctness of this position is believed to be incontrovertible. The principle alluded to was, that a State bankrupt law which impairs the obligation of a contract, is unconstitutional in its application to such contract. In that case, it is true, the contract preceded in order of time the Act of Assembly, under which the debtor was discharged, although it was not thought necessary to notice that circumstance in the opinion which was pronounced. The principle, however, remained, in the opinion of the court delivered in *M'Millan* v. *M'Neal*, unaffected by the circumstance that the law of Louisiana preceded a contract made in another State; since that law, having no extra-territorial force, never did at any time govern or affect the obligation of such contract. It could not, therefore, be correctly said to be prior to the contract, in reference to its obligation: since if, upon legal principles, it could affect the contract, that could not happen until the debtor became a citizen of Louisiana, and that was subsequent to the contract. But I hold the principle to be well established, that a discharge under the bankrupt laws of one government does not affect contracts made or to be executed under another, whether the law be prior or subsequent in the date to that of the contract; and this I take to be the only point really decided in the case alluded to. Whether the Chief Justice was correctly understood by the reporter, when he is supposed to have said, "that this case was not distinguishable in principle from the preceding case of *Sturges* v. *Crowninshield*," it is not material at this time to inquire, because I understand the meaning of these expressions to go no

further than to intimate that there was no distinction between the cases as to the constitutional objection, since it professed to discharge a debt contracted in another State, which, at the time it was contracted, was not within its operation, nor subject to be discharged by it. The case now to be decided, is that of a debt contracted in the State of New York, by a citizen of that State, from which he was discharged, so far as he constitutionally could be, under a bankrupt law of that State, in force at the time when the debt was contracted. It is a case, therefore, that bears no resemblance to the one just noticed.

I come now to the consideration of the question, which, for the first time, has been directly brought before this court for judgment. . . .

What is it, then, which constitutes the obligation of a contract? The answer is given by the Chief Justice, in the case of *Sturges* v. *Crowninshield*, to which I readily assent now, as I did then; it is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affect its validity, construction, or discharge.

But the question, which law is referred to in the above definition, still remains to be solved. It cannot, for a moment, be conceded that the mere moral law is intended, since the obligation which that imposes is altogether of the imperfect kind which the parties to it are free to obey or not, as they please. It cannot be supposed that it was with this law the grave authors of this instrument were dealing.

The universal law of all civilized nations, which declares that men shall perform that to which they have agreed, has been supposed by the counsel who have argued this cause for the defendant in error, to be the law which is alluded to; and I have no objection to acknowledging its obligation, whilst I must deny that it is that which exclusively governs the contract. It is upon this law that the obligation which nations acknowledge to perform their compacts with each other is founded, and I, therefore, feel no objection to answer the question asked by the same counsel — What law it is which constitutes the obligation of the compact between Virginia and Kentucky — by admitting, that it is this common law of nations which requires them to perform it. I admit further that it is this law which creates the obligation of a contract made upon a desert spot, where no municipal law exists, and (which was another case put by the same counsel) which contract, by the tacit assent of all nations, their tribunals are authorized to enforce.

But can it be seriously insisted that this, any more than the moral law upon which it is founded, was exclusively in the contemplation of those who framed this Constitution? What is the language of this universal law? It is simply that all men are bound to perform their contracts. The injunction is as absolute as the contracts to which it applies. It admits of no qualification and no restraint, either as to its validity, construction, or discharge, further than may be necessary to develop the intention of the parties to the contract. And if it be true

that this is exclusively the law, to which the Constitution refers us, it is very apparent that the sphere of State legislation upon subjects connected with the contracts of individuals, would be abridged beyond what it can for a moment be believed the sovereign States of this Union would have consented to; for it will be found, upon examination, that there are few laws which concern the general police of a State, or the government of its citizens, in their intercourse with each other or with strangers, which may not in some way or other affect the contracts which they have entered into, or may thereafter form. For what are laws of evidence, or which concern remedies — frauds and perjuries — laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men, and the charges of tavern-keepers, and a multitude of others which crowd the codes of every State, but laws which may affect the validity, construction, or duration, or discharge of contracts? Whilst I admit, then, that this common law of nations, which has been mentioned, may form in part the obligation of a contract, I must unhesitatingly insist that this law is to be taken in strict subordination to the municipal laws of the land where the contract is made, or is to be executed. The former can be satisfied by nothing short of performance; the latter may affect and control the validity, construction, evidence, remedy, performance, and discharge of the contract. The former is the common law of all civilized nations, and of each of them; the latter is the peculiar law of each, and is paramount to the former whenever they come in collision with each other.

It is, then, the municipal law of the State, whether that be written or unwritten, which is emphatically the law of the contract made within the State, and must govern it throughout, wherever its performance is sought to be enforced.

It forms, in my humble opinion, a part of the contract, and travels with it wherever the parties to it may be found. It is so regarded by all the civilized nations of the world, and is enforced by the tribunals of those nations according to its own forms, unless the parties to it have otherwise agreed, as where the contract is to be executed in, or refers to the laws of, some other country than that in which it is formed, or where it is of an immoral character, or contravenes the policy of the nation to whose tribunals the appeal is made; in which latter cases, the remedy which the comity of nations affords for enforcing the obligation of contracts wherever formed, is denied. Free from these objections, this law, which accompanies the contract as forming a part of it, is regarded and enforced everywhere, whether it affect the validity, construction, or discharge of the contract. It is upon this principle of universal law, that the discharge of the contract, or of one of the parties to it, by the bankrupt laws of the country where it was made, operates as a discharge everywhere.

If, then, it be true that the law of the country where the contract is made or to be executed, forms a part of that contract and of its obliga-

tion, it would seem to be somewhat of a solecism to say that it does, at the same time, impair that obligation.

But it is contended that if the municipal law of the State where the contract is so made form a part of it, so does that clause of the Constitution which prohibits the States from passing laws to impair the obligation of contracts; and, consequently, that the law is rendered inoperative by force of its controlling associate. All this I admit, provided it be first proved that the law so incorporated with and forming a part of the contract, does, in effect, impair its obligation; and before this can be proved, it must be affirmed and satisfactorily made out, that if, by the terms of the contract, it is agreed that, on the happening of a certain event, as, upon the future insolvency of one of the parties, and his surrender of all his property for the benefit of his creditors, the contract shall be considered as performed and at an end, this stipulation would impair the obligation of the contract. If this proposition can be successfully affirmed, I can only say, that the soundness of it is beyond the reach of my mind to understand.

Again, it is insisted that if the law of the contract forms a part of it, the law itself cannot be repealed without impairing the obligation of the contract. This proposition I must be permitted to deny. It may be repealed at any time, at the will of the legislature, and then it ceases to form any part of those contracts which may afterwards be entered into. The repeal is no more void than a new law would be which operates upon contracts to affect their validity, construction, or duration. Both are valid (if the view which I take of this case be correct), as they may affect contracts afterwards formed; but neither are so, if they bear upon existing contracts; and, in the former case, in which the repeal contains no enactment, the Constitution would forbid the application of the repealing law to past contracts, and to those only.

To illustrate this argument, let us take four laws, which, either by new enactments, or by the repeal of former laws, may affect contracts as to their validity, construction, evidence, or remedy.

Laws against usury are of the first description.

A law which converts a penalty, stipulated for by the parties, as the only atonement for a breach of the contract, into a mere agreement for a just compensation, to be measured by the legal rate of interest, is of the second.

The Statute of Frauds, and the Statute of Limitations, may be cited as examples of the last two.

The validity of these laws can never be questioned by those who accompany me in the view which I take of the question under consideration, unless they operate, by their express provisions, upon contracts previously entered into; and even then they are void only so far as they do so operate; because, in that case, and in that case only, do they impair the obligation of those contracts. But if they equally impair the obligation of contracts subsequently made, which they must do, if this be the operation of a bankrupt law upon such contracts, it

would seem to follow that all such laws, whether in the form of new enactments, or of repealing laws, producing the same legal consequences, are made void by the Constitution; and yet the counsel for the defendants in error have not ventured to maintain so alarming a proposition.

If it be conceded that those laws are not repugnant to the Constitution, so far as they apply to subsequent contracts, I am yet to be instructed how to distinguish between those laws, and the one now under consideration. How has this been attempted by the learned counsel who have argued this cause upon the ground of such a distinction?

They have insisted that the effect of the law first supposed, is to annihilate the contract in its birth, or rather to prevent it from having a legal existence, and consequently, that there is no obligation to be impaired. But this is clearly not so, since it may legitimately avoid all contracts afterwards entered into, which reserve to the lender a higher rate of interest than this law permits.

The validity of the second law is admitted, and yet this can only be in its application to subsequent contracts; for it has not, and I think it cannot, for a moment, be maintained, that a law which, in express terms, varies the construction of an existing contract, or which, repealing a former law, is made to produce the same effect, does not impair the obligation of that contract.

The Statute of Frauds, and the Statute of Limitations, which have been put as examples of the third and fourth classes of laws, are also admitted to be valid, because they merely concern the modes of proceeding in the trial of causes. The former, supplying a rule of evidence, and the latter, forming a part of the remedy given by the legislature to enforce the obligation, and likewise providing a rule of evidence.

All this I admit. But how does it happen that these laws, like those which affect the validity and construction of contracts, are valid as to subsequent, and yet void as to prior and subsisting contracts? For we are informed by the learned judge who delivered the opinion of this court, in the case of *Sturges* v. *Crowninshield*, 4 W. 122, that, "if, in a State where six years may be pleaded in bar to an action of *assumpsit*, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed within it, there could be little doubt of its unconstitutionality."

It is thus most apparent that, whichever way we turn, whether to laws affecting the validity, construction, or discharges of contracts, or the evidence or remedy to be employed in enforcing them, we are met by this overruling and admitted distinction, between those which operate retrospectively, and those which operate prospectively. In all of them the law is pronounced to be void in the first class of cases, and not so in the second.

Let us stop, then, to make a more critical examination of the Act of Limitations, which, although it concerns the remedy, or, if it must be conceded, the evidence, is yet void or otherwise, as it is made to apply

retroactively, or prospectively, and see if it can, upon any intelligible principle, be distinguished from a bankrupt law, when applied in the same manner. What is the effect of the former? The answer is, to discharge the debtor and all his future acquisitions from his contract; because he is permitted to plead it in bar of any remedy which can be instituted against him, and consequently in bar or destruction of the obligation which his contract imposed upon him. What is the effect of a discharge under a bankrupt law? I can answer this question in no other terms than those which are given to the former question. If there be a difference, it is one which, in the eye of justice, at least, is more favorable to the validity of the latter than of the former; for in the one, the debtor surrenders everything which he possesses towards the discharge of his obligation, and in the other, he surrenders nothing, and sullenly shelters himself behind a legal objection with which the law has provided him, for the purpose of protecting his person, and his present as well as his future acquisitions, against the performance of his contract.

It is said that the former does not discharge him absolutely from his contract, because it leaves a shadow sufficiently substantial to raise a consideration for a new promise to pay. And is not this equally the case with a certificated bankrupt, who afterwards promises to pay a debt from which his certificate had discharged him? In the former case, it is said the defendant must plead the statute in order to bar the remedy and to exempt him from his obligation. And so, I answer, he must plead his discharge under the bankrupt law, and his conformity to it, in order to bar the remedy of his creditor, and to secure to himself a like exemption. I have, in short, sought in vain for some other grounds on which to distinguish the two laws from each other than those which were suggested at the bar. I can imagine no other, and I confidently believe that none exist which will bear the test of a critical examination.

To the decision of this court, made in the case of *Sturges* v. *Crowninshield*, and to the reasoning of the learned judge who delivered that opinion, I entirely submit; although I did not then, nor can I now bring my mind to concur in that part of it which admits the constitutional power of the State legislatures to pass bankrupt laws, by which I understand those laws which discharge the person and the future acquisitions of the bankrupt from his debts. I have always thought that the power to pass such a law was exclusively vested by the Constitution in the Legislature of the United States. But it becomes me to believe that this opinion was and is incorrect, since it stands condemned by the decision of a majority of this court, solemnly pronounced.

After making this acknowledgment, I refer again to the above decision with some degree of confidence in support of the opinion, to which I am now inclined to come, that a bankrupt law which operates prospectively, or in so far as it does so operate, does not violate the

Constitution of the United States. It is there stated "that, until the power to pass uniform laws on the subject of bankruptcies be exercised by Congress, the States are not forbidden to pass a bankrupt law, provided it contain no principle which violates the 10th section of the 1st article of the Constitution of the United States." The question in that case was, whether the law of New York, passed on the 3d of April, 1811, which liberates not only the person of the debtor, but discharges him from all liability for any debt contracted previous as well as subsequent to his discharge, on his surrendering his property for the use of his creditors, was a valid law under the Constitution, in its application to a debt contracted prior to its passage. The court decided that it was not, upon the single ground that it impaired the obligation of that contract. And if it be true that the States cannot pass a similar law to operate upon contracts subsequently entered into, it follows inevitably, either that they cannot pass such laws at all, contrary to the express declaration of the court, as before quoted, or that such laws do not impair the obligation of contracts subsequently entered into; in fine, it is a self-evident proposition that every contract that can be formed, must either precede or follow any law by which it may be affected.

I have, throughout the preceding part of this opinion, considered the municipal law of the country where the contract is made as incorporated with the contract, whether it affects its validity, construction, or discharge. But I think it quite immaterial to stickle for this position, if it be conceded to me, what can scarcely be denied, that this municipal law constitutes the law of the contract so formed, and must govern it throughout. I hold the legal consequences to be the same in whichever view the law, as it affects the contract, is considered.

I come now to a more particular examination and construction of the section under which this question arises; and I am free to acknowledge that the collocation of the subjects for which it provides, has made an irresistible impression upon my mind, much stronger, I am persuaded, than I can find language to communicate to the minds of others.

It declares that "no State shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts." These prohibitions, associated with the powers granted to Congress "to coin money, and to regulate the value thereof, and of foreign coin," most obviously constitute members of the same family, being upon the same subject and governed by the same policy.

This policy was to provide a fixed and uniform standard of value throughout the United States, by which the commercial and other dealings between the citizens thereof, or between them and foreigners, as well as the moneyed transactions of the government, should be regulated. For it might well be asked, why vest in Congress the power to establish a uniform standard of value by the means pointed out, if the States might use the same means, and thus defeat the uniformity of the standard, and, consequently, the standard itself? And why establish a standard at all, for the government of the various contracts which

might be entered into, if those contracts might afterwards be discharged by a different standard, or by that which is not money, under the authority of State tender laws? It is obvious, therefore, that these prohibitions, in the 10th section, are entirely homogeneous, and are essential to the establishment of a uniform standard of value, in the formation and discharge of contracts. It is for this reason, independent of the general phraseology which is employed, that the prohibition in regard to State tender laws will admit of no construction which would confine it to State laws which have a retrospective operation.

The next class of prohibitions contained in this section consists of bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts.

Here, too, we observe, as I think, members of the same family brought together in the most intimate connection with each other. The States are forbidden to pass any bill of attainder or *ex post facto* law, by which a man shall be punished criminally or penally, by loss of life, of his liberty, property, or reputation, for an act which, at the time of its commission, violated no existing law of the land. Why did the authors of the Constitution turn their attention to this subject, which, at the first blush, would appear to be peculiarly fit to be left to the discretion of those who have the police and good government of the State under their management and control? The only answer to be given is, because laws of this character are oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man. The injustice and tyranny which characterizes *ex post facto* laws, consists altogether in their retrospective operation, which applies with equal force, although not exclusively, to bills of attainder.

But if it was deemed wise and proper to prohibit State legislation as to retrospective laws, which concern, almost exclusively, the citizens and inhabitants of the particular State in which this legislation takes place, how much more did it concern the private and political interests of the citizens of all the States, in their commercial and ordinary intercourse with each other, that the same prohibition should be extended civilly to the contracts which they might enter into?

If it were proper to prohibit a State legislature to pass a retrospective law, which should take from the pocket of one of its own citizens a single dollar as a punishment for an act which was innocent at the time it was committed; how much more proper was it to prohibit laws of the same character precisely, which might deprive the citizens of other States, and foreigners as well as citizens of the same State, of thousands, to which, by their contracts, they were justly entitled, and which they might possibly have realized but for such State interference? How natural, then, was it, under the influence of these considerations, to interdict similar legislation in regard to contracts, by providing that no State should pass laws impairing the obligation of past contracts? It is true that the first two of these prohibitions apply to laws of a criminal, and the last to laws of a civil character; but if I am correct

in my view of the spirit and motives of these prohibitions, they agree in the principle which suggested them. They are founded upon the same reason, and the application of it is at least as strong to the last as it is to the first two prohibitions.

But these reasons are altogether inapplicable to laws of a prospective character. There is nothing unjust or tyrannical in punishing offences prohibited by law, and committed in violation of that law. Nor can it be unjust or oppressive, to declare by law that contracts subsequently entered into, may be discharged in a way different from that which the parties have provided, but which they know, or may know, are liable, under certain circumstances, to be discharged in a manner contrary to the provisions of their contract.

Thinking, as I have always done, that the power to pass bankrupt laws was intended by the authors of the Constitution to be exclusive in Congress, or, at least, that they expected the power vested in that body would be exercised, so as effectually to prevent its exercise by the States, it is the more probable that, in reference to all other interferences of the State legislatures upon the subject of contracts, retrospective laws were alone in the contemplation of the convention. . . .

But why, it has been asked, forbid the States to pass laws making anything but gold and silver coin a tender in payment of debts contracted subsequent as well as prior to the law which authorizes it; and yet confine the prohibition to pass laws impairing the obligation of contracts to past contracts, or, in other words, to future bankrupt laws, when the consequence resulting from each is the same, the latter being considered by the counsel as being, in truth, nothing less than tender laws in disguise.

An answer to this question has, in part, been anticipated by some of the preceding observations. The power to pass bankrupt laws having been vested in Congress, either as an exclusive power, or under the belief that it would certainly be exercised, it is highly probable that State legislation upon that subject was not within the contemplation of the convention; or, if it was, it is quite unlikely that the exercise of the power, by the State legislatures, would have been prohibited by the use of terms which, I have endeavored to show, are inapplicable to laws intended to operate prospectively. For had the prohibition been to pass laws impairing contracts, instead of the obligation of contracts, I admit that it would have borne the construction which is contended for, since it is clear that the agreement of the parties in the first case would be impaired as much by a prior as it would be by a subsequent bankrupt law. It has, besides, been attempted to be shown that the limited restriction upon State legislation, imposed by the former prohibition, might be submitted to by the States, whilst the extensive operation of the latter would have hazarded, to say the least of it, the adoption of the Constitution by the State conventions.

But an answer, still more satisfactory to my mind, is this: tender laws, of the description stated in this section, are always unjust; and,

where there is an existing bankrupt law at the time the contract is made, they can seldom be useful to the honest debtor. They violate the agreement of the parties to it, without the semblance of an apology for the measure, since they operate to discharge the debtor from his undertaking, upon terms variant from those by which he bound himself, to the injury of the creditor, and unsupported, in many cases, by the plea of necessity. They extend relief to the opulent debtor, who does not stand in need of it; as well as to the one who is, by misfortunes, often unavoidable, reduced to poverty, and disabled from complying with his engagements. In relation to subsequent contracts, they are unjust when extended to the former class of debtors, and useless to the second, since they may be relieved by conforming to the requisitions of the State bankrupt law, where there is one. Being discharged by this law from all his antecedent debts, and having his future acquisitions secured to him, an opportunity is afforded him to become once more a useful member of society.

If this view of the subject be correct, it will be difficult to prove that a prospective bankrupt law resembles, in any of its features, a law which should make anything but gold and silver coin a tender in payment of debts.

I shall now conclude this opinion by repeating the acknowledgment which candor compelled me to make in its commencement, that the question which I have been examining is involved in difficulty and doubt. But if I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt. This has always been the language of this court, when that subject has called for its decision; and I know that it expresses the honest sentiments of each and every member of this bench. I am perfectly satisfied that it is entertained by those of them from whom it is the misfortune of the majority of the court to differ on the present occasion, and that they feel no reasonable doubt of the correctness of the conclusion to which their best judgment has conducted them.

My opinion is, that the judgment of the court below ought to be reversed, and judgment given for the plaintiff in error. . . . [The concurring opinions of JUSTICES JOHNSON, THOMPSON, and TRIMBLE, and the dissenting opinion of MARSHALL, C. J., for himself and JUSTICES DUVALL and STORY, are omitted. Passages from some of these are given in a note.][1]

[1] JOHNSON, J. . . . We are not in possession of the grounds of the decision below; and it has been argued here, as having been given upon the general nullity of the discharge, on the ground of its unconstitutionality. But it is obvious that it might also have proceeded upon the ground of its nullity as to citizens of other States, who have

Judgment having been entered in favor of the validity of a certificate of discharge under the State laws in those cases, argued in connection with *Ogden* v. *Saunders*, where the contract was made between citizens

never, by any act of their own, submitted themselves to the *lex fori* of the State that gives the discharge — considering the right given by the Constitution to go into the courts of the United States upon any contracts, whatever be their *lex loci*, as modifying and limiting the general power which States are acknowledged to possess over contracts formed under control of their peculiar laws.

This question, however, has not been argued, and must not now be considered as disposed of by this decision.

The abstract question of the general power of the States to pass laws for the relief of insolvent debtors will be alone considered. And here, in order to ascertain with precision what we are to decide, it is first proper to consider what this court has already decided on this subject. And this brings under review the two cases of *Sturges* v. *Crowninshield*, and *M'Millan* v. *M'Neal*, adjudged in the year 1819, and contained in the 4th vol. of Wheaton's Reports, 122 and 209. If the marginal note to the report, or summary of the effect of the case of *M'Millan* v. *M'Neal*, presented a correct view of the report of that decision, it is obvious that there would remain very little, if anything, for this court to decide. But by comparing the note of the reporter with the facts of the case, it will be found that there is a generality of expression admitted into the former, which the case itself does not justify. The principle recognized and affirmed in *M'Millan* v. *M'Neal* is one of universal law, and so obvious and incontestable that it need be only understood to be assented to. It is nothing more than this, "that insolvent laws have no extra-territorial operation upon the contracts of other States; that the principle is applicable as well to the discharges given under the laws of the States, as of foreign countries; and that the anterior or posterior character of the law under which the discharge is given, with reference to the date of the contract, makes no discrimination in the application of that principle."

The report of the case of *Sturges* v. *Crowninshield* needs also some explanation The court was, in that case, greatly divided in their views of the doctrine, and the judgment partakes as much of a compromise as of a legal adjudication. The minority thought it better to yield something than risk the whole. And, although their course of reasoning led them to the general maintenance of the State power over the subject, controlled and limited alone by the oath administered to all their public functionaries to maintain the Constitution of the United States, yet, as denying the power to act upon anterior contracts could do no harm, but, in fact, imposed a restriction conceived in the true spirit of the Constitution, they were satisfied to acquiesce in it, provided the decision were so guarded as to secure the power over posterior contracts, as well from the positive terms of the adjudication, as from inferences deducible from the reasoning of the court.

The case of *Sturges* v. *Crowninshield*, then, must, in its authority, be limited to the terms of the certificate, and that certificate affirms two propositions.

1. That a State has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts within the meaning of the Constitution, and provided there be no Act of Congress in force to establish an uniform system of bankruptcy, conflicting with such law.

2. That a law of this description, acting upon prior contracts, is a law impairing the obligation of contracts within the meaning of the Constitution.

Whatever inferences or whatever doctrines the opinion of the court in that case may seem to support, the concluding words of that opinion were intended to control and to confine the authority of the adjudication to the limits of the certificate. . . .

"Lex non cogit ad impossibilia," is a maxim applied by law to the contracts of parties in a hundred ways. And where is the objection, in a moral or political view, to applying it to the exercise of the power to relieve insolvents? It is in analogy with this maxim that the power to relieve them is exercised; and if it never was imagined that, in other cases, this maxim violated the obligation of contracts, I see no reason

of the State under whose law the discharge was obtained, and in whose courts the certificate was pleaded, the cause was further argued by the

why the fair, ordinary, and reasonable exercise of it, in this instance, should be subjected to that imputation.

If it be objected to these views of the subject that they are as applicable to contracts prior to the law as to those posterior to it, and, therefore, inconsistent with the decision in the case of *Sturges* v. *Crowninshield*, my reply is, that I think this no objection to its correctness. I entertained this opinion then, and have seen no reason to doubt it since. But, if applicable to the case of prior debts, *multo fortiori*, will it be so to those contracted subsequent to such a law; the posterior date of the contract removes all doubt of its being in the fair and unexceptionable administration of justice that the discharge is awarded. . . .

The right, then, of the creditor to the aid of the public arm for the recovery of contracts, is not absolute and unlimited, but may be modified by the necessities or policy of societies. And this, together with the contract itself, must be taken by the individual, subject to such restrictions and conditions as are imposed by the laws of the country. The right to pass bankrupt laws is asserted by every civilized nation in the world. And in no writer, I will venture to say, has it ever been suggested, that the power of annulling such contracts, universally exercised under their bankrupt or insolvent systems, involves a violation of the obligation of contracts. In international law, the subject is perfectly understood, and the right generally acquiesced in; and yet the denial of justice is, by the same code, an acknowledged cause of war. . . .

TRIMBLE, J. . . . I conclude that, so far as relates to private contracts between individual and individual, it is the civil obligation of contracts; that obligation which is recognized by and results from the law of the State in which the contract is made, which is within the meaning of the Constitution. If so, it follows that the States have, since the adoption of the Constitution, the authority to prescribe and declare, by their laws, prospectively, what shall be the obligation of all contracts made within them. Such a power seems to be almost indispensable to the very existence of the States, and is necessary to the safety and welfare of the people. The whole frame and theory of the Constitution seems to favor this construction. . . .

MARSHALL, C. J., dissenting. . . . All admit that the Constitution refers to and preserves the legal, not the moral obligation of a contract. Obligations purely moral are to be enforced by the operation of internal and invisible agents, not by the agency of human laws. The restraints imposed on States by the Constitution are intended for those objects which would, if not restrained, be the subject of State legislation. What, then, was the original legal obligation of the contract now under the consideration of the court?

The plaintiff insists that the law enters into the contract so completely as to become a constituent part of it. That it is to be construed as if it contained an express stipulation to be discharged, should the debtor become insolvent, by the surrender of all his property for the benefit of his creditors, in pursuance of the Act of the Legislature.

This is, unquestionably, pressing the argument very far; and the establishment of the principle leads inevitably to consequences which would affect society deeply and seriously. . . .

This idea admits of being pressed still further. If one law enters into all subsequent contracts, so does every other law which relates to the subject. A legislative act, then, declaring that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe, would become a component part of every contract, and be one of its conditions. Thus, one of the most important features in the Constitution of the United States, one which the state of the times most urgently required, one on which the good and the wise reposed confidently for securing the prosperity and harmony of our citizens, would lie prostrate, and be construed into an inanimate, inoperative, unmeaning clause. . . .

We perceive, then, no reason for the opinion that the prohibition "to pass any law

same counsel, upon the points reserved, as to the effect of such a discharge in respect to a contract made with a citizen of another State, and where the certificate was pleaded in the courts of another State, or of the United States.

JOHNSON, J. I am instructed by the majority of the court finally to dispose of this cause. The present majority is not the same which determined the general question on the constitutionality of State insolvent laws, with reference to the violation of the obligation of contracts. I now stand united with the minority on the former question, and, therefore, feel it due to myself and the community to maintain my consistency.

The question now to be considered is, whether a discharge of a debtor under a State insolvent law, would be valid against a creditor or citizen of another State, who has never voluntarily subjected himself to the State laws, otherwise than by the origin of his contract.

As between its own citizens, whatever be the origin of the contract, there is now no question to be made on the effect of such a discharge;

impairing the obligation of contracts," is incompatible with the fair exercise of that discretion, which the State legislatures possess in common with all governments, to regulate the remedies afforded by their own courts. We think that obligation and remedy are distinguishable from each other. That the first is created by the act of the parties, the last is afforded by government. The words of the restriction we have been considering, countenance, we think, this idea. No State shall "pass any law impairing the obligation of contracts." These words seem to us to import that the obligation is intrinsic, that it is created by the contract itself, not that it is dependent on the laws made to enforce it. When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our Constitution were intimately acquainted with the writings of those wise and learned men whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contract. If we turn to those treatises, we find them to concur in the declaration that contracts possess an original intrinsic obligation, derived from the acts of free agents, and not given by government.[1] We must suppose that the framers of our Constitution took the same view of the subject, and the language they have used confirms this opinion.

The propositions we have endeavored to maintain, of the truth of which we are ourselves convinced, are these: —

That the words of the clause in the Constitution, which we are considering, taken in their natural and obvious sense, admit of a prospective as well as of a retrospective operation.

That an Act of the Legislature does not enter into the contract, and become one of the conditions stipulated by the parties; nor does it act externally on the agreement, unless it have the full force of law.

That contracts derive their obligation from the act of the parties, not from the grant of government; and that the right of government to regulate the manner in which they shall be formed, or to prohibit such as may be against the policy of the State, is entirely consistent with their inviolability after they have been formed.

That the obligation of a contract is not identified with the means which government may furnish to enforce it; and that a prohibition to pass any law impairing it, does not imply a prohibition to vary the remedy, nor does a power to vary the remedy imply a power to impair the obligation derived from the act of the parties.

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[1] See, *e. g.*, Grotius, *De Jure Belli et Pacis*, II., 14, 6, — the section immediately preceding what is quoted *supra*, p. 982 n. — ED.

nor is it to be questioned, that a discharge not valid under the Constitution in the courts of the United States, is equally invalid in the State courts. The question to be considered goes to the invalidity of the discharge altogether, and, therefore, steers clear of that provision in the Constitution which purports to give validity in every State to the records, judicial proceedings, and so forth, of each State.

The question now to be considered, was anticipated in the case of *Sturges* v. *Crowninshield*, 4 W. 122, when the court, in the close of the opinion delivered, declared that it means to confine its views to the case then under consideration, and not to commit itself as to those in which the interests and rights of a citizen of another State are implicated.

The question is one partly international, partly constitutional. My opinion on the subject is briefly this: that the provision in the Constitution which gives the power to the general government to establish tribunals of its own in every State, in order that the citizens of other States or sovereignties might therein prosecute their rights under the jurisdiction of the United States, had for its object an harmonious distribution of justice throughout the Union; to confine the States, in the exercise of their judicial sovereignty, to cases between their own citizens; to prevent, in fact, the exercise of that very power over the rights of citizens of other States, which the origin of the contract might be supposed to give to each State; and thus, to obviate that *conflictus legum*, which has employed the pens of Huberus and various others, and which any one who studies the subject will plainly perceive it is infinitely more easy to prevent than to adjust.

These conflicts of power and right necessarily arise only after contracts are entered into. Contracts, then, become the appropriate subjects of judicial cognizance; and if the just claims which they give rise to, are violated by arbitrary laws, or if the course of distributive justice be turned aside, or obstructed by legislative interference, it becomes a subject of jealousy, irritation, and national complaint or retaliation.

It is not unimportant to observe, that the Constitution was adopted at the very period when the courts of Great Britain were engaged in adjusting the conflicts of right which arose upon their own bankrupt law, among the subjects of that Crown in the several dominions of Scotland, Ireland, and the West Indies. The first case we have on the effect of foreign discharges, that of *Ballantine* v. *Golding*, 1 Cooke's Bank. Law, 487, occurred in 1783, and the law could hardly be held settled before the case of *Hunter* v. *Potts*, 4 Term Rep. 182, which was decided in 1791.

Any one who will take the trouble to investigate the subject, will, I think, be satisfied, that although the British courts profess to decide upon a principle of universal law, when adjudicating upon the effect of a foreign discharge, neither the passage in Vattel, to which they constantly refer, nor the practice and doctrines of other nations, will sustain them in the principle to the extent in which they assert it. It

was all-important to a great commercial nation, the creditors of all the rest of the world, to maintain the doctrine as one of universal obligation, that the assignment of the bankrupt's effects, under a law of the country of the contract, should carry the interest in his debts, wherever his debtor may reside; and that no foreign discharge of his debtor should operate against debts contracted with the bankrupt in his own country. But I think it perfectly clear that, in the United States, a different doctrine has been established; and, since the power to discharge the bankrupt is asserted on the same principle with the power to assign his debts, that the departure from it in the one instance carries with it a negation of the principle altogether.

It is vain to deny that it is now the established doctrine in England, that the discharge of a bankrupt shall be effectual against contracts of the State that give the discharge, whatsoever be the allegiance or country of the creditor. But I think it equally clear, that this is a rule peculiar to her jurisprudence, and that reciprocity is the general rule of other countries; that the effect given to such discharge is so much a matter of comity, that the States of the European continent, in all cases, reserve the right of deciding whether reciprocity will not operate injuriously upon their own citizens.

Huberus, in his third axiom on this subject, puts the effect of such laws upon the ground of courtesy, and recognizes the reservation that I have mentioned; other writers do the same.

I will now examine the American decision on this subject; and, first, in direct hostility with the received doctrines of the British courts, it has been solemnly adjudged in this court, and, I believe, in every State court of the Union, that, notwithstanding the laws of bankruptcy in England, a creditor of the bankrupt may levy an attachment on a debt due the bankrupt in this country, and appropriate the proceeds to his own debt. . . . [Here follows a statement and discussion of the cases of *Harrison* v. *Henry*, 5 Cranch, 289; *Baker* v. *Wheaton*, 5 Mass. 509; *Watson* v. *Bourne*, 10 Mass. 337; *Assignees of Topham* v. *Chapman*, 1 Const. Rep. (So. Ca.) 283, and *Phillips* v. *Hunter*, 1 H. Bl. 402.]

I think it, then, fully established, that in the United States a creditor of the foreign bankrupt may attach the debt due the foreign bankrupt, and apply the money to the satisfaction of his peculiar debt, to the prejudice of the rights of the assignees or other creditors.

I do not here speak of assignees, or rights created, under the bankrupt's own deed; those stand on a different ground, and do not affect this question. I confine myself to assignments, or transfers, resting on the operation of the laws of the country, independent of the bankrupt's deed; to the rights and liabilities of debtor, creditor, bankrupt, and assignees, as created by law.

What is the actual bearing of this right to attach, so generally recognized by our decisions?

It imports a general abandonment of the British principles; for,

according to their laws, the assignee alone has the power to release the debtor. But the right to attach necessarily implies the right to release the debtor, and that right is here asserted under the laws of a State which is not the State of the contract.

So, also, the creditor of the bankrupt is, by the laws of his country, entitled to no more than a ratable participation in the bankrupt's effects. But the right to attach imports a right to exclusive satisfaction, if the effects so attached should prove adequate to make satisfaction.

The right to attach also imports the right to sue the bankrupt; and who would impute to the bankrupt law of another country, the power to restrain the citizens of these States in the exercise of their right to go into the tribunals of their own country for the recovery of debts, wherever they may have originated? Yet, universally, after the law takes the bankrupt into its own hands, his creditors are prohibited from suing.

Thus much for the law of this case in an international view. I will consider it with reference to the provisions of the Constitution.

I have said above, that I had no doubt the erection of a distinct tribunal for the resort of citizens of other States, was introduced *ex industria*, into the Constitution, to prevent, among other evils, the assertion of a power over the rights of the citizens of other States, upon the metaphysical ideas of the British courts on the subject of jurisdiction over contracts. And there was good reason for it; for, upon that principle it is, that a power is asserted over the rights of creditors which involves a mere mockery of justice.

Thus, in the case of *Burrows* v. *Jamineau* (reported in 2 Strange, and better reported in Moseley, 1, and some other books), the creditor, residing in England, was cited, probably, by a placard on a door-post in Leghorn, to appear there to answer to his debtor; and his debt passed upon by the court, perhaps, without his having ever heard of the institution of legal process to destroy it.

The Scotch, if I remember correctly, attach the summons on the flag-staff, or in the market-place, at the shore of Leith; and the civil law process by proclamation, or *viis et modis*, is not much better, as the means of subjecting the rights of foreign creditors to their tribunals.

All this mockery of justice, and the jealousies, recriminations, and perhaps retaliations which might grow out of it are avoided, if the power of the States over contracts, after they become the subject exclusively of judicial cognizance, is limited to the controversies of their own citizens.

And it does appear to me almost incontrovertible, that the States cannot proceed one step further without exercising a power incompatible with the acknowledged powers of other States, or of the United States, and with the rights of the citizens of other States.

Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are to

be affected, are entitled to a hearing. Hence every system, in common with the particular system now before us, professes to summon the creditors before some tribunal, to show cause against granting a discharge to the bankrupt.

But on what principle can a citizen of another State be forced into the courts of a State for this investigation? The judgment to be passed is to prostrate his rights; and on the subject of these rights the Constitution exempts him from the jurisdiction of the State tribunals, without regard to the place where the contract may originate. In the only tribunal to which he owes allegiance, the State insolvent or bankrupt laws cannot be carried into effect; they have a law of their own on the subject (2 Stats. at Large, 4); and a certificate of discharge under any other law would not be acknowledged as valid even in the courts of the State in which the court of the United States that grants it is held. Where is the reciprocity? Where the reason upon which the State courts can thus exercise a power over the suitors of that court, when that court possesses no such power over the suitors of the State courts?

In fact, the Constitution takes away the only ground upon which this eminent dominion over particular contracts can be claimed, which is that of sovereignty. For the constitutional suitors in the courts of the United States are not only exempted from the necessity of resorting to the State tribunals, but actually cannot be forced into them. If, then, the law of the English courts had ever been practically adopted in this country in the State tribunals, the Constitution has produced such a radical modification of State power over even their own contracts, in the hands of individuals not subject to their jurisdiction, as to furnish ground for excepting the rights of such individuals from the power which the States unquestionably possess over their own contracts, and their own citizens.

Follow out the contrary doctrine in its consequences, and see the absurdity it will produce.

The Constitution has constituted courts professedly independent of State power in their judicial course; and yet the judgments of those courts are to be vacated, and their prisoners set at large, under the power of the State courts, or of the State laws, without the possibility of protecting themselves from its exercise.

I cannot acquiesce in an incompatibility so obvious.

No one has ever imagined that a prisoner in confinement, under process from the courts of the United States, could avail himself of the insolvent laws of the State in which the court sits. And the reason is, that those laws are municipal and peculiar, and appertaining exclusively to the exercise of State power in that sphere in which it is sovereign, that is, between its own citizens, between suitors subjected to State power exclusively, in their controversies between themselves.

In the courts of the United States, no higher power is asserted than that of discharging the individual in confinement under its own process. This affects not to interfere with the rights of creditors in the State

courts, against the same individual. Perfect reciprocity would seem to indicate that no greater power should be exercised under State authority over the rights of suitors who belong to the United States jurisdiction. Even although the principle asserted in the British courts, of supreme and exclusive power over their own contracts, had obtained in the courts of the United States, I must think that power has undergone a radical modification by the judicial powers granted to the United States.

I, therefore, consider the discharge, under a State law, as incompetent to discharge a debt due a citizen of another State; and it follows that the plea of a discharge here set up, is insufficient to bar the rights of the plaintiff.

It becomes necessary, therefore, to consider the other errors assigned in behalf of the defendant; and, first, as to the plea of the Act of Limitations.

The statute pleaded here is not the Act of Louisiana, but that of New York; and the question is not raised by the facts or averments, whether he could avail himself of that law if the full time had run out before his departure from New York, as was supposed in argument. The plea is obviously founded on the idea that the statute of the State of the contract was generally pleadable in any other State, a doctrine that will not bear argument.

The remaining error assigned has regard to the sum for which the judgment is entered, it being for a greater amount than the nominal amount of the bills of exchange on which the suit was brought, and which are found by the verdict.

There has been a defect of explanation on this subject; but from the best information afforded us, we consider the amount for which judgment is entered, as made up of principal, interest, and damages, and the latter as being legally incident to the finding of the bills of exchange, and their non-payment, and assessed by the court under a local practice consonant with that by which the amount of written contracts is determined, by reference to the prothonotary, in many other of our courts. We, therefore, see no error in it. The judgment below will, therefore, be affirmed.

And the purport of this adjudication, as I understand it, is, that as between citizens of the same State, a discharge of a bankrupt by the laws of that State is valid as it affects posterior contracts; that as against creditors, citizens of other States, it is invalid as to all contracts.

The propositions which I have endeavored to maintain in the opinion which I have delivered are these: —

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.

Mr. Justice Washington, Mr. Justice Thompson, and Mr. Justice Trimble dissented.

Mr. Chief Justice Marshall, Mr. Justice Duvall, and Mr. Justice Story assented to the judgment, which was entered for the defendant in error. *Judgment affirmed.*[1]

[1] See Pomeroy, Const. Law (Bennett's ed.), §§ 592–594.

In *Boyle* v. *Zacharie*, 6 Pet. 348 (1832), "in answer to an inquiry by *Mr. Wirt*, Marshall, C. J., said: "The judges who were in the minority of the court upon the general question as to the constitutionality of State insolvent laws, concurred in the opinion of Mr. Justice Johnson in the case of *Ogden* v. *Saunders*, 12 Wheat. 213. That opinion is therefore to be deemed the opinion of the other judges who assented to that judgment. Whatever principles are established in that opinion are to be considered no longer open for controversy, but the settled law of the court." And in s. c. 6 Pet. 635, 643 (1832), Story, J., for the court, after saying the same thing, added: "It is proper to make this remark, in order to remove an erroneous impression of the bar, that it was his single opinion, and not of the three other judges, who concurred in the judgment. So far, then, as decisions upon the subject of State insolvent laws have been made by this court, they are to be deemed final and conclusive."

In *Donnelly* v. *Corbett*, 7 N. Y. 500, 504 (1852), Gardiner, J., for the court, said: "It has been said, in reference to contracts between citizens of the same States, that bankrupt laws in force at the time of the agreement, became a part of the contract — and that the same rule should apply to laws at the place of performance in cases like the present. This argument has never been deemed satisfactory. For if existing insolvent laws constitute an element of the agreement, why should not the right to enact them, in the discretion of the legislature, especially when given by a written constitution, be recognized in the same manner. There is no more difficulty in finding a place for such an acknowledgment, or indeed for a State constitution, in the undertaking of a debtor, than for a State bankrupt law. In either case, upon the hypothesis under consideration, the creditor is bound in virtue of his own assent. He may therefore as well be concluded by a recognition of a right to legislate prospectively upon this subject, as by a recognition of a law in force at the time of the contract. Every insolvent law, consequently, enacted in pursuance of such a constitution, in the ordinary course of legislation would be valid, whether passed previous or subsequent to the creation of the debt. The United States Court however have uniformly held otherwise as to all laws discharging the debtor, passed subsequent to the contract (6 Peters, 348; 12 Wheaton, 213).

"Again, if the insolvent law of South Carolina constituted a part of the undertaking of the defendant, so for the same reason did the Constitution of the United States. The substance of the contract between the parties would then be, that the maker should pay the money specified in the note unless discharged by some law of the place, by performance not in conflict with the supreme law of the land. This would lead us through a circle back to the question, whether annulling the contract without satisfaction and against the will of the creditor, impaired its obligation.

"The notion, however, that insolvent laws constitute a part of the agreement of parties, under any circumstances, has been considered as fallacious by judges of the court, in which the doctrine was first broached (5 Howard, 311). [This case, *Cook* v.

In *Canada Southern Ry. Co.* v. *Gebhard et al.*, 109 U. S. 527 (1883), various holders of mortgage bonds of the railway company brought

Moffatt, held that one State cannot discharge its people from contracts with citizens of another State, drawn and dated in the former State, but delivered and to be performed in the latter]. The permission by these laws accorded to a debtor to absolve himself is an act of sovereignty, induced by considerations of public expediency. It is the exercise of a power not derived from or dependent upon contract, but beyond and in hostility to it.

"The public good or the exigencies of a State may require the taking of private property without the consent of the owner, or the discharge of a debt without the consent of the creditor; but the idea that the justification in either case rests on contract, or depends upon the assent of the holder, has scarcely the merit of plausibility."

In *Baldwin* v. *Hale*, 1 Wall. 223 (1863), it was held that a State where a contract is made and to be performed cannot discharge the maker as against the claim of one who was and is a citizen of another State.

In *Denny* v. *Bennett*, 128 U. S. 489 (1888), MILLER, J., for the court, said: "This is a writ of error to the Supreme Court of the State of Minnesota.

"The principal point raised by the assignments of error is, that an Act of the Legislature of that State, approved March 7, 1881, c. 148, Laws of 1881, p. 193, is repugnant to the Constitution of the United States so far as it affects citizens of States other than Minnesota. That statute provides that whenever the property of a debtor is seized by an attachment or execution against him he may make an assignment of all his property and estate, not exempt by law, for the equal benefit of all his creditors who shall file releases of heir debts and claims, and his property shall be equitably distributed among such creditors. . . .

"The question of the invalidity of this Minnesota statute, as it relates to the rights of creditors, is an interesting one. The argument in favor of that proposition is twofold. First, that it impairs the obligation of contracts; and, second, that such a statute can have no extra-territorial operation, and cannot, therefore, be binding on creditors living in a different State from that of the debtor and of the *situs* of his property.

"With regard to the first of these it may be conceded that, so far as an attempt might be made to apply this statute to contracts in existence before it was enacted, it would be liable to the objection raised, and therefore in such a case of no effect. But the doctrine has been long settled that statutes limiting the right of the creditor to enforce his claims against the property of the debtor, which are in existence at the time the contracts are made, are not void, but are within the legislative power of the States where the property and the debtor are to be found. The courts of the country abound in decisions of this class, exempting property from execution and attachment, no limit having been fixed to the amount — providing for a valuation at which alone, or generally two-thirds of which, the property can be brought to a forced sale to discharge the debt — granting stays of execution after judgment, and in numerous ways holding that, as to contracts made after the passage of such laws, the legislative enactments regulating the rights of the creditors in the enforcement of their claims are valid. These statutes, exempting the homestead of the debtor, perhaps with many acres of land adjoining it, the books and library of the professional man, the horse and buggy and surgical implements of the physician, or the household furniture, horses, cows, and other articles belonging to the debtor, have all been held to be valid, without reference to the residence of the creditor, as applied to contracts made after their passage.

"The principle is well stated in the case of *Edwards* v. *Kearzey*, 96 U. S. 595, 603, in the following language: —

"'The inhibition of the Constitution is wholly prospective. The States may legislate as to contracts thereafter made, as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effect.' . . .

"No reason has been suggested why the legislature could not exempt all interests in landed estate from execution and sale under judgments against the owner, and per-

actions to recover on them. The company pleaded in defence a "scheme of arrangement," among its creditors, entered into under an

haps all his personal property. However this may be, it is very certain that the established construction of the Constitution of the United States against impairing the obligation of contracts requires that statutes of this class shall be construed to be parts of all contracts made when they are in existence, and therefore cannot be held to impair their obligation. . . .

"But it is said that this statute of Minnesota is void under the principles laid down by this court in the cases of *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Ogden* v. *Saunders*, 12 Wheat. 213; *Baldwin* v. *Hale*, 1 Wall. 223, and *Gilman* v. *Lockwood*, 4 Wall. 409. The proposition lying at the foundation of all these decisions is, that a statute of a State, being without force in any other State, cannot discharge a debtor from a debt held by a citizen of such other State. One of the best statements of the doctrine is found in the following language used in the latest case on the subject, that of *Gilman* v. *Lockwood*, *supra*.

"'State legislatures may pass insolvent laws, provided there be no Act of Congress establishing a uniform system of bankruptcy conflicting with their provisions, and provided that the law itself be so framed that it does not impair the obligation of contracts. Certificates of discharge, however, granted 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, unless it appear that the plaintiff proved his debt against the defendant's estate in insolvency, or in some manner became a party to the proceedings. Insolvent laws of one State cannot discharge the contracts of citizens of other States; because such laws 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 of the cause.'

"This is conceived to be a clear and accurate presentation of the doctrine of the preceding cases, and it will be seen that the substance of the restrictive principle goes no farther than to prohibit, or to make invalid, the discharge of a debt held by a citizen of another State than that where the court is sitting, who does not appear and take part, or is not otherwise brought within the jurisdiction of the court granting the discharge. In other words, whatever the court before whom such proceedings are had may do with regard to the disposition of the property of the debtor, it has no power to release him from the obligation of a contract which he owes to a resident of another State, who is not personally subjected to the jurisdiction of the court. Any one who will take the trouble to examine all these cases will perceive that the objection to the extra-territorial operation of a State insolvent law is, that it cannot, like the bankrupt law passed by Congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the State, so far as it does not impair the obligation of contracts, is conceded, but the power to release him, which is one of the usual elements of all bankrupt laws, does not belong to the legislature where the creditor is not within the control of the court. The Minnesota statute makes no provision for any such release. The creditor who became such after the statute was passed cannot complain that the obligation of his contract is impaired, because the law was a part of the contract at the time he made it, nor can he say that his contract is destroyed and the debtor discharged from it, which is of the essence of a bankrupt law, because no such decree can be made by the court, neither does the law have any such effect, though the obligation of the debtor to pay may be cancelled or discharged by the voluntary act of the creditor who makes such release for a consideration which to him seems to be sufficient."

In *Stoddard et al.* v. *Harrington*, 100 Mass 87, 89 (1868), HOAR, J., for the court, said: "The suggestion that the power of a State over the contracts of its citizens is limited by the power to make them parties to the proceedings in insolvency, does not seem to us well founded, because we think that the effect of the insolvent law qualifies

Act of the Canadian Parliament. The Circuit Court of the United States for the Southern District of New York, held that the arrangement was not a bar to the actions. Judgments were given for the plaintiffs. On error, WAITE, C. J., for the court, said: "Two questions are presented for our consideration: 1. Whether the 'Arrangement Act' is valid in Canada, and had the effect of binding non-

the contract from its inception; and the question of the sufficiency of the notice to creditors to make them so far parties as to be bound by these proceedings does not seem to be one over which the courts of the United States have any peculiar jurisdiction."

In *Phœnix National Bank* v. *Batcheller*, 151 Mass. 589 (1890), HOLMES, J., for the court, said: "This is an action by a Rhode Island national bank, upon a promissory note payable in Massachusetts, and made here by the defendants, citizens of this State. The defence is a discharge in insolvency in this State. It is admitted that the plaintiff did not prove its claim upon the note, and the only question is whether, under these circumstances, the discharge is a bar. It was argued for the defendants, that the decisions of the Supreme Court of the United States that discharges in such cases are not generally valid against citizens of other States do not go upon any constitutional ground, but upon mistaken views of what is called private international law, and therefore are not binding upon us; and we were asked to reconsider *Kelley* v. *Drury*, 9 Allen, 27, in which this court yielded its earlier expressed opinion, and followed the precedent of *Baldwin* v. *Hale*, 1 Wall. 223. . . .

"The often repeated view of the Supreme Court of the United States is, that discharges like the present are void for want of jurisdiction, and that statutes purporting to authorize them are beyond the power of the States to pass. *Baldwin* v. *Hale*, 1 Wall. 223, 233; *Baldwin* v. *Bank of Newbury*, 1 Wall. 234; *Gilman* v. *Lockwood*, 4 Wall. 409; *Denny* v. *Bennett*, 128 U S. 489, 497; *Cole* v. *Cunningham*, 133 U. S 107, 115. Whether that court would regard a decision to the contrary by a State court as subject to review by them upon constitutional grounds, does not appear very clearly from any language of theirs which has been called to our attention, unless it be the following, repeated in *Baldwin* v. *Hale*, 1 Wall. 223, 231, from *Ogden* v. *Saunders*, 12 Wheat 213, 369: '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.' . . .

"This language certainly gives the impression that our decision would be regarded as subject to review, possibly on the ground of an implied restriction on the power to pass insolvent laws reserved to the States (*Denny* v. *Bennett*, 128 U. S. 489, 498); possibly on the ground that the discharge would impair the obligation of contracts with persons not within the jurisdiction (*Cook* v *Moffat*, 5 How. 295, 308); possibly by reason of the Fourteenth Amendment (*Pennoyer* v. *Neff*, 95 U. S. 714); possibly on some vaguer ground. We feel the force of the reasoning quoted from *Stoddard* v. *Harrington*, 100 Mass. 87, 89, but that case did not profess to weaken the authority of *Kelley* v. *Drury*, and, moreover, the question which we are now considering is not what would be our own opinion, but what seems to be the opinion of the Supreme Court of the United States.

"The decision in *Kelley* v. *Drury* did not go upon any nice inquiry whether it was subject to review, but upon the ground that this court deferred to the decision of the Supreme Court of the United States, that discharges like the present were not binding outside the jurisdiction, and that, this being so, a discrimination should not be made in favor of our citizens in proceedings in the State court in distinction from proceedings in the courts of the United States." — ED.

assenting bond-holders within the Dominion by the terms of the scheme; and, 2. Whether, if it did have that effect in Canada, the courts of the United States should give it the same effect as against citizens of the United States whose rights accrued before its passage. 1. There is no constitutional prohibition in Canada against the passage of laws impairing the obligation of contracts, and the Parliament of the Dominion had, in 1878, exclusive legislative authority over the corporation and the general subjects of bankruptcy and insolvency in that jurisdiction. . . .

"In *Gilfillan* v. *Union Canal Company* [109 U. S. 401], it was said that holders of bonds and other obligations issued by large corporations for sale in market and secured by mortgages to trustees, or otherwise, have, by fair implication, certain contract relations with each other. In England, we infer from what was said by Lord Cairns in *Cambrian Railways Company's Scheme* [L. R. 3 Ch. 294], they are considered as in a sense part proprietors of the existing capital of the company, and dealt with by Parliament and the courts accordingly. They are not there, any more than here, corporators, and thus necessarily, in the absence of fraud or undue influence, bound by the will of the majority as to matters within the scope of the corporate powers, but they are interested in the administration of a trust which has been created for their common benefit. Ordinarily their ultimate security depends in a large degree on the success of the work in which the corporation is engaged, and it is not uncommon for differences of opinion to exist as to what ought to be done for the promotion of their mutual interests. In the absence of statutory authority or some provision in the instrument which establishes the trust, nothing can be done by a majority, however large, which will bind a minority without their consent. Hence it seems to be eminently proper that where the legislative power exists, some statutory provision should be made for binding the minority in a reasonable way by the will of the majority; and unless, as is the case in the States of the United States, the passage of laws impairing the obligation of contracts is forbidden, we see no good reason why such provision may not be made in respect to existing as well as prospective obligations. The nature of securities of this class is such that the right of legislative supervision for the good of all, unless restrained by some constitutional prohibition, seems almost necessarily to form one of their ingredients, and when insolvency is threatened, and the interests of the public, as well as creditors, are imperilled by the financial embarrassments of the corporation, a reasonable 'scheme of arrangement' may, in our opinion, as well be legalized as an ordinary 'composition in bankruptcy.' In fact, such 'Arrangement Acts' are a species of Bankrupt Acts. Their object is to enable corporations created for the good of the public to relieve themselves from financial embarrassments by appropriating their property to the settlement and adjustment of their affairs, so that they may accomplish the purposes for which they were incorporated. The necessity for such legislation

is clearly shown in the preamble to the Grand Trunk Arrangement Act, 1862, passed by the Parliament of the Province of Canada on the 9th of June, 1862, before the establishment of the Dominion government, and which is in these words: —

"'Whereas the interest on all the bonds of the Grand Trunk Railway Company of Canada is in arrear, as well as the rent of the railways leased to it, and the company has also become indebted, both in Canada and in England, on simple contract, to various persons and corporations, and several of the creditors have obtained judgment against it, and much litigation is now pending; and whereas the keeping open of the railway traffic, which is of the utmost importance to the interests of the province, is thereby imperilled, and the terms of a compromise have been provisionally settled between the different classes of creditors and the company, but in order to facilitate and give effect to such compromise the interference of the legislature of the province is necessary.'

"The confirmation and legalization of 'a scheme of arrangement' under such circumstances is no more than is done in bankruptcy when a 'composition' agreement with the bankrupt debtor, if assented to by the required majority of creditors, is made binding on the non-assenting minority. In no just sense do such governmental regulations deprive a person of his property without due process of law. They simply require each individual to so conduct himself for the general good as not unnecessarily to injure another. Bankrupt laws have been in force in England for more than three centuries, and they had their origin in the Roman law. The Constitution expressly empowers the Congress of the United States to establish such laws. Every member of a political community must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained. Such concessions make up the consideration he gives for the obligation of the body politic to protect him in life, liberty, and property. Bankrupt laws, whatever may be the form they assume, are of that character.

"2. That the laws of a country have no extra-territorial force is an axiom of international jurisprudence, but things done in one country under the authority of law may be of binding effect in another country. The obligor of the bonds and coupons here sued on was a corporation created for a public purpose; that is to say, to build, maintain, and work a railway in Canada. It had its corporate home in Canada, and was subject to the exclusive legislative authority of the Dominion Parliament. It had no power to borrow money or incur debts except for completing, maintaining, and working its railway. The bonds taken by the defendants in error showed on their face that they were part of a series amounting in the aggregate to a very large sum of money, and that they were secured by a trust mortgage on the railway of the company, its lands, tolls, revenues, &c. In this way the defendants in error, when they bought their bonds, were, in legal effect,

informed that they were entering into contract relations not only with a foreign corporation created for a public purpose, and carrying on its business within a foreign jurisdiction, but with the holders of other bonds of the same series, who were relying equally with themselves for their ultimate security on a mortgage of property devoted to a public use, situated entirely within the territory of a foreign government.

"A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty' (*Bank of Augusta* v. *Earle*, 13 Pet. 588), though it may do business in all places where its charter allows and the local laws do not forbid. *Railroad* v. *Koontz*, 104 U. S. 12. But wherever it goes for business it carries its charter, as that is the law of its existence (*Relf* v. *Rundel*, 103 U. S. 226), and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (*Paul* v. *Virginia*, 8 Wall. 168), but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.

"No better illustration of the propriety of this rule can be found than in the facts of the present case. This corporation was created in Canada to build and work a railway in that Dominion. Its principal business was to be done in Canada, and the bulk of its corporate property was permanently fixed there. All its powers to contract were derived from the Canadian government, and all the contracts it could make were such as related directly or indirectly to its business in Canada. That business affected the public interests, and the keeping

of the railway open for traffic was of the utmost importance to the people of the Dominion. The corporation had become financially embarrassed, and was, and had been for a long time, unable to meet its engagements in the ordinary way as they matured. There was an urgent necessity that something be done for the settlement of its affairs. In this the public, the creditors and shareholders, were all interested. A large majority of the creditors and shareholders had agreed on a plan of adjustment, which would enable the company to go on with its business, and thus accommodate the public, and to protect the creditors to the full extent of the available value of its corporate property. The Dominion Parliament had the legislative power to legalize the plan of adjustment as it had been agreed on by the majority of those interested, and to bind the resident minority creditors by its terms. This power was known and recognized throughout the Dominion when the corporation was created, and when all its bonds were executed and put on the market and sold. It is in accordance with and part of the policy of the English and Canadian governments in dealing with embarrassed and insolvent railway companies and in providing for their reorganization in the interest of all concerned. It takes the place in England and Canada of foreclosure sales in the United States, which in general accomplish substantially the same result with more expense and greater delay; for it rarely happens in the United States that foreclosures of railway mortgages are anything else than the machinery by which arrangements between the creditors and other parties in interest are carried into effect, and a reorganization of the affairs of the corporation under a new name brought about. It is in entire harmony with the spirit of bankrupt laws, the binding force of which, upon those who are subject to the jurisdiction, is recognized by all civilized nations. It is not in conflict with the Constitution of the United States, which, although prohibiting States from passing laws impairing the obligation of contracts, allows Congress 'to establish . . . uniform laws on the subject of bankruptcy throughout the United States.' Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries. The fact that the bonds made in Canada were payable in New York is unimportant, except in determining by what law the parties intended their contract should be governed; and every citizen of a country, other than that in which the corporation is located, may protect himself against all unjust legislation of the foreign government by refusing to deal with its corporations.

"On the whole, we are satisfied that the scheme of arrangement bound the defendants in error, and that these actions cannot be maintained."

[HARLAN, J., gave a dissenting opinion, at the end of which he said:]

"As I do not think that a foreign railway corporation is entitled, upon principles of international comity, to have the benefit, in our courts — to the prejudice of our own people and in violation of their contract and property rights — of a foreign statute which could not be sustained had it been enacted by Congress or by any one of the United States, with reference to the negotiable securities of an American railway corporation; and, as I do not agree that an American court should accord to a foreign railway corporation the privilege of repudiating its contract obligations to American citizens, when it must deny any such privilege, under like circumstances, to our own railway corporations, I dissent from the opinion and judgment of the court."

Mr. Justice Field, not being present at the argument of this case, took no part in the decision.

SATTERLEE *v.* MATTHEWSON.

Supreme Court of the United States. 1829.

[2 *Pet.* 380; 8 *Curtis's Decisions*, 147.][1]

The case is stated in the opinion of the court.

Price and *Sergeant*, for the plaintiff. *Sutherland* and *Peters*, *contra.*

Washington, J., delivered the opinion of the court.

This is a writ of error to the Supreme Court of Pennsylvania. An ejectment was commenced by the defendant in error, in the Court of Common Pleas, against Elisha Satterlee, to recover the land in controversy, and, upon the motion of the plaintiff in error, he was admitted as her landlord, a defendant to the suit. The plaintiff, at the trial, set up a title under a warrant dated the 10th of January, 1812, founded upon an improvement in the year 1785, which it was admitted was under a Connecticut title, and a patent bearing date the 19th of February, 1813.

The defendant claimed title under a patent issued to Wharton, in the year 1781, and a conveyance by him to John F. Satterlee, in April, 1812. It was contended on the part of the plaintiff, that admitting the defendant's title to be the oldest and best, yet he was stopped from setting it up in that suit, as it appeared in evidence that he had come into possession as tenant to the plaintiff sometime in the year 1790. The Court of Common Pleas decided in favor of the plaintiff upon the ground just stated, and judgment was accordingly rendered for her. Upon a writ of error to the Supreme Court of that State, that court decided, in June, 1825, 13 Serg. & Rawle, 133, that by the settled

[1] The case is taken from Curtis's Decisions. — Ed.

law of Pennsylvania, the relation of landlord and tenant could not subsist under a Connecticut title; upon which ground the judgment was reversed, and a *venire facias de novo* was awarded.

On the 8th of April, 1826, and before the second trial of this cause took place, the legislature of that State passed a law in substance as follows, viz.: "that the relation of landlord and tenant shall exist, and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants, as between other citizens of this Commonwealth, on the trial of any cause now pending, or hereafter to be brought within this Commonwealth, any law or usage to the contrary notwithstanding."

Upon the re-trial of this cause in the inferior court, in May, 1826, evidence was given conducing to prove that the land in dispute was purchased of Wharton by Elisha Satterlee, the father of John F. Satterlee, and that by his direction the conveyance was made to the son. It further appeared in evidence, that the son brought an ejectment against his father, in the year 1813, and by some contrivance between those parties, alleged by the plaintiff below to be merely colorable and fraudulent, for the purpose of depriving her of her possession, obtained a judgment and execution thereon, under which the possession was delivered to the plaintiff in that suit, who immediately afterwards leased the premises to the father for two lives, at a rent of one dollar per annum. The fairness of the transactions was made a question on the trial, and it was asserted by the plaintiff that, notwithstanding the eviction of Elisha Satterlee under the above proceedings, he still continued to be her tenant.

The judge, after noticing in his charge the decision of the Supreme Court in 1825, and the Act of Assembly before recited, stated to the jury the general principle of law, which prevents a tenant from controverting the title of his landlord by showing it to be defective, the exception to that principle where the landlord claims under a Connecticut title, as laid down by the above decision, and the effect of the Act of Assembly upon that decision, which Act he pronounced to be binding on the court. He therefore concluded, and so charged the jury, that if they should be satisfied from the evidence, that the transactions between the two Satterlees before mentioned were *bonâ fide*, and that John F. Satterlee was the actual purchaser of the land, then the defendants might set up the eviction as a bar to the plaintiff's recovery as landlord. But that, if the jury should be satisfied that those transactions were collusive, and that Elisha Satterlee was in fact the real purchaser, and the name of his son inserted in the deed for the fraudulent purpose of destroying the right of the plaintiff as landlord; then the merely claiming under a Connecticut title would not deprive her of her right to recover in that suit.

To this charge, of which the substance only has been stated, an exception was taken, and the whole of it is spread upon the record. The jury found a verdict for the plaintiff; and judgment being ren-

dered for her, the cause was again taken to the Supreme Court by a writ of error.

The only question which occurs in this cause, which it is competent to this court to decide is, whether the statute of Pennsylvania which has been mentioned, of the 8th of April, 1826, is or is not objectionable, on the ground of its repugnancy to the Constitution of the United States? . . . We come now to the main question in this cause. Is the Act which is objected to, repugnant to any provision of the Constitution of the United States? It is alleged to be so by the counsel for the plaintiff in error, for a variety of reasons; and particularly because it impairs the obligation of the contract between the State of Pennsylvania and the plaintiff, who claims title under her grant to Wharton, as well as of the contract between Satterlee and Matthewson; because it creates a contract between parties where none previously existed, by rendering that a binding contract which the law of the land had declared to be invalid; and because it operates to divest and destroy the vested rights of the plaintiff. Another objection relied upon is, that in passing the Act in question the legislature exercised those functions which belong exclusively to the judicial branch of the government.

Let these objections be considered. The grant to Wharton bestowed upon him a fee-simple estate in the land granted, together with all the rights, privileges, and advantages which, by the laws of Pennsylvania, that instrument might legally pass. Were any of those rights, which it is admitted vested in his vendee or alienee, disturbed or impaired by the Act under consideration? It does not appear from the record, or even from the reasoning of the judges of either court, that they were in any instance denied, or even drawn into question. Before Satterlee became entitled to any part of the land in dispute under Wharton, he had voluntarily entered into a contract with Matthewson, by which he became her tenant, under a stipulation that either of the parties might put an end to the tenancy at the termination of any one year. Under this new contract, which, if it was ever valid, was still subsisting and in full force at the time when Satterlee acquired the title of Wharton, he exposed himself to the operation of a certain principle of the common law, which estopped him from controverting the title of his landlord, by setting up a better title to the land in himself, or one outstanding in some third person.

It is true that the Supreme Court of the State decided, in the year 1825, that this contract, being entered into with a person claiming under a Connecticut title, was void; so that the principle of law which has been mentioned did not apply to it. But the legislature afterwards declared, by the Act under examination, that contracts of that nature were valid, and that the relation of landlord and tenant should exist and be held effectual as well in contracts of that description as in those between other citizens of the State.

Now, this law may be censured, as it has been, as an unwise and unjust exercise of legislative power; as retrospective in its operation;

as the exercise by the legislature of a judicial function; and as creating a contract between parties where none previously existed. All this may be admitted; but the question which we are now considering is, does it impair the obligation of the contract between the State and Wharton or his alienee? Both the decision of the Supreme Court in 1825, and this Act, operate, not upon that contract, but upon the subsequent contract between Satterlee and Matthewson. No question arose or was decided to disparage the title of Wharton, or of Satterlee, as his vendee. So far from it, that the judge stated in his charge to the jury that if the transactions between John F. Satterlee and Elisha Satterlee were fair, then the elder title of the defendant must prevail, and he would be entitled to a verdict.

We are, then, to inquire whether the obligation of the contract between Satterlee and Matthewson was impaired by this statute? The objections urged at the bar, and the arguments in support of them, apply to that contract if to either. It is that contract which the Act declared to be valid, in opposition to the decision of the Supreme Court; and admitting the correctness of that decision, it is not easy to perceive how a law which gives validity to a void contract can be said to impair the obligation of that contract. Should a statute declare, contrary to the general principles of law, that contracts founded upon an illegal or immoral consideration, whether in existence at the time of passing the statute, or which might hereafter be entered into, should nevertheless be valid and binding upon the parties, all would admit the retrospective character of such an enactment, and that the effect of it was to create a contract between parties where none had previously existed. But it surely cannot be contended that to create a contract, and to destroy or impair one, mean the same thing.

If the effect of the statute in question be not to impair the obligation of either of those contracts, and none other appear upon this record, is there any other part of the Constitution of the United States to which it is repugnant? It is said to be retrospective. Be it so; but retrospective laws, which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument.

All the other objections which have been made to this statute admit of the same answer. There is nothing in the Constitution of the United States which forbids the legislature of a State to exercise judicial functions. The case of *Ogden* v. *Blackledge*, 2 C. 272, came into this court from the Circuit Court of the United States, and not from the Supreme Court of North Carolina; and the question, whether the Act of 1799, which partook of a judicial character, was repugnant to the Constitution of the United States, did not arise, and consequently was not decided. It may safely be affirmed that no case has ever been decided in this court, upon a writ of error to a State court, which affords the slightest countenance to this objection.

The objection, however, which was most pressed upon the court, and

relied upon by the counsel for the plaintiff in error, was, that the effect of this Act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a State law of this description; nor are we aware of any decision of this or of any circuit court which has condemned such a law upon this ground, provided its effect be not to impair the obligation of a contract; and it has been shown that the Act in question has no such effect upon either of the contracts, which have been before mentioned.

In the case of *Fletcher* v. *Peck*, 6 C. 87, it was stated by the Chief Justice that it might well be doubted whether the nature of society and of government do not prescribe some limits to the legislative power; and he asks, "if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?" It is nowhere intimated in that opinion, that a State statute which divests a vested right, is repugnant to the Constitution of the United States; and the case in which that opinion was pronounced was removed into this court by writ of error, not from the Supreme Court of a State, but from a circuit court. The strong expressions of the court upon this point in the cases of *Vanhorne's Lessee* v. *Dorrance*, 2 D. 304; and *The Society for the Propagation of the Gospel* v. *Wheeler*, 2 Gall. 105, were founded expressly on the constitutions of the respective States in which those cases were tried.

We do not mean in any respect to impugn the correctness of the sentiments expressed in those cases, or to question the correctness of a circuit court, sitting to administer the laws of a State, in giving to the Constitution of that State a paramount authority over a legislative Act passed in violation of it. We intend to decide no more than that the statute objected to in this case is not repugnant to the Constitution of the United States, and that, unless it be so, this court has no authority, under the 25th section of the Judiciary Act, to re-examine and to reverse the judgment of the Supreme Court of Pennsylvania in the present case. That judgment, therefore, must be affirmed, with costs.

JOHNSON, J. I assent to the decision entered in this cause, but feel it my duty to record my disapprobation of the ground on which it is placed. Could I have brought myself to entertain the same view of the decision of the Supreme Court of Pennsylvania with that which my brethren have expressed, I should have felt it a solemn duty to reverse the decision of that court, as violating the Constitution of the United States in a most vital part.

What boots it, that I am protected by that Constitution from having the obligation of my contracts violated, if the legislative power can create a contract for me, or render binding upon me a contract which was null and void in its creation? To give efficacy to a void contract is not, it is true, violating a contract, but it is doing infinitely worse; it is advancing to the very extreme of that class of arbitrary and despotic acts which bear upon individual rights and liabilities, and against the

whole of which the Constitution most clearly intended to interpose a protection commensurate with the evil. And it is very clear to my mind, that the cause here did not call for the decision now rendered. There is another, and a safe and obvious ground upon which the decision of the Pennsylvania court may be sustained.

The fallacy of the argument of the plaintiff in error consists in this, that he would give to the decision of a court, on a point arising in the progress of his cause, the binding effect of a statute or a judgment; that he would in fact restrict the same court from revising and overruling a decision which it has once rendered, and from entering a different judgment from that which would have been rendered in the same court, had the first decision been adhered to. It is impossible, in examining the cause, not to perceive that the statute complained of was no more than declarative of the law on a point on which the decisions of the State courts had fluctuated, and which never was finally settled until the decision took place on which this writ of error is sued out.

The decision on which he relies, to maintain the invalidity of the Connecticut lease, was rendered on a motion for a new trial; all the right it conferred was, to have that new trial; and it even appears that, before that new trial took place, the same court had decided a cause, which in effect overruled the decision on which he now rests; so that, when this Act was passed, he could not even lay claim to that imperfect state of right which uniform decisions are supposed to confer. The latest decision, in fact, which ought to be the precedent, if any, was against his right.

It is perfectly clear, when we examine the reasoning of the judges on rendering the judgment now under review, that they consider the law as unsettled, or rather as settled against the plaintiff here at the time the Act was passed; and if so, what right of his has been violated? The Act does no more than what the courts of justice had done, and would do, without the aid of the law; pronounce the decision on which he relies as erroneous in principle, and not binding in precedent. The decision of the State court is supported under this view of the subject, without resorting to the portentous doctrine (for I must call it portentous), that a State may declare a void deed to be a valid deed, as affecting individual litigants on a point of right, without violating the Constitution of the United States. If so, why not create a deed or destroy the operation of a limitation Act, after it has vested a title.

The whole of this difficulty arises out of that unhappy idea, that the phrase, *ex post facto*, in the Constitution of the United States was confined to criminal cases exclusively; a decision which leaves a large class of arbitrary legislative Acts without the prohibitions of the Constitution. It was in anticipation of the consequences, that I took occasion, in the investigations on the bankrupt question, to make a remark on the meaning of that phrase in the Constitution. My subsequent

investigations have confirmed me in the opinion then delivered, and the present case illustrates its correctness; I will subjoin a note [1] to this opinion devoted to the examination of that question.

PROVIDENCE BANK *v.* BILLINGS ET AL.

SUPREME COURT OF THE UNITED STATES. 1830.

[4 *Peters*, 514.] [2]

Whipple, for the plaintiffs in error; *Hazzard* and *Jones*, for the defendants.

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

This is a writ of error to a judgment rendered in the highest court for the State of Rhode Island, in an action of trespass brought by the plaintiff in error against the defendant.

In November, 1791, the Legislature of Rhode Island granted a charter of incorporation to certain individuals, who had associated themselves together for the purpose of forming a banking company. They are incorporated by the name of the "President, Directors, and Company of the Providence Bank;" and have the ordinary powers which are supposed to be necessary for the usual objects of such associations.

In 1822 the Legislature of Rhode Island passed "an Act imposing a duty on licensed persons and others, and bodies corporate within the State;" in which, among other things, it is enacted that there shall be paid, for the use of the State, by each and every bank within the State, except the Bank of the United States, the sum of fifty cents on each and every thousand dollars of the capital stock actually paid in." This tax was afterwards augmented to one dollar and twenty-five cents.

The Providence Bank, having determined to resist the payment of this tax, brought an action of trespass against the officers by whom a warrant of distress was issued against and served upon the property of the bank, in pursuance of the law. The defendants justify the taking set out in the declaration under the Act of assembly imposing the tax; to which plea the plaintiffs demur, and assign for cause of demurrer that the Act is repugnant to the Constitution of the United States, inasmuch as it impairs the obligation of the contract created by their charter of incorporation. Judgment was given by the Court of Common Pleas in favor of the defendants; which judgment was, on appeal, confirmed by the Supreme Judicial Court of the State: that judgment has been brought before this court by a writ of error.

It has been settled that a contract entered into between a State and an individual, is as fully protected by the tenth section of the first arti-

[1] For this note, see the end of 2 P. [681. See *supra*, p. 1434. — ED.]

[2] The statement of facts is omitted. — ED.

cle of the Constitution, as a contract between two individuals; and it is not denied that a charter incorporating a bank is a contract. Is this contract impaired by taxing the banks of the State?

This question is to be answered by the charter itself.

It contains no stipulation promising exemption from taxation. The State, then, has made no express contract which has been impaired by the Act of which the plaintiffs complain. No words have been found in the charter, which, in themselves, would justify the opinion that the power of taxation was in the view of either of the parties; and that an exemption of it was intended, though not expressed. The plaintiffs find great difficulty in showing that the charter contains a promise, either express or implied, not to tax the bank. The elaborate and ingenious argument which has been urged amounts, in substance, to this. The charter authorizes the bank to employ its capital in banking transactions, for the benefit of the stockholders. It binds the State to permit these transactions for this object. Any law arresting directly the operations of the bank would violate this obligation, and would come within the prohibition of the Constitution. But, as that cannot be done circuitously which may not be done directly, the charter restrains the State from passing any Act which may indirectly destroy the profits of the bank. A power to tax the bank may unquestionably be carried to such an excess as to take all its profits, and still more than its profits for the use of the State; and consequently destroy the institution. Now, whatever may be the rule of expediency, the constitutionality of a measure depends, not on the degree of its exercise, but on its principle. A power, therefore, which may in effect destroy the charter, is inconsistent with it; and is impliedly renounced by granting it. Such a power cannot be exercised without impairing the obligation of the contract. When pushed to its extreme point, or exercised in moderation, it is the same power, and is hostile to the rights granted by the charter. This is substantially the argument for the bank. The plaintiffs cite and rely on several sentiments expressed, on various occasions by this court, in support of these positions.

The claim of the Providence Bank is certainly of the first impression. The power of taxing moneyed corporations has been frequently exercised; and has never before, so far as is known, been resisted. Its novelty, however, furnishes no conclusive argument against it.

That the taxing power is of vital importance; that it is essential to the existence of government, — are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist: but as the whole community is interested in retaining it undiminished, that community 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.

The plaintiffs would give to this charter the same construction as if it contained a clause exempting the bank from taxation on its stock in trade. But can it be supposed that such a clause would not enlarge its privileges? They contend that it must be implied; because the power to tax may be so wielded as to defeat the purpose for which the charter was granted. And may not this be said with equal truth of other legislative powers? Does it not also apply with equal force to every incorporated company? A company may be incorporated for the purpose of trading in goods as well as trading in money. If the policy of the State should lead to the imposition of a tax on unincorporated companies, could those which might be incorporated claim an exemption, in virtue of a charter which does not indicate such an intention? The time may come when a duty may be imposed on manufactures. Would an incorporated company be exempted from this duty, as the mere consequence of its charter?

The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist.

If the power of taxation is inconsistent with the charter, because it may be so exercised as to destroy the object for which the charter is given; it is equally inconsistent with every other charter, because it is equally capable of working the destruction of the objects for which every other charter is given. If the grant of a power to trade in money to a given amount, implies an exemption of the stock in trade from taxation, because the tax may absorb all the profits; then the grant of any other thing implies the same exemption; for that thing may be taxed to an extent which will render it totally unprofitable to the grantee. Land, for example, has, in many, perhaps in all the States, been granted by government since the adoption of the Constitution. This grant is a contract, the object of which is that the profits issuing from it shall enure to the benefit of the grantee. Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all; and the proposition appears so extravagant, that it is difficult to admit any resemblance in the cases. And yet if the proposition for which the plaintiffs contend be true, it carries us to this point. That proposition is, that a power which is in itself capable of being exerted to the total destruction of the grant, is inconsistent with the grant; and is, therefore, impliedly relinquished by the grantor, though the language of the instrument contains no allusion to the subject. If this be an abstract truth, it may be supposed universal. But it is not universal; and therefore its truth cannot be admitted, in these broad terms, in any case. We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction.

The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right, that it must bear a portion of the public burdens; and that portion must be determined by the legislature. This vital power 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, where there is no express contract, against unjust and excessive taxation; as well as against unwise legislation generally. This principle was laid down in the case of *M'Cullough* v. *The State of Maryland*, and in *Osborn et al.* v. *The Bank of the United States.* Both those cases, we think, proceeded on the admission that an incorporated bank, unless its charter shall express the exemption, is no more exempted from taxation, than an unincorporated company would be, carrying on the same business.

The case of *Fletcher* v. *Peck* has been cited; but in that case the Legislature of Georgia passed an Act to annul its grant. The case of the *State of New Jersey* v. *Wilson* has been also mentioned; but in that case the stipulation exempting the land from taxation, was made in express words.

The reasoning of the court in the case of *M'Cullough* v. *The State of Maryland* has been applied to this case; but the court itself appears to have provided against this application. Its opinion in that case, as well as in *Osborn et al.* v. *The Bank of the United States,* was founded, expressly, on the supremacy of the laws of Congress, and the necessary consequence of that supremacy to exempt its instruments employed in the execution of its powers, from the operation of any interfering power whatever. In reasoning on the argument that the power of taxation was not confined to the people and property of a State, but might be exercised on every object brought within its jurisdiction, this court admitted the truth of the proposition; and added, that "the power was an incident of sovereignty, and was co-extensive with that to which it was an incident. All powers, the court said, over which the sovereign power of a State extends, are subjects of taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think not.

So in the case of *Osborn* v. *The Bank of the United States*, the court said, "the argument" in favor of the right of the State to tax the

bank, "supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object.

"If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, would certainly be subject to the taxing power of the State as any individual would be."

The court was certainly not discussing the question whether a tax imposed by a State on a bank chartered by itself, impaired the obligation of its contract; and these opinions are not conclusive as they would be had they been delivered in such a case: but they show that the question was not considered as doubtful, and that inferences drawn from general expressions pointed to a different subject cannot be correctly drawn.

We have reflected seriously on this case, and are of opinion that the Act of the Legislature of Rhode Island, passed in 1822, imposing a duty on licensed persons and others, and bodies corporate within the State, does not impair the obligation of the contract created by the charter granted to the plaintiffs in error. It is, therefore, the opinion of this court, that there is no error in the judgment of the supreme judicial court for the State of Rhode Island, affirming the judgment of the circuit court in this case; and the same is affirmed; and the cause is remanded to the said Supreme Judicial Court, that its judgment may be finally entered.[1]

[1] See *West Riv. Br. Co.* v. *Dix*, 6 How. 507; s. c. *supra*, p. 976; *Portland Bk.* v. *Apthorp*, 12 Mass. 252 (1815); s. c. *supra*, p. 1416; *B. & L. R. R. Co.* v. *S. & L. R. R. Co.*, 2 Gray, 1; s. c. *supra*, p. 977.

In *Memphis Gas Light Co.* v. *Taxing Dist.*, 109 U. S. 398 (1883), MILLER, J., for the court, said: "The question presented is whether the statute of the State under which the defendant assessed a license tax of $250 against plaintiff in error is void, because it violates the contract found in the charter of the company. . . . [The question was found to turn on certain clauses in the charter of another company, in Nashville.]

"The section of the charter on which plaintiff's counsel mainly rely as showing a contract is the fifth section, which reads as follows: —

"'SEC. 5. The said company shall have the privilege of erecting, establishing, and constructing gas works, and manufacturing and vending gas in the city of Nashville, by means of public works, for a term of fifty years from and after the date of this Act. A reasonable price per thousand feet for gas shall be charged in the case of private individuals, to be regulated by the prices in other southwestern cities; and for public lights, such sum as may be agreed upon by the company and the public authorities of Nashville: *Provided*, Said company shall never charge more than one cent for every cubic foot of gas used, as may be indicated by the gas meter, or computed by the ordinary rules in such cases; nor shall they ever charge the corporation of the city of Nashville more per cubic foot than they shall be getting at the same time from the majority of the inhabitants of the city using such gas.'

"The argument of counsel is that if no express contract against taxation can be found here it must be implied, because to permit the State to tax this company by a license tax for the privilege granted by its charter is to destroy that privilege. But the answer is that the company took their charter subject to the same right of taxation

THE PROPRIETORS OF THE CHARLES RIVER BRIDGE *v.* THE PROPRIETORS OF THE WARREN BRIDGE ET AL.

SUPREME COURT OF THE UNITED STATES. 1837.

[11 *Peters*, 420.][1]

Dutton and *Webster* for the plaintiffs. *Greenleaf* and *Davis*, *contra*.

TANEY, C. J. The questions involved in this case are of the gravest character, and the court have given to them the most anxious and deliberate consideration. The value of the right claimed by the plaintiffs is large in amount; and many persons may no doubt be seriously affected in their pecuniary interests by any decision which the court may pronounce; and the questions which have been raised as to the power of the several States, in relation to the corporations they have chartered, are pregnant with important consequences; not only to the individuals who are concerned in the corporate franchises, but to the communities in which they exist. The court are fully sensible that it is their duty, in exercising the high powers conferred on them by the Constitution of the United States, to deal with these great and extensive interests with the utmost caution; guarding, as far as they have

in the State that applies to all other privileges and to all other property. If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect in their charter.

"The Constitution of the United States does not profess in all cases to protect property from unjust or oppressive taxation by the States. That is left to the State constitutions and State laws. In the case of the *Erie Railroad Co.* v. *Pennsylvania*, 21 Wall. 492, it was said.—

"'This court has in the most emphatic terms and on every occasion declared that the language in which the surrender (of the right of taxation) is made must be clear and unmistakable. The covenant or enactment must distinctly express that there shall be no other or further taxation. A State cannot strip herself of this most essential power by doubtful words. It cannot by ambiguous language be deprived of this highest attribute of sovereignty. The principle has been distinctly laid down in each of the cases referred to. It has never been departed from.'" — ED.

[1] The statement of facts is omitted.

The case of the Charles River Bridge is first reported in 6 Pick. 376 (1829). That corporation applied, in 1828, for an injunction, on the ground of waste and nuisance, to prevent building the Warren Bridge, and allowing passengers to go over it. The plaintiffs' contention was that the contract of the charter was impaired, and that their property was taken without compensation. A preliminary injunction was refused. The pleadings were then completed, and the evidence put in; and in 7 Pick. 344 (1830), (the bridge, meantime, being finished and in use), the court (3 to 1) held for the defendant, that there was no taking of property without compensation. As to impairing the obligation of the contract, the court was equally divided (2 to 2). This was, in effect, a decision for the defendant, on the last-named point also. The case was promptly carried to Washington, in 1830, where, after many delays, it came up for final argument in January, 1837. Meantime, Mr. Justice Johnson had died, Mr. Justice Duvall had resigned, and, in 1835, Chief Justice Marshall died. These judges were succeeded by Justices Wayne and Barbour, and Chief Justice Taney. — ED.

the power to do so, the rights of property, and at the same time carefully abstaining from any encroachment on the rights reserved to the States.

It appears, from the record, that in the year 1650, the Legislature of Massachusetts granted to the President of Harvard College "the liberty and power" to dispose of the ferry from Charlestown to Boston, by lease or otherwise, in the behalf and for the behoof of the college; and that, under that grant, the college continued to hold and keep the ferry by its lessees or agents, and to receive the profits of it, until 1785. In the last-mentioned year, a petition was presented to the legislature, by Thomas Russell and others, stating the inconvenience of the transportation by ferries, over Charles River, and the public advantages that would result from a bridge; and praying to be incorporated for the purpose of erecting a bridge in the place where the ferry between Boston and Charlestown was then kept. Pursuant to this petition, the legislature, on the 9th of March, 1785, passed an Act incorporating a company, by the name of "The Proprietors of the Charles River Bridge," for the purposes mentioned in the petition. Under this charter the company were empowered to erect a bridge, in "the place where the ferry was then kept;" certain tolls were granted, and the charter was limited to forty years, from the first opening of the bridge for passengers; and from the time the toll commenced, until the expiration of this term, the company were to pay two hundred pounds, annually, to Harvard College; and at the expiration of the forty years the bridge was to be the property of the Commonwealth; "saving (as the law expresses it), to the said college or university, a reasonable annual compensation, for the annual income of the ferry, which they might have received had not the said bridge been erected."

The bridge was accordingly built, and was opened for passengers on the 17th of June, 1786. In 1792, the charter was extended to seventy years, from the opening of the bridge; and at the expiration of that time it was to belong to the Commonwealth. The corporation have regularly paid to the college the annual sum of two hundred pounds, and have performed all of the duties imposed on them by the terms of their charter.

In 1828, the Legislature of Massachusetts incorporated a company by the name of "The Proprietors of the Warren Bridge," for the purpose of erecting another bridge over Charles River. This bridge is only sixteen rods, at its commencement, on the Charlestown side, from the commencement of the bridge of the plaintiffs; and they are about fifty rods apart at their termination on the Boston side. The travellers who pass over either bridge, proceed from Charlestown square, which receives the travel of many great public roads leading from the country; and the passengers and travellers who go to and from Boston used to pass over the Charles River Bridge, from and through this square, before the erection of the Warren Bridge.

The Warren Bridge, by the terms of its charter, was to be surren-

dered to the State, as soon as the expenses of the proprietors in building and supporting it should be reimbursed; but this period was not, in any event, to exceed six years from the time the company commenced receiving toll.

When the original bill in this case was filed, the Warren Bridge had not been built; and the bill was filed after the passage of the law, in order to obtain an injunction to prevent its erection, and for general relief. The bill, among other things, charged, as a ground for relief, that the Act for the erection of the Warren Bridge impaired the obligation of the contract between the Commonwealth and the proprietors of the Charles River Bridge; and was therefore repugnant to the Constitution of the United States. Afterwards, a supplemental bill was filed, stating that the bridge had then been so far completed, that it had been opened for travel, and that divers persons had passed over, and thus avoided the payment of the toll, which would otherwise have been received by the plaintiffs. The answer to the supplemental bill admitted that the bridge had been so far completed that foot passengers could pass; but denied that any persons but the workmen and the superintendents had passed over with their consent. In this state of the pleadings, the cause came on for hearing in the Supreme Judicial Court for the county of Suffolk, in the Commonwealth of Massachusetts, at November term, 1829; and the court decided that the Act incorporating the Warren Bridge did not impair the obligation of the contract with the proprietors of the Charles River Bridge, and dismissed the complainants' bill: and the case is brought here by writ of error from that decision. It is, however, proper to state, that it is understood that the State court was equally divided upon the question; and that the decree dismissing the bill upon the ground above stated, was pronounced by a majority of the court, for the purpose of enabling the complainants to bring the question for decision before this court.

In the argument here, it was admitted, that since the filing of the supplemental bill, a sufficient amount of toll had been received by the proprietors of the Warren Bridge to reimburse all their expenses, and that the bridge is now the property of the State, and has been made a free bridge; and that the value of the franchise granted to the proprietors of the Charles River Bridge has by this means been entirely destroyed.

If the complainants deemed these facts material, they ought to have been brought before the State court, by a supplemental bill; and this court, in pronouncing its judgment, cannot regularly notice them. But in the view which the court take of this subject, these additional circumstances would not in any degree influence their decision. And as they are conceded to be true, and the case has been argued on that ground, and the controversy has been for a long time depending, and all parties desire a final end of it; and as it is of importance to them, that the principles on which this court decide should not be misunderstood, — the case will be treated in the opinion now delivered, as if these admitted facts were regularly before us.

A good deal of evidence has been offered to show the nature and extent of the ferry right granted to the college; and also to show the rights claimed by the proprietors of the bridge at different times, by virtue of their charter; and the opinions entertained by committees of the legislature, and others, upon that subject. But as these circumstances do not affect the judgment of this court, it is unnecessary to recapitulate them.

The plaintiffs in error insist, mainly, upon two grounds: 1st. That by virtue of the grant of 1650, Harvard College was entitled, in perpetuity, to the right of keeping a ferry between Charlestown and Boston; that this right was exclusive; and that the legislature had not the power to establish another ferry on the same line of travel, because it would infringe the rights of the college; and that these rights, upon the erection of the bridge in the place of the ferry, under the charter of 1785, were transferred to, and became vested in "the proprietors of the Charles River Bridge;" and that under, and by virtue of this transfer of the ferry right, the rights of the bridge company were as exclusive in that line of travel, as the rights of the ferry. 2d. That independently of the ferry right, the Acts of the Legislature of Massachusetts of 1785 and 1792, by their true construction, necessarily implied that the legislature would not authorize another bridge, and especially a free one, by the side of this, and placed in the same line of travel, whereby the franchise granted to the "proprietors of the Charles River Bridge" should be rendered of no value; and the plaintiffs in error contend, that the grant of the ferry to the college, and of the charter to the proprietors of the bridge, are both contracts on the part of the State; and that the law authorizing the erection of the Warren Bridge in 1828 impairs the obligation of one or both of these contracts.

It is very clear, that in the form in which this case comes before us, — being a writ of error to a State court, — the plaintiffs, in claiming under either of these rights, must place themselves on the ground of contract, and cannot support themselves upon the principle that the law divests vested rights. It is well settled by the decisions of this court, that a State law may be retrospective in its character, and may divest vested rights, and yet not violate the Constitution of the United States, unless it also impairs the obligation of a contract. In 2 Peters, 413, *Satterlee* v. *Mathewson*, this court, in speaking of the State law then before them, and interpreting the article in the Constitution of the United States which forbids the States to pass laws impairing the obligation of contracts, uses the following language: "It (the State law) is said to be retrospective; be it so. But retrospective laws which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument" (the Constitution of the United States). And in another passage in the same case, the court say: "The objection, however, most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was, that the effect of this Act was to divest rights

which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a State law of this description; nor are we aware of any decision of this, or of any circuit court, which has condemned such a law upon this ground, provided its effect be not to impair the obligation of a contract." The same principles were reaffirmed in this court, in the late case of *Watson and Others* v. *Mercer*, decided in 1834, 8 Pet. 110: "As to the first point (say the court), it is clear that this court has no right to pronounce an Act of the State legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the States from passing retrospective laws, generally; but only *ex post facto* laws."

After these solemn decisions of this court, it is apparent that the plaintiffs in error cannot sustain themselves here, either upon the ferry right, or the charter to the bridge; upon the ground that vested rights of property have been divested by the legislature. And whether they claim under the ferry right, or the charter to the bridge, they must show that the title which they claim, was acquired by contract, and that the terms of that contract have been violated by the charter to the Warren Bridge. In other words, they must show that the State had entered into a contract with them, or those under whom they claim, not to establish a free bridge at the place where the Warren Bridge is erected. Such, and such only, are the principles upon which the plaintiffs in error can claim relief in this case.

The nature and extent of the ferry right granted to Harvard College, in 1650, must depend upon the laws of Massachusetts; and the character and extent of this right has been elaborately discussed at the bar. But in the view which the court take of the case before them, it is not necessary to express any opinion on these questions. For assuming that the grant to Harvard College, and the charter to the bridge company, were both contracts, and that the ferry right was as extensive and exclusive as the plaintiffs contend for; still they cannot enlarge the privileges granted to the bridge, unless it can be shown, that the rights of Harvard College in this ferry have, by assignment, or in some other way, been transferred to the proprietors of the Charles River Bridge, and still remain in existence, vested in them, to the same extent with that in which they were held and enjoyed by the college before the bridge was built. . . . [This is denied by the court.]

It is however said, that the payment of the two hundred pounds a year to the college, as provided for in the law, gives to the proprietors of the bridge an equitable claim to be treated as the assignees of their interest; and by substitution, upon chancery principles, to be clothed with all their rights.

The answer to this argument is obvious. This annual sum was intended to be paid out of the proceeds of the tolls which the company

were authorized to collect. The amount of the tolls, it must be presumed, was graduated with a view to this encumbrance, as well as to every other expenditure to which the company might be subjected, under the provisions of their charter. The tolls were to be collected from the public, and it was intended that the expense of the annuity to Harvard College should be borne by the public; and it is manifest that it was so borne, from the amount which it is admitted they received, until the Warren Bridge was erected. Their agreement, therefore, to pay that sum can give them no equitable right to be regarded as the assignees of the college, and certainly can furnish no foundation for presuming a conveyance; and as the proprietors of the bridge are neither the legal nor equitable assignees of the college, it is not easy to perceive how the ferry franchise can be invoked in aid of their claims, if it were even still a subsisting privilege; and had not been resumed by the State, for the purpose of building a bridge in its place.

Neither can the extent of the pre-existing ferry right, whatever it may have been, have any influence upon the construction of the written charter for the bridge. It does not, by any means, follow, that because the legislative power in Massachusetts, in 1650, may have granted to a justly favored seminary of learning the exclusive right of ferry between Boston and Charlestown, they would, in 1785, give the same extensive privilege to another corporation, who were about to erect a bridge in the same place. The fact that such a right was granted to the college cannot, by any sound rule of construction, be used to extend the privileges of the bridge company beyond what the words of the charter naturally and legally import. Increased population, longer experience in legislation, the different character of the corporation which owned the ferry from that which owned the bridge, might well have induced a change in the policy of the State in this respect; and as the franchise of the ferry, and that of the bridge, are different in their nature, and were each established by separate grants, which have no words to connect the privileges of the one with the privileges of the other, there is no rule of legal interpretation which would authorize the court to associate these grants together, and to infer that any privilege was intended to be given to the bridge company, merely because it had been conferred on the ferry. The charter to the bridge is a written instrument which must speak for itself, and be interpreted by its own terms.

This brings us to the Act of the Legislature of Massachusetts, of 1785, by which the plaintiffs were incorporated by the name of "The Proprietors of the Charles River Bridge;" and it is here, and in the law of 1792, prolonging their charter, that we must look for the extent and nature of the franchise conferred upon the plaintiffs.

Much has been said in the argument of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the State, may be implied. The court think there can be no serious difficulty on that head. It is the grant of certain franchises

by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England and by the decisions of our own tribunals. In 2 Barn. & Adol. 793, in the case of the Proprietors of the Stourbridge Canal against Wheely and others, the court say, "the canal having been made under an Act of Parliament, the rights of the plaintiffs are derived entirely from that Act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction, in all such cases, is now fully established to be this; that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the Act." And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one as could well be imagined for giving to the canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants, to a very considerable extent, in transporting large quantities of coal. The rights of all persons to navigate the canal were expressly secured by the Act of Parliament; so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the canal, and did not pass through the locks; and the statute, in giving the right to exact toll, had given it for articles which passed "through any one or more of the locks," and had said nothing as to toll for navigating one of the levels; the court held that the right to demand toll, in the latter case, could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the Act of incorporation, and for an implied grant; if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors, and used the canal freely and extensively for their own profit. Still the right to exact toll could not be implied, because such a privilege was not found in the charter.

Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to Acts of incorporation a rule of construction differing from that of the English law, and, by implication, make the terms of a charter in one of the States, more unfavorable to the public, than upon an Act of Parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle, and for introducing a new and adverse rule

of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavorably to the public, and to the rights of the community, than would be done in a like case in an English court of justice.

But we are not now left to determine, for the first time, the rules by which public grants are to be construed in this country. The subject has already been considered in this court; and the rule of construction, above stated, fully established. . . . [Here follows a reference to *U. S.* v. *Arredondo*, 6 Pet. 738; *Jackson* v. *Lamphire*, 3 Pet. 289; *Beaty* v. *Lessee of Knowles*, 4 Pet. 168, and *Prov. Bank* v. *Billings*, 4 Pet. 514. After quoting from this last-named case, the opinion proceeds as follows:]

The case now before the court is, in principle, precisely the same. It is a charter from a State. The Act of incorporation is silent in relation to the contested power. The argument in favor of the proprietors of the Charles River Bridge is the same, almost in words, with that used by the Providence Bank; that is, that the power claimed by the State, if it exists, may be so used as to destroy the value of the franchise they have granted to the corporation. The argument must receive the same answer; and the fact that the power has been already exercised so as to destroy the value of the franchise, cannot in any degree affect the principle. The existence of the power does not, and cannot, depend upon the circumstance of its having been exercised or not.

It may, perhaps, be said, that in the case of the Providence Bank, this court were speaking of the taxing power; which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade; and are essential to the comfort, convenience, and prosperity of the people. A State ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges, that a State has surrendered, for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens

must daily pass, the community have a right to insist, in the language of this court above quoted, "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." The continued existence of a government would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the court was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same. No one will question that the interests of the great body of the people of the State would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll, and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation.

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785 to the proprietors of the Charles River Bridge. This Act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation, for the purpose of building the bridge; and establishes certain rates of toll, which the company are authorized to take. This is the whole grant. There is no exclusive privilege given to them over the waters of Charles River above or below their bridge. No right to erect another bridge themselves, nor to prevent other persons from erecting one. No engagement from the State that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects the charter is silent; and nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used from which an intention to grant any of these rights can be inferred. If the plaintiff is entitled to them, it must be implied, simply from the nature of the grant, and cannot be inferred from the words by which the grant is made.

The relative position of the Warren Bridge has already been described. It does not interrupt the passage over the Charles River Bridge, nor make the way to it or from it less convenient. None of the faculties or franchises granted to that corporation have been revoked by the legislature; and its right to take the tolls granted by the charter

remains unaltered. In short, all the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it remain unimpaired. But its income is destroyed by the Warren Bridge; which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended that the erection of the Warren Bridge would have done them any injury, or in any degree affected their right of property, if it had not diminished the amount of their tolls. In order then to entitle themselves to relief, it is necessary to show that the legislature contracted not to do the act of which they complain; and that they impaired or, in other words, violated that contract by the erection of the Warren Bridge.

The inquiry then is, does the charter contain such a contract on the part of the State? Is there any such stipulation to be found in that instrument? It must be admitted on all hands, that there is none, — no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied; and the same answer must be given to them that was given by this court to the Providence Bank. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient, and cheap ways for the transportation of produce and the purposes of travel, shall not be construed to have been surrendered or diminished by the State, unless it shall appear by plain words that it was intended to be done.

But the case before the court is even still stronger against any such implied contract as the plaintiffs in error contend for. The Charles River Bridge was completed in 1786. The time limited for the duration of the corporation by their original charter expired in 1826. When, therefore, the law passed authorizing the erection of the Warren Bridge, the proprietors of Charles River Bridge held their corporate existence under the law of 1792, which extended their charter for thirty years; and the rights, privileges, and franchises of the company must depend upon the construction of the last-mentioned law, taken in connection with the Act of 1785.

The Act of 1792, which extends the charter of this bridge, incorporates another company to build a bridge over Charles River; furnishing another communication with Boston, and distant only between one and two miles from the old bridge.

The first six sections of this Act incorporate the proprietors of the West Boston Bridge, and define the privileges, and describe the duties, of that corporation. In the seventh section there is the following recital: "And whereas the erection of Charles River Bridge was a work of hazard and public utility, and another bridge in the place of West Boston Bridge may diminish the emoluments of Charles River Bridge; therefore, for the encouragement of enterprise," they proceed to extend the charter of the Charles River Bridge, and to continue it for the term of seventy years from the day the bridge was completed; subject to the conditions prescribed in the original Act, and to be entitled to the same tolls. It appears, then, that by the same Act that extended this charter, the legislature established another bridge, which they knew would lessen its profits; and this, too, before the expiration of the first charter, and only seven years after it was granted; thereby showing that the State did not suppose that, by the terms it had used in the first law, it had deprived itself of the power of making such public improvements as might impair the profits of the Charles River Bridge; and from the language used in the clauses of the law by which the charter is extended, it would seem, that the legislature were especially careful to exclude any inference that the extension was made upon the ground of compromise with the bridge company, or as a compensation for rights impaired.

On the contrary, words are cautiously employed to exclude that conclusion; and the extension is declared to be granted as a reward for the hazard they had run, and "for the encouragement of enterprise." The extension was given because the company had undertaken and executed a work of doubtful success; and the improvements which the legislature then contemplated, might diminish the emoluments they had expected to receive from it. It results from this statement, that the legislature, in the very law extending the charter, asserts its rights to authorize improvements over Charles River which would take off a portion of the travel from this bridge and diminish its profits; and the bridge company accept the renewal thus given, and thus carefully connected with this assertion of the right on the part of the State. Can they, when holding their corporate existence under this law, and deriving their franchises altogether from it, add to the privileges expressed in their charter an implied agreement, which is in direct conflict with a portion of the law from which they derive their corporate existence? Can the legislature be presumed to have taken upon themselves an implied obligation, contrary to its own acts and declarations contained in the same law? It would be difficult to find a case justifying such an implication, even between individuals; still less will it be found where sovereign rights are concerned, and where the interests of a whole community would be deeply affected by such an implication. It would, indeed, be a strong exertion of judicial power, acting upon its own views of what justice required, and the parties ought to have done; to raise, by a sort of judicial coercion, an implied

contract, and infer it from the nature of the very instrument in which the legislature appear to have taken pains to use words which disavow and repudiate any intention, on the part of the State, to make such a contract.

Indeed, the practice and usage of almost every State in the Union, old enough to have commenced the work of internal improvement, is opposed to the doctrine contended for on the part of the plaintiffs in error. Turnpike roads have been made in succession, on the same line of travel; the later ones interfering materially with the profits of the first. These corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation and travelling. In some cases, railroads have rendered the turnpike roads on the same line of travel so entirely useless, that the franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporations supposed that their privileges were invaded, or any contract violated on the part of the State. Amid the multitude of cases which have occurred, and have been daily occurring for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for, and this court called upon to infer it from an ordinary Act of incorporation, containing nothing more than the usual stipulations and provisions to be found in every such law. The absence of any such controversy, when there must have been so many occasions to give rise to it, proves that neither States, nor individuals, nor corporations, ever imagined that such a contract could be implied from such charters. It shows that the men who voted for these laws never imagined that they were forming such a contract; and if we maintain that they have made it, we must create it by a legal fiction, in opposition to the truth of the fact, and the obvious intention of the party. We cannot deal thus with the rights reserved to the States, and by legal intendments and mere technical reasoning take away from them any portion of that power over their own internal police and improvement which is so necessary to their well-being and prosperity.

And what would be the fruits of this doctrine of implied contracts on the part of the States, and of property in a line of travel by a corporation, if it should now be sanctioned by this court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it, in the various Acts which have been passed, within the last forty years, for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach without invading its rights in the privileged line? If this court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies; and which

have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling, and you will soon find the old turnpike corporations awakening from their sleep and calling upon this court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals upon lines of travel which had been before occupied by turnpike corporations will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still until the claims of the old turnpike corporations shall be satisfied, and they shall consent to permit these States to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world. Nor is this all. This court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for if such a right of property exists, we have no lights to guide us in marking out its extent, unless, indeed, we resort to the old feudal grants, and to the exclusive rights of ferries, by prescription, between towns, and are prepared to decide that when a turnpike road from one town to another had been made, no railroad or canal, between these two points, could afterwards be established. This court are not prepared to sanction principles which must lead to such results.

Many other questions of the deepest importance have been raised and elaborately discussed in the argument. It is not necessary, for the decision of this case, to express our opinion upon them; and the court deem it proper to avoid volunteering an opinion on any question involving the construction of the Constitution, where the case itself does not bring the question directly before them, and make it their duty to decide upon it.

Some questions, also, of a purely technical character have been made and argued as to the form of proceeding and the right to relief. But enough appears on the record to bring out the great question in contest; and it is the interest of all parties concerned that the real controversy should be settled without further delay; and as the opinion of the court is pronounced on the main question in dispute here, and disposes of the whole case, it is altogether unnecessary to enter upon the examination of the forms of proceeding in which the parties have brought it before the court.

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts, dismissing the plaintiffs' bill, must, therefore, be affirmed, with costs.[1]

[The dissenting opinion of STORY, J., in which THOMPSON, J., con-

[1] And so *Turnpike Co.* v. *The State*, 3 Wall. 210. Compare *In re Brooklyn*, 38 N. E. Rep. 983 (N. Y., 1894). — ED.

curred, and the opinion of McLean, J., who concurred with the majority in the result, but only on the ground of want of jurisdiction in this court, — the case appearing to be one of taking property without compensation, and not of impairing the obligation of a contract, — are omitted.][1]

[1] This is the first considerable opinion of Chief Justice Taney, who took his place on the bench at this term of court (January Term, 1837); only three short opinions by him had preceded this one. Greenleaf, counsel for the defendants, was at this time the colleague of Judge Story, as professor at the Harvard Law School, and suffered some reproach, in a community which was highly excited over the controversy, on account of the part that he took in the case. This led to his placing in the library of that school a book containing his minutes of the arguments and other interesting matter relating to the case. There is found here a newspaper report of a legal opinion given in September, 1833, to the Trenton and New Brunswick Turnpike Company, by Taney, then Attorney-General of the United States, holding that a statute of New Jersey of 1832 was invalid, which provided that no railroad company should be incorporated within certain specified limits, during the life of the charter of the Camden & Amboy Railroad Company. It is treated as being an unconstitutional restraint upon the legislative power. The Turnpike Co. was contemplating the use of rails on its road. In another opinion, preserved in the same volume, given to the same company by Chancellor Kent, in which Daniel Webster concurs, the writer places his objection on the ground that the turnpike charter is a contract, and is violated by that of the railroad company; and he adds: "I have read the opinion of Mr. Taney, which has been shown to me with the papers, and in which he holds the legislative disability created by the above Act to be void and not binding upon any future legislature. I wish to waive, at present, any discussion or opinion upon that point, as not being necessary in the view which I take of the case. I certainly think the legislative stipulation ought to be sternly construed, as one that may be exceedingly inconvenient to the public welfare."

In *The Washington and Balt. Turnpike Co.* v. *The Balt. & Ohio R. R. Co.*, 10 Gill & Johns. 392 (1839), the plaintiffs, maintaining a turnpike, between Washington and Baltimore, under a charter from the State of Maryland, given in 1812, brought an action of trespass against the defendants for building and maintaining a railroad between the same cities, near the turnpike, under charters of Maryland, given in 1827, 1831, 1832, and 1833. It was insisted that these last Acts violated the contract of the plaintiffs' charter, and deprived them of their property without compensation. But the county court gave judgment for the defendants, and the Maryland Court of Appeals affirmed it, without giving any reported opinion.

And so, *obiter*, *White River Tpk. Co.* v. *Vt. Central R. R. Co.*, 21 Vt., 590, 594 (1849).

It appears to have been the Bridge Case which gave rise to the general provision in the Massachusetts laws discussed in *Greenwood* v. *Freight Co.*, 105 U. S. 13; s. c., *infra*, p. 1710. (For the more special statute of 1809, see *supra*, p. 1552 n.) The opinions in 7 Pick. 344, were given January 12, 1830. By Mass. Stat. 1830, c. 81 (March 11, 1831), it was provided, "That all Acts of incorporation which shall be passed after the passage of this Act shall at all times hereafter be liable to be amended, altered, or repealed at the pleasure of the legislature, and in the same manner as if an express provision to that effect were therein contained, — unless there shall have been inserted in such Act of incorporation an express limit as to the duration of the same." To-day this provision stands (Pub. St. c. 105, s. 3) in the form that "Every Act of incorporation passed after the eleventh day of March, in the year eighteen hundred and thirty-one, shall be subject to amendment, alteration, or repeal, at the pleasure of the General Court. See *In the Matter of Brooklyn*, 143 N. Y. 596 (1894). — Ed.

CREASE *v.* BABCOCK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1839.

[23 *Pick.* 334.][1]

C. G. Loring, W. H. Gardiner, Choate, and *B. Sumner*, for the defendants; *B. Rand* and *E. Hasket Derby*, for the plaintiff.

MORTON, J., delivered the opinion of the court. This is a bill in equity by one of the creditors of the Chelsea Bank against a part of the stock-holders, to recover of them individually the amount of two bank notes of $1,000 each. To this bill some of the defendants have filed pleas, and others have demurred. . . .

This bank was incorporated April 16, 1836, to continue till October 1, 1851, and has not expired by its own limitation. St. 1836, c. 274. On the 19th of April, 1837, the legislature passed an Act repealing its charter. St. 1837, c. 225. This, if it has the force and operation of a law, terminated the corporate existence of the bank long before the expiration of the term for which it was granted. But the validity of this Act is disputed. Its constitutionality is denied; and this raises the first and most important question which we are called upon to decide.

That a charter of incorporation is a contract between the government and the corporators, is a proposition which seems to be fully supported by the highest judicial authorities. 2 Kent's Comm. (3d ed.) 272, 306; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 344. That it is exempt from the ordinary action of legislative power, beyond the reservations, express or implied, contained in it, is equally well supported. In other words, the government can rightfully do nothing inconsistent with the fair meaning of the contract which it has made. If therefore the legislature grant a charter for a definite period, they cannot at their will and pleasure revoke it. This comes within the prohibition of the 10th section of the 1st article of the Constitution of the United States. But it is not necessary further to discuss these general principles, which are not in controversy between the counsel, and which will furnish very little aid in the decision of the question under consideration. That depends upon the proper construction of the several statutes to which I am about to refer.

The Chelsea Bank charter expressly entitled it "to all the powers and privileges," and subjected it "to all the duties, liabilities and requirements contained in the 36th chapter of the Revised Statutes." . . .

The 2d section of the 36th chapter expressly provides, that each bank shall be entitled to all the powers and privileges, and be subject to all the liabilities contained in the 44th chapter. As all the revised

[1] The statement of facts is omitted. — ED.

statutes were enacted at the same time and came into existence by the same legislative fiat, by a well-known rule of construction they must all be considered together and construed as one Act. And when the Chelsea Bank charter is expressly made subject to the provisions of the 36th chapter, which refers to the 44th, it must be taken to be subject to the same rules of construction which govern in all other cases. Nothing can be plainer than the intention of the legislature to place all the banks upon an equal footing.

The last section of the 13th title, upon the subject of corporations, is general and manifestly applies to and governs all the preceding regulations upon the subject, as much as if it had been repeated at the end of each chapter. No one doubts that it applies to banks. It provides, that all Acts of incorporation passed after a certain time, "shall, at all times, be subject to amendment, alteration or repeal, at the pleasure of the legislature; provided that no Act of incorporation shall be repealed, unless for some violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same." This section constitutes a part and must govern the construction of the contract with the Chelsea Bank, as much as if it had been recited *verbatim* in its charter. Upon the import of this language must depend the repealing Act. Whatever may be its meaning, the corporators have directly agreed to it by accepting their charter, of which this was a constituent part.

We think there can be no doubt of the right of the legislature to make such a contract. Their power to make an unlimited charter, without some such reservation, express or implied, so as to bind their own and their successors' constituents forever, we apprehend, would be more liable to be questioned. How far they might part with any portion of sovereign power, irrevocably, beyond the recovery of the people themselves, we have no occasion to inquire.

The making of grants of real and personal estate, of franchises and other rights and privileges, whether strictly speaking it may be deemed legislation or not, is undoubtedly within the competence of our legislative body. The power has always been exercised by them, and undoubtedly is more safe in their hands and falls more appropriately within their province than any other department of the government.

If they have a right to make grants, they of necessity must prescribe the terms upon which they shall be made. If they may limit their duration, they may also impose other restrictions. They may determine how much or how little, how large or how small, an estate or franchise, they will grant. They may grant absolutely or on condition; so they may grant during pleasure, or until a certain event happens. And if a grant be accepted on the terms prescribed, it becomes a compact; and the grantees can have no reason to complain of the execution of their own contract. And Chancellor Kent, though with some appearance of reluctance (2 Kent's Comm. 306), says, "if a charter be granted and accepted, with that reservation, there seems to be no

ground to question the validity and efficiency of the reservation." Angell & Ames on Corp. 504.

The case of *M'Laren* v. *Pennington*, 1 Paige, 107, is a strong case to this point. The Legislature of New Jersey granted a bank charter, for which they received a bonus of $25,000. In the Act of incorporation, they reserved the power to alter, amend or repeal it. The bank went into operation, paid its bonus, and in less than one year, a shorter time than the Chelsea Bank continued, the legislature deemed it necessary to interfere and actually repealed the charter. This, upon full consideration, was adjudged to be a valid repeal. It was contended that the reservation was repugnant to the grant, and therefore void. But this ground was distinctly overruled by the chancellor; who said, this reservation "is not a condition repugnant to the grant; it is only a limitation of the grant."

Had the proviso to this section been omitted, this charter might have been amended, altered or repealed, "at the pleasure of the legislature;" but the defendants' counsel argue that the proviso not only restricts the power to repeal, but entirely takes it away, because the inquiry whether the bank has violated its charter or committed any default, is a judicial act, and therefore cannot constitutionally be performed by the legislature. The effect of this argument is to raise banks above the control of the legislature, and place them and all corporations with limited charters, upon a different basis from other corporations. . . .

The true question is whether the legislature can in any case repeal an Act of incorporation granted for a term of years. Any charter may be forfeited by a violation or for other sufficient cause; and on a proper process a judgment of forfeiture might be decreed. But this would be a judicial act and might be done without the concurrence, and against the will of the legislature. It is entirely independent of and unconnected with the power to repeal.

But the legislature clearly intended to reserve the power to discontinue corporations, not only for violations of their charters, but also for other defaults; which must mean, if anything, some acts short of violations, but which were inconsistent with, if not subversive of the ends for which the corporation was established.

They reserve the power to repeal at pleasure, provided that on certain charters, they will not exercise it, unless the corporations have committed some default. If a default has been committed, then, by the express terms of the compact, they have a right to exercise the power. They have exercised it, and therefore by the courtesy and confidence, which is due from one department of the government to another, we are bound to presume that the contingency, upon which the right to exercise it depended, has happened. Nor is the objection that the legislature had no power to inquire into the existence of the contingency, valid. If any man or body of men is invested with power to do a certain act upon the occurrence of a certain event, when the event

happens they have a right to perform the act, and the most that can be urged against it is, that if it be exercised before the event happens, it is void. And this is true by whomsoever the fact is to be ascertained.

But we do not believe that the inquiry into the affairs or defaults of a corporation, with a view to continue or discontinue it, is a judicial act. No issue is formed. No decree or judgment is passed. No forfeiture is adjudged. No fine or punishment is imposed. But an inquiry is had in such form as is deemed most wise and expedient, with a view to ascertain facts upon which to exert legislative power; or to learn whether a contingency has happened upon which legislative action is required. . . .

It is indispensable that this inquiry should, in the first instance, be made by the legislature. No other body can do it for them. They have restricted themselves from exercising the power of repeal, until a certain event happens. This they must necessarily ascertain before they can properly exercise the power. Their decision must, *primâ facie*, be presumed to be right. Whether it be conclusive or not, is a question which it is not necessary now to determine.

From a careful examination of the whole subject, my own opinion is, that the true construction of the 23d section is this. The legislature reserve to themselves the right to amend, alter and repeal, at their pleasure, all Acts of incorporation, passed after 1831, provided that they will not repeal any such Act, granted for a term of years, without ascertaining to their satisfaction that the corporation has violated its charter or committed some other default. This restriction is imposed upon the legislative will, and the corporators confide in the wisdom and justice of the legislature not to exercise the power unless the facts clearly authorize and require them to do it. This is not an unreasonable confidence. It is to be recollected, that this restriction applies only to a total repeal, and not to an alteration or amendment, which they may exercise at pleasure in limited as well as unlimited corporations. Now if corporators are willing to accept charters with an unlimited power to amend or alter, why should they hesitate to accept them with this guarded and restricted power to repeal?

In whatever light, therefore, I view the subject, I am satisfied that the legislature had the power to repeal the Chelsea Bank charter, and that their Act of April 19, 1837, was valid and effectual to repeal the Act by which the bank was established.[1] . . .

In *Bronson* v. *Kinzie et al.* 1 How. 311 (1843), the case came up on a division of opinion in the Circuit Court of the United States, for the District of Illinois. Bronson, on March 27, 1841, filed a bill to foreclose a mortgage with power of sale, given him by Kinzie on July 13, 1838, to secure the payment of his bond of the same date. On February 19, 1841, by a legislative Act of Illinois it was provided that

[1] For the language of PARSONS, C. J., for the court, in *Wales* v. *Stetson*, 2 Mass. 143, 146 (1806), see *supra*, p. 1551.—ED.

mortgagors might redeem their land, when sold, within twelve months after the sale, and if they did not, judgment creditors might do it within fifteen months after the sale. On February 27, 1841, by another legislative Act of Illinois, it was provided that when execution should be levied on any property, the property should be valued under oath, by three householders, and that at the sale it should not be struck off upon any bid of less than two thirds of such appraisal. In June, 1841, the Circuit Court of the United States adopted rules which enforced these enactments. On the plaintiff's motion for a decree of strict foreclosure or a sale to the highest bidder without regard to the above-named statutes of Illinois, the judges below differed as to whether these statutes should be enforced.

The Supreme Court (TANEY, C. J.), now said: "As concerns the obligations of the contract upon which this controversy has arisen, they depend upon the laws of Illinois as they stood at the time the mortgage deed was executed. The money due was indeed to be paid in New York. But the mortgage given to secure the debt was made in Illinois for real property situated in that State, and the rights which the mortgagee acquired in the premises depended upon the laws of that State. In other words, the existing laws of Illinois created and defined the legal and equitable obligations of the mortgage contract.

"If the laws of the State passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a State may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the Statute of Limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every State to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution.

"This subject came before the Supreme Court in the case of *Green* v. *Biddle*, decided in 1823, and reported in 8 Wheat. 1. It appears

to have been twice elaborately argued by counsel on both sides, and deliberately considered by the court. On the part of the demandant in that case, it was insisted that the laws of Kentucky passed in 1797 and 1812, concerning occupying claimants of land, impaired the obligation of the compact made with Virginia in 1789. On the other hand, it was contended that these laws only regulated the remedy, and did not operate on the right to the lands. In deciding the point, the court say, 'It is no answer that the Acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these Acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests.' And in the opinion delivered by the court after the second argument, the same rule is reiterated in language equally strong. (See pages 75,[1] 76, and 84.) This judgment of the court is entitled to the more weight, because the opinion is stated in the report of the case to have been unanimous; and Judge Washington, who was the only member of the court absent at the first argument, delivered the opinion of the second.

"We concur entirely in the correctness of the rule above stated. It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it. Blackstone, in his Commentaries on the Laws of England, 1 vol. 55, after having treated of the declaratory and directory parts of the law, defines the remedial in the following words: —

"'The remedial part of the law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it.

[1] "Nothing, in short, can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it when withheld by any person, however innocently he may have obtained it, or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged, but it is impaired, and rendered insecure, according to the nature and extent of such restrictions." 8 Wheat. 75.

For, in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law. When, for instance, the declaratory part of the law has said that the field or inheritance which belonged to Titius's father is vested by his death in Titius; and the directory part has forbidden any one to enter on another's property without the leave of the owner; if Gaius, after this, will presume to take possession of the land, the remedial part of the law will then interpose its office, will make Gaius restore the possession to Titius, and also pay him damages for the invasion.'

"We have quoted the entire paragraph, because it shows, in a few plain words, and illustrates by a familiar example, the connection of the remedy with the right. It is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which the clause in the Constitution now in question mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life. It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the Constitution of the United States. And it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy, which would render this provision illusive and nugatory; mere words of form, affording no protection, and producing no practical result.

"We proceed to apply these principles to the case before us. According to the long-settled rules of law and equity in all of the States whose jurisprudence has been modelled upon the principles of the common law, the legal title to the premises in question vested in the complainant, upon the failure of the mortgagor to comply with the conditions contained in the proviso; and at law, he had a right to sue for and recover the land itself. But, in equity, this legal title is regarded as a trust estate, to secure the payment of the money; and, therefore, when the debt is discharged, there is a resulting trust for the mortgagor. *Conard* v. *The Atlantic Insurance Company*, 1 Peters, 441. It is upon this construction of the contract, that courts of equity lend their aid either to the mortgagor or mortgagee, in order to enforce their respective rights. The court will, upon the application of the mortgagor, direct the reconveyance of the property to him, upon the payment of the money; and, upon the application of the mortgagee, it will order a sale of the property to discharge the debt. But, as courts of equity follow the law, they acknowledge the legal title of the mortgagee, and never deprive him of his right at law until his debt is paid; and he is

entitled to the aid of the court to extinguish the equitable title of the mortgagor, in order that he may obtain the benefit of his security. For this purpose, it is his absolute and undoubted right, under an ordinary mortgage deed, if the money is not paid at the appointed day, to go into the Court of Chancery, and obtain its order for the sale of the whole mortgaged property (if the whole is necessary), free and discharged from the equitable interest of the mortgagor. This is his right, by the law of the contract; and it is the duty of the court to maintain and enforce it, without any unreasonable delay.

"When this contract was made, no statute had been passed by the State changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court; and it must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated. They were the laws of Illinois at the time; and, therefore, entered into the contract, and formed a part of it, without any express stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem, by paying the money after the day limited in the deed, and before he was foreclosed by the decree of the Court of Chancery. Yet no one doubts his right or his remedy; for, by the laws of the State then in force, this right and this remedy were a part of the law of the contract, without any express agreement by the parties. So, also, the rights of the mortgagee, as known to the laws, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed a part of it; and any subsequent law, impairing the rights thus acquired, impairs the obligations which the contract imposed.

"This brings us to examine the statutes of Illinois which have given rise to this controversy. As concerns the law of February 19, 1841, it appears to the court not to act merely on the remedy, but directly upon the contract itself, and to engraft upon it new conditions injurious and unjust to the mortgagee. It declares that, although the mortgaged premises should be sold under the decree of the Court of Chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable interest in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security, by rendering the property unsalable for anything like its value. This law gives to the mortgagor, and to the judgment creditor, an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any

such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the Constitution.

"The second point certified arises under the law of February 27, 1841. The observations already made in relation to the other Act apply with equal force to this. It is true that this law apparently acts upon the remedy, and not directly upon the contract. Yet its effect is to deprive the party of his pre-existing right to foreclose the mortgage by a sale of the premises, and to impose upon him conditions which would frequently render any sale altogether impossible. And this law is still more objectionable, because it is not a general one, and prescribing the mode of selling mortgaged premises in all cases, but is confined to judgments rendered, and contracts made, prior to the 1st of May, 1841. The Act was passed on the 27th of February in that year; and it operates mainly on past contracts, and not on future. If the contracts intended to be affected by it had been specifically enumerated in the law, and these conditions applied to them, while other contracts of the same description were to be enforced in the ordinary course of legal proceedings, no one would doubt that such a law was unconstitutional. Here a particular class of contracts is selected, and encumbered with these new conditions; and it can make no difference, in principle, whether they are described by the names of the parties, or by the time at which they were made.

"In the case before us, the conflict of these laws with the obligations of the contract is made the more evident by an express covenant contained in the instrument itself, whereby the mortgagee, in default of payment, was authorized to enter on the premises, and sell them at public auction; and to retain, out of the money thus raised, the amount due, and to pay the overplus, if any, to the mortgagor. It is impossible to read this covenant, and compare it with the laws now under consideration, without seeing that both of these acts materially interfere with the express agreement of the parties contained in this covenant. Yet, the right here secured to the mortgagee is substantially nothing more than the right to sell, free and discharged of the equitable interest of Kinzie and wife, in order to obtain his money. Now, at the time this deed was executed, the right to sell, free and discharged of the equitable estate of the mortgagor, was a part of every ordinary contract of mortgage in the State, without the aid of this express covenant; and the only difference between the right annexed by law and that given by the covenant consists in this: that in the former case, the right of sale must be exercised under the direction of the Court of Chancery, upon such terms as it shall prescribe, and the sale made by an agent of the court; in the latter, the sale is to be made by the party himself. But, even under this covenant, the sale made by the party is so far subject to the supervision of the court, that it will be set aside, and a new one ordered, if reasonable notice is not given, or the proceedings be regarded, in any respect, as contrary to equity and justice.

There is, therefore, in truth but little material difference between the rights of the mortgagee with or without this covenant. The distinction consists rather in the form of the remedy, than in the substantial right; and as it is evident that the laws in question invade the right secured by this covenant, there can be no sound reason for a different conclusion, where similar rights are incorporated by law into the contract, and form a part of it at the time it is made.

"Mortgages made since the passage of these laws must undoubtedly be governed by them; for every State has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale, for the payment of a debt; and may impose such conditions and restrictions upon the creditor as its judgment and policy may dictate. And all future contracts would be subject to such provisions; and they would be obligatory upon the parties in the courts of the United States, as well as in those of the State. We speak, of course, of contracts made and to be executed in the State. It is a case of that description that is now before us; and we do not think it proper to go beyond it.

"Upon the questions presented by the Circuit Court, we therefore answer: —

"1. That the decree should direct the premises to be sold at public auction to the highest bidder, without regard to the law of February 19, 1841, which gives the right of redemption to the mortgagor for twelve months, and to the judgment creditor for fifteen.

"2. That the decree should direct the sale of the mortgaged premises, without being first valued by three householders, and without requiring two-thirds of the amount of the said valuation to be bid according to the law of February 27, 1841.

"The decision of these two questions disposes of the third. And we shall direct these answers to be certified to the Circuit Court."[1]

McLEAN, J., gave an opinion concurring in the result on the ground that the statute, under the rules of the court, did not apply to this case; but denying the main positions of the court.[2]

[1] Present MR. CHIEF JUSTICE TANEY, and JUSTICES THOMPSON, McLEAN, BALDWIN, WAYNE, CATRON, and DANIEL.

[2] In *McCracken* v. *Hayward*, 2 How. 608 (1844), on a division of opinion between the judges of the same court on the same question, arising under the same statute of February 27, 1841, a like decision was given. BALDWIN, J., for the court, said: "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 Peters, 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*." . . .

And so, as regards "Stay laws," *Edwards* v. *Kearzey*, 96 U. S. 595 (1877). Compare *Tuttle* v. *Black*, 38 Pac. Rep. 108 (Cal. 1894).

"'The principle,' said the court (MATTHEWS, J.), in *Pritchard* v. *Norton*, 106 U. S. 124, 132 (1882), 'that what is apparently mere matter of remedy in some circumstances, in others, where it touches the substance of the controversy, becomes matter

of right, is familiar in our constitutional jurisprudence in the application of that provision of the Constitution which prohibits the passing by a State any law impairing the obligation of contracts. For it has been uniformly held that 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.' *McCracken* v. *Hayward*, 2 How. 608, 612; Cooley, Const. Lim. 285."

"'The obligation of a contract' is, therefore, the collective legal rights and duties which the existing law applicable to the contract raises or creates out of or from the stipulations of the parties; rights which it devolves upon one party, and corresponding duties which it lays upon the other.

"I have been thus particular in attempting to analyze and define the term 'obligation of a contract,' because some of our most eminent jurists have been greatly troubled by the phrase. I shall not refer to cases in which judges have examined the import of the words; their number is legion; their conflict is irreconcilable; a citation of them would unnecessarily consume time and space. A brief account of one leading case in the Supreme Court of the United States will sufficiently indicate the difficulty and the opposition of views. In *Ogden* v. *Saunders* (1827), the effect of a discharge under a State insolvent law was considered. In a former case, *Sturges* v. *Crowninshield*, the same court had held that such a statute, so far as it applied to pre-existing contracts, was void. Now, the indebtedness affected by the discharge had accrued subsequently to the passage of the State law. It was urged on behalf of the creditor that the State legislation still impaired the obligation of a contract. On the other hand it was claimed that, the insolvent law having been in existence at the time when the contract was made, its provisions were to be taken as a part of the agreement; or, to express the thought better, that the obligation of the contract was only such a compulsive or binding efficacy as the whole existing municipal law applicable thereto gave to the stipulations; in other words, that the obligation flowing from the existing law, upon the occasion of the contract, was not absolute upon the debtor, requiring him to pay at all events, but was only qualified, requiring him to pay unless the contingencies should happen by which he might be discharged. The majority of the court adopted this view. Three judges, however, Chief Justice Marshall, and Justices Story and Duvall, were of the opinion that the obligation inheres in the very stipulations of the contract, and that, no reference having been made in express terms by the parties to the existing insolvent law, as limiting the extent of the debtor's liability, he could not take advantage of that statute. The majority of the court were plainly right; and they established a principle of interpretation which has been generally assented to by the national and State tribunals. . . . Two persons enter into a contract; the law by its command obliges one of these parties to do the certain thing agreed upon; the law also says to this party, If you do not perform the thing commanded, you shall be subjected to a certain kind of punishment. This latter is the sanction, and this sanction or remedy as much forms a part of the obligation of the contract as does the very thing agreed to be done. In other words, the parties, by entering into a contract, create an occasion by which the commands of the law come into play; these commands give one party a right as against the other to have a certain thing done, and subject the other to the duty of doing that thing. But this is not all. The very same contract gives to the first party the right against the other to say, If you do not perform exactly what you agreed to do, you shall do something else by way of penalty or satisfaction; and a corresponding alternative duty rests upon this other party to do the thing which is required by way of penalty or satisfaction. In other words, the right to the remedy is included in the notion of the obligation of a contract. Were it otherwise, the obligation would be binding only upon those parties who should voluntarily submit to it, and the law, as a compulsive and restraining force, would become a mere nullity." Pomeroy's *Const. Law* (Bennett's ed.), §§ 592–597. — Ed.

VON HOFFMAN *v.* QUINCY.

SUPREME COURT OF THE UNITED STATES. 1866.

[4 *Wall.* 535.][1]

[ERROR to the Circuit Court of the United States for the Southern District of Illinois. Petition for a writ of *mandamus*, demurrer to the defendant's answer, and judgment for defendant.] *Messrs. McKinnon* and *Merrick*, for the relator, plaintiff in error. *Messrs. Cushing* and *Ewing, Jr.*, *contra*, for the city of Quincy, defendant in error.

MR. JUSTICE SWAYNE delivered the opinion of the court, and after stating the case, proceeded thus: —

The demurrer admits what is set forth in the answer. On the other hand, the answer, according to the law of pleading, admits what is alleged in the petition and not denied.

It is then a part of the case before us, that when the bonds were issued and negotiated there were statutes of Illinois in force which authorized the levying of a sufficient special tax to pay the coupons in question as they became due. Such statutes are so inconsistent with the provisions of the Act of 1863, relied upon by the city, and cover the same ground, in such a manner that the Act of 1863 unquestionably repeals them, if that Act be valid for the purposes it was intended to accomplish.

The validity of the bonds and coupons is not denied. No question is made as to the judgment. The case turns upon the validity of the statute restricting the power of taxation left to the city within the narrow limits which it prescribes.

The answer says expressly that fifty cents on the hundred dollars' worth of property, which is all the statute allows to be levied to meet the debts and current expenses of the city, will not be sufficient for those purposes. The expenses will, of course, be first defrayed out of the fund. What the deficiency will be as to the debts, or whether anything applicable to them will remain, is not stated. So far, it appears that nothing has been paid upon these liabilities. And it was not claimed at the argument that the result under the statute would be different in the future. . . .

A statute of frauds embracing a pre-existing parol contract not before required to be in writing would affect its validity. A statute declaring that the word "ton" should thereafter be held, in prior as well as subsequent contracts, to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtment may be extinguished by a process of bankruptcy would involve its discharge, and a statute forbidding the sale of any of the debtor's property, under a judgment upon such a contract, would relate to the remedy.

[1] The statement of facts is omitted. — ED.

It cannot be doubted, either upon principle or authority, that each of such laws passed by a State would impair the obligation of the contract, and the last-mentioned not less than the first. Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract "is the law which binds the parties to perform their agreement." *Sturges* v. *Crowninshield*, 12 Wheaton, 257. The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. In *Green* v. *Biddle*, 8 Id. 84, it was said: "The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. Upon this principle it is that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his advantage."

"One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching, in any respect, on its obligation, — dispensing with any part of its force." *Planters' Bank* v. *Sharp et al.*, 6 Howard, 327.

This has reference to legislation which affects the contract directly, and not incidentally or only by consequence.

The right to imprison for debt is not a part of the contract. It is regarded as penal rather than remedial. The States may abolish it whenever they think proper. *Beers* v. *Haughton*, 9 Peters, 359; *Ogden* v. *Saunders*, 12 Wheaton, 230; *Mason* v. *Haile*, 12 Id. 373; *Sturges* v. *Crowninshield*, 4 Id. 200. They may also exempt from sale, under execution, the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture. It is said: "Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised by every sovereignty according to its own views of policy and humanity."

It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of

modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the Act is within the prohibition of the Constitution, and to that extent void. *Bronson* v. *Kinzie*, 1 Howard, 311; *McCracken* v. *Hayward*, 2 Id. 608.

If these doctrines were *res integræ* the consistency and soundness of the reasoning which maintains a distinction between the contract and the remedy — or, to speak more accurately, between the remedy and the other parts of the contract — might perhaps well be doubted. 1 Kent's Commentaries, 456; Sedgwick on Stat. and Cons. Law, 652; Mr. Justice Washington's dissenting opinion in *Mason* v. *Haile*, 12 Wheaton, 379. But they rest in this court upon a foundation of authority too firm to be shaken; and they are supported by such an array of judicial names that it is hard for the mind not to feel constrained to believe they are correct. The doctrine upon the subject established by the latest adjudications of this court render the distinction one rather of form than substance.

When the bonds in question were issued, there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the Act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that Act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist.

It is well settled that a State may disable itself by contract from exercising its taxing power in particular cases. *New Jersey* v. *Wilson*, 7 Cranch, 166; *Dodge* v. *Woolsey*, 18 Howard, 331; *Piqua Branch* v. *Knoop*, 16 Id. 331. It is equally clear that where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other. *People* v. *Bell*, 10 California, 570; *Dominic* v. *Sayre*, 3 Sandford, 555.

The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The Act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that Act had not been passed. A different result would leave nothing of the contract but an abstract right, of no practical

value, and render the protection of the Constitution a shadow and a delusion.

The Circuit Court erred in overruling the application for a *mandamus*. The judgment of that court is reversed, and the cause will be remanded, with instructions to proceed *In conformity with this opinion.*[1]

HEINE *v.* THE LEVEE COMMISSIONERS.

SUPREME COURT OF THE UNITED STATES. 1873.

[19 *Wall.* 655.]

APPEAL from the Circuit Court for the District of Louisiana.

This was a suit in Chancery brought by Heine and others, holders of bonds issued by what is called the board of levee commissioners of the levee district for the parishes of Carroll and Madison of the State of Louisiana. The board thus described was made a *quasi* corporation by the Legislature of Louisiana, with authority to issue the bonds and provide for the payment of interest and principal by taxes levied upon the real and personal property within the district. The bill alleged a failure to levy these taxes and to pay the interest on any part of said bonds, that the persons duly appointed levee commissioners had pretended to resign their office for the purpose of evading this duty, and that the complainants had applied in vain to the judge of the District Court, who was by statute authorized to levy a tax on the alluvial lands to pay the bonds if the levee commissioners failed to do so. The prayer for relief was that the levee commissioners be required to assess and collect the tax necessary to pay the bonds and interest, and if, after reasonable time, they failed to do so, that the district judge be ordered to do the same; and for such other and further relief as the nature of the case required.

No judgment at law had been recovered on the bonds or any of them, nor any attempt to collect the money due by suit in the common-law court.

A demurrer to the bill was sustained in the Circuit Court, and the plaintiffs appealed from the decree of dismissal rendered on that demurrer.

Mr. Thomas Allen Clarke, for the appellants; *Messrs. S. R. Walker, W. Tunstall,* and *J. E. Leonard, contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

The question presented by the present case is not a new one in this court. It has been decided in numerous cases, founded on the refusal to pay corporation bonds, that the appropriate proceeding was to sue at law and by a judgment of the court establish the validity of the claim and the amount due, and by the return of an ordinary execution ascer-

[1] Compare *Gunn* v. *Barry*, 15 Wall. 610. — ED.

tain that no property of the corporation could be found liable to such execution and sufficient to satisfy the judgment. Then, if the corporation had authority to levy and collect taxes for the payment of that debt, a *mandamus* would issue to compel them to raise by taxation the amount necessary to satisfy the debt. *Von Hoffman* v. *City of Quincy*, 4 Wallace, 535; *Supervisors* v. *United States*, Ib. 435; *Riggs* v. *Johnson County*, 6 Id. 166; *City of Galena* v. *Amy*, 5 Id. 705, and many other cases in this court, and especially the case of *Walkley* v. *City of Muscatine*, 6 Id. 481.

Unless, then, there is some difficulty or obstruction in the way of this common-law remedy, Chancery can have no jurisdiction.

It is said that by reason of the resignation of the levee commissioners no suit can be sustained against them so as to procure a judgment on which the *mandamus* may ultimately issue.

But the present suit is brought against these very men in their official character, and no difference can be seen in their capacity to be sued in a court of law and a court of equity. The same service of process is required in each. The same officers serve the process, and the jurisdiction of the court over the person is governed by precisely the same principles in each case. The Court of Chancery possesses no extraordinary powers to compel persons to submit to its jurisdiction and litigate before it, not possessed by a common-law court, when the latter is competent to give relief.

This proposition was directly in issue and distinctly settled in the case of *Rees* v. *City of Watertown*, at the present term. [19 Wall.] p. 107. In that case the plaintiff had obtained judgment, issued execution, which was returned *nulla bona*, and had then procured a writ of *mandamus*, ordering the aldermen of the city to levy the tax. The aldermen resigned before the writ could be served, with intent to evade its effect. After other aldermen were elected, a new writ was served on them, and they in turn resigned, after an order to show cause why they should not be punished for a contempt in failing to obey the writ of *mandamus*. Notwithstanding all this, we held that Chancery had no jurisdiction, by a direct proceeding, to levy the tax or to seize the property of the citizens and sell it for the satisfaction of the judgment. . . .

The court is asked if it should fail to find any principle peculiar to courts of equity on which the bill can be sustained, to treat it as a petition for the writ of *mandamus*.

This would ignore the well-established principle of the Federal courts that the line between the equitable and common-law jurisdiction must be maintained, and that a suit must be of the one character or the other, and be prosecuted by pleadings and processes belonging to each class of jurisdiction.

Mandamus is essentially and exclusively a common-law remedy, and is unknown to the equity practice. But if this were otherwise it is the well-settled doctrine of this court that the circuit courts cannot use the writ of *mandamus* as an original and independent remedy, but are limited

to its use as a process in the enforcement of rights when jurisdiction has been already acquired for other purposes. In fact, in the class of cases in which it is here sought it is a writ in execution of the judgment of the court already rendered, and can only be used because it is an appropriate process for that purpose. *McIntire* v. *Wood*, 7 Cranch, 504; *McClung* v. *Silliman*, 6 Wheaton, 601; *Kendall* v. *United States*, 12 Peters, 526; *Riggs* v. *Johnson County*, 6 Wallace, 197; *The Secretary* v. *McGarrahan*, 9 Id. 311; *Bath County* v. *Amy*, 13 Id. 244.

The Circuit Court cannot, therefore, issue the writ if the bill could be treated merely as a petition on the common-law side of the court, praying for that remedy.

There does not appear to be any authority founded on the recognized principles of a court of equity on which this bill can be sustained. If sustained at all it must be on the very broad ground that because the plaintiff finds himself unable to collect his debt by proceedings at law, it is the duty of a court of equity to devise some mode by which it can be done. It is, however, the experience of every day and of all men, that debts are created which are never paid, though the creditor has exhausted all the resources of the law. It is a misfortune which in the imperfection of human nature often admits of no redress. The holder of a corporation bond must in common with other men submit to this calamity, when the law affords no relief.

The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, State or national. In the case before us the national sovereignty has nothing to do with it. The power must be derived from the legislature of the State. So far as the present case is concerned, the State has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the legislature either to assess the tax by special statute or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal court. It is unreasonable to suppose that the legislature would ever select a Federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal government of the legislative functions of the State government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee.

In the case of *Walkley* v. *City of Muscatine* and *Rees* v. *City of Watertown*, already cited, we have distinctly refused to enter upon this course, and we see no reason in the present case to depart from the well-considered judgment of the court in those cases, especially the latter. *Decree affirmed.*[1]

Dissenting, Mr. Justice Clifford and Mr. Justice Swayne.

Mr. Justice Bradley did not sit.

[1] See also *Meriwether* v. *Garrett*, 102 U. S. 472. — Ed.

SEIBERT *v.* LEWIS.

SUPREME COURT OF THE UNITED STATES. 1887.

[122 *U. S.* 284.][1]

Mr. D. A. McKnight, for plaintiff in error; *Mr. J. B. Henderson* and *Mr. James M. Lewis,* for defendant in error.

MR. JUSTICE MATTHEWS, after stating the case as above reported, delivered the opinion of the court.

It is conceded that the relator's judgment, which he is now seeking to collect, was founded upon municipal obligations of Cape Girardeau County, issued under the authority of an Act to facilitate the construction of railroads in the State of Missouri, which took effect March 23, 1868. Missouri Laws of 1868, p. 92. The second section of that Act is as follows: —

"SEC. 2. In order to meet the payments on account of the subscription to the stock, according to its terms, or to pay the interest and principal on any bond which may be issued on account of such subscription, the county court shall, from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax, which shall be levied on all the real estate lying within the township making the subscription, in accordance with the valuation then last made by the county assessor for county purposes."

It will be observed that the tax authorized by this section of the statute of 1868, under which the bonds were issued, is to be levied on the real estate within the township only, and not upon the personal property, including statements of merchants and manufacturers doing business in the township. But this levy upon personal property and merchants' licenses, in addition to real estate, is authorized by an amendment passed March 10, 1871. 1 Wagner's Statutes, 1872, 313, § 52. . . .

That the relator was entitled to a tax levied in pursuance of this amended section, his judgment having been obtained while it was in force, was adjudged in his favor by the Circuit Court when he obtained his peremptory *mandamus* against the judges of the county court, requiring them to levy the tax, the collection of which he is now seeking to enforce by the present proceeding. The question was also directly adjudged in his favor by this court in the case of *Cape Girardeau County Court* v. *Hill*, 118 U. S. 68. In that case it was said: "The township having legally incurred an obligation to pay the bonds in question, it was competent for the legislature at any time to make provision for its being met by taxation upon any kind of property within the township that was subject to taxation for public purposes."

[1] The statement of facts is omitted. — ED.

Having obtained his judgment while that Act remained in force, and having obtained by the judgment of the Circuit Court an actual levy of a tax according to its provisions, his right thereto became thereby vested so as not to be affected by a subsequent repeal of the statute. But on March 8, 1879, the General Assembly of the State of Missouri passed an Act, found in §§ 6798, 6799, and 6800 of the Revised Statutes of Missouri of 1879. . . .

By these provisions, it appears that the State tax and the tax necessary to pay the funded or bonded debt of the State, the tax for the current county expenditures, and for schools, are to be assessed, levied, and collected in the several counties of the State as a matter of positive duty by the county courts of the several counties, according to their previous practice, without the intervention of any other authority. All other taxes, which include the tax sought to be collected in this proceeding, can be assessed, levied, and collected only under the limitations and conditions therein prescribed; that is to say, the county court being first satisfied that there exists a necessity for the assessment, levy, and collection of such other tax, shall request the prosecuting attorney for the county to present a petition to the Circuit Court of the county, or to the judge thereof in vacation, setting forth the facts, and specifying the reasons why such other tax or taxes should be assessed, levied, and collected. In pursuance of that request the prosecuting attorney is required to present such a petition, and the Circuit Court, or judge thereof, to whom such petition is presented, shall make an order directed to the county court of such county, commanding such court to have assessed, levied, and collected such tax, "upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy, and collection thereof will not be in conflict with the Constitution and laws of this State." Section 6800 provides, that any county court judge, or other county officer, who shall assess, levy, or collect, or attempt so to do, or cause to be assessed, levied, or collected, any tax, without being first ordered so to do by the Circuit Court of the county, in the express manner provided and directed in the preceding section shall be guilty of a misdemeanor, to be punished on conviction by a fine of not less than $500 and a forfeiture of his office; and it is therein declared that "the method herein provided for the assessment, levy, and collection of any tax or taxes not enumerated and specified in § 6798, shall be the only method known to the law whereby such tax or taxes may be assessed or collected, or ordered to be assessed, levied, or collected."

It is because of these provisions of the law that the respondent herein, as he sets out in his return, has been restrained by an injunction from the Circuit Court of Cape Girardeau County from further proceeding in the collection of the tax heretofore levied by the county court by virtue of a writ of *mandamus* from the Circuit Court of the United States.

The question presented for our determination is, whether, by virtue of this statute of the State, he is justified in his disobedience to the judgment and mandate of the Circuit Court of the United States. It is well

settled by the decisions of this court that "the remedy subsisting in a State, when and where the contract is made and is to be performed, is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void." *Edwards* v. *Kearzey*, 96 U. S. 595, 607.

It had been previously said upon a review of the decisions of the court, in *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 553: "It is competent for the States to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the Act is within the prohibition of the Constitution, and to that extent void." . . . [Here follow passages from the opinions in *Von Hoffman* v. *Quincy*, 4 Wall. 535, *Bronson* v. *Kinzie*, 1 How. 311, and *Louisiana* v. *N. O.*, 102 U. S. 203.]

In various forms, but with the same meaning, this rule has been often repeated in subsequent decisions by this court. It is, therefore, not denied in argument in the present case that § 2 of the Act of March 23, 1868, under which the municipal obligations of the relator which had passed into judgment were issued, constitutes a part of the contract to the benefit of which he is entitled. That section, it will be remembered, provides that to pay the interest and principal on any bond which may be issued under the authority thereof, "the county court shall from time to time levy and cause to be collected, in the same manner as county taxes, a special tax," &c.

The precise question, therefore, for present adjudication is, whether the provisions for levying and collecting such a tax, contained in the sections of the Revised Statutes above quoted, are, in view of the doctrine of this court on that subject, a legal equivalent for the provision contained in the Act of March 23, 1868. . . .

But the contract which the relator is entitled to insist upon under the Act of March 23, 1868, is, that he shall have a special tax for the payment of the principal and interest due him, to be levied from time to time "in the same manner as county taxes." It may be admitted that the legislature, from time to time, notwithstanding this provision, might by subsequent legislation change the mode and the means for the assessment, levy, and collection of county taxes, as in its judgment the public interests should require. Any such changes, made in view of public interests, not substantially to the prejudice of public creditors, might be considered, in respect to them, as the legal equivalent for the particular mode in force in 1868, and a fair and reasonable substitute therefor. Ordinarily, it would be true that such altered provisions would not be injurious to any private rights, for the creditor would at all times have

the guarantee of as prompt and speedy a collection of a tax in satisfaction his claim as is secured by law for the collection of the revenues of the county, most important for the support of its government.

It may, therefore, be considered as a most material and important part of the contract contained in the second section of the Act of March 23, 1868, not, perhaps, that the creditor shall always have a right to have taxes for his benefit collected in the same manner in which county taxes were collectible at that date, but that he shall at least always have the right to a special tax to be levied and collected in the same manner as county taxes at the same time may be levied and collected. In other words, the essential part and value of the contract is, that he shall always have a special tax to be collected in a manner as prompt and efficacious as that which shall at the time, when he applies for it, be provided by law for the collection of the general revenue of the county. His contract is not only that he shall have as good a remedy as that provided by the terms of the contract when made, but that his remedy shall be by means of a tax, in reference to which the levy and collection shall be as efficacious as the State provides for the benefit of its counties, without any discrimination against him.

It is in this vital point that the obligation of the contract with the relator has been impaired by the section of the law under which the respondent seeks to justify his disobedience of the mandate of the Circuit Court. Those sections provide one mode for the collection of county taxes by the direct action of the county court; they provide another mode for the collection of the special tax for the payment of obligations such as those held by the relator and merged in his judgment. They expressly declare that he shall not be entitled to a tax collected in the same manner as county taxes, but add limitations and conditions which, whatever may have been the legislative motive, compared with the original remedy provided by the law for the satisfaction of his contract, cannot fail seriously to embarrass, hinder, and delay him in the collection of his debt, and which make an express and injurious discrimination against him.

We are referred by counsel for the plaintiff in error to the case of *Hawley* v. *Fairbanks*, 108 U. S. 543, as an authority in support of his contention. In that case, however, a peremptory *mandamus* was awarded to compel the levy and collection of a tax for the payment of a judgment of the Circuit Court of the United States, notwithstanding an injunction to the contrary issued out of the State court. And it was there held that the judgment of the Circuit Court of the United States against the municipality was a sufficient warrant and authority to the county clerk to make the assessment of a tax for its payment, notwithstanding the omission of the preliminary certificates of the town clerk and the allowance by the board of auditors of the town, which in other cases the law made necessary to the orderly levy and collection of the tax.

We have also been furnished with the opinion of the Supreme Court

of the State of Missouri, in the case of *State ex rel. Cramer* v. *Judges of the County Court of Cape Girardeau County*, 8 Western Reporter, 626, delivered March 21, 1887 [s. c. 91 Mo. 452], affirming the judgment of the Circuit Court of Cape Girardeau County, perpetuating the injunction set up in the return of the respondent in this case as an answer to the alternative *mandamus*. . . .

For the reasons which we have pointed out, we are unable to concur in the judgment of the Supreme Court of Missouri, and are constrained to hold that the sections of the Revised Statutes in question impair the obligation of the contract with the relator under the Act of March 23, 1868, and as to him are, therefore, null and void by force of the Constitution of the United States; and that the laws of Missouri, for the collection of the tax necessary to pay his judgment, in force at the time when it was rendered, continue to be and are still in force for that purpose. They are the laws of the State which are applicable to his case. When he seeks and obtains the writ of *mandamus* from the Circuit Court of the United States, for the purpose of levying a tax for the payment of the judgment which it has rendered in his favor, he asks and obtains only the enforcement of the laws of Missouri under which his rights became vested, and which are preserved for his benefit by the Constitution of the United States. The question, therefore, is not whether a tax shall be levied in Missouri without the authority of its law, but which of several of its laws are in force and govern the case. Our conclusion is, that the statutory provisions relied upon by the respondent in his return to the alternative writ of *mandamus* do not apply, and do not, therefore, afford the justification which he pleads.

The judgment of the Circuit Court is accordingly affirmed.[1]

In *McGahey* v. *Virginia*, 135 U. S. 662 (1890), a group of cases was considered, which grew out of certain legislation of Virginia as to coupons on its bonds. Mr. Justice Bradley, on behalf of the court, prefaced a detailed consideration of the cases, by a general review of the previous action of the court in this matter. He said: —

These cases, like the *Virginia Coupon Cases*, decided in April, 1885, and reported in 114 U. S. 269, and like *Barry* v. *Edmunds* and other cases argued at the same time, decided in February, 1886, and reported in 116 U. S. 550, etc., arise upon certain tax-receivable coupons attached to bonds of the State of Virginia issued in reduction and liquidation of the State debt under the Acts of March 30, 1871, and March 28, 1879. The present appeals are a continuation of the controversy arising upon said coupons as receivable and tendered in payment of taxes and other State dues.

The origin of these bonds and coupons has been fully explained in former cases; but the proper disposition of the cases now to be considered will be greatly facilitated by presenting a connected *résumé* of the

[1] See 2 Hare, Am. Const. Law, 709–711, 1071, 1072. — Ed.

legislative Acts relating to, and affecting the said securities, and of the decisions heretofore made in reference to said Acts.

The State debt of Virginia amounted, prior to the late Civil War, to more than thirty millions of dollars. After the war it became a matter of great importance to arrange this debt in such manner as to bring it within the control and means of the State. West Virginia had recently been separated from the parent State, and had participated in the advantages of the money raised by the issue of the State securities. It was supposed by those who were best qualified to know the facts that at least one-third of the State resources was lost by this excision of territory, and the Legislature of Virginia deemed it nothing more than equitable that the new State should bear one-third of the State debt. A proposition was therefore made to the bond-holders of the State to receive two-thirds of the amount due them in new bonds payable thirty-four years after date, with coupons attached thereto receivable, after becoming due, in payment of taxes and other claims and demands due to the State. This scheme was formulated by the Act of March 30, 1871, entitled "An Act to provide for the funding and payment of the public debt," and was acquiesced in by the public creditors, or the great majority of them, who accepted and received the bonds provided for in the Act, which were looked upon as a favorite security in consequence of the value attached to the coupons as legal tender instruments in the payment of taxes and public dues. The Act, amongst other things, provided as follows: —

"SECTION 2. The owners of any of the bonds, stocks, or interest certificates heretofore issued by this State which are recognized by its Constitution and laws as legal" [except certain specific securities named] "may fund two-thirds of the amount of the same, together with two-thirds of the interest due or to become due thereon to the first day of July, 1871, in six per centum coupon or registered bonds of this State, . . . to become due and payable in thirty-four years after date, but redeemable . . . after ten years, the interest to be payable semi-annually on the first days of January and July in each year. The bonds shall be made payable to order or bearer, and the coupons to bearer, and registered bonds payable to order may be exchanged for bonds payable to bearer, and registered bonds may be exchanged for coupon bonds, or *vice versa*, at the option of the holder. The coupons shall be payable semi-annually, and be receivable at and after maturity for all taxes, debts, dues, and demands due the State, which shall be expressed on their face. . . ."

Provision was made in the third section of the Act for the issue of certificates for one-third part of the debt which was not funded in said bonds, the payment of which certificates it was declared would be provided for in accordance with such settlement as should thereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State existing at the time of its dismemberment.

By the fourth section, the treasurer was authorized and directed to

cause to be prepared, engraved, or lithographed, registered bonds and bonds with coupons, and certificates of the character mentioned in the second and third sections, and, when prepared, to commence the issuance of the same. It was further enacted that the bonds and certificates should be signed by the treasurer and countersigned by the auditor; that the coupons should be signed by the treasurer, or that a *fac-simile* of his signature should be stamped or engraved thereon. The bonds were to be issued in series, and those of each series to be numbered from one upwards, as issued, and the coupons, in addition to the number of the bond to which they were attached, were to be numbered from one to sixty-seven. The surrendered bonds were to be cancelled and deposited in the office of the State treasurer.

By section 5, certain assets belonging to the State, when realized or converted into money, were to be paid into the treasury to the credit of a sinking fund created for the purchase and redemption of the bonds issued under the Act, and, after 1880, inclusive, a tax of two cents on a hundred dollars of the assessed valuation of all property in the State was to be applied in like manner. The treasurer, the auditor of public accounts, and second auditor were appointed commissioners of the sinking fund.

It has always been contended on the part of the bond-holders 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 the session of the General Assembly of Virginia of 1886, several additional Acts were passed, all having for object the imposition of further obstructions and impediments in the way of using the tax-paying coupons. An enumeration of these Acts, with a general indication of their purport, is all that is necessary to state. By the Act of January 21, 1886, it was declared that expert evidence shall not be received of the genuineness of any paper or instrument made by machinery, or in any other manner than by the actual or personal handwriting of the party to be charged, or his agent. By the Act of January 26, 1886, it was declared that in the trial of any issue involving the genuineness of a coupon purporting to have been cut from any bond authorized by law to be issued by the State, or by any city, county, or corporation, the defendant may demand the production of the bond, and thereupon it shall be the duty of the plaintiff to produce such bond, with proof that the coupon was actually cut therefrom. On the same day another Act was passed declaring that any person who shall solicit or induce any suit or action to be brought against the State of Virginia, or any citizen thereof, by verbal representations, or by writing or printing, shall be deemed guilty of the offence of champerty, and subject to fine and imprisonment. By the Act of March 1, 1886, it was declared that any person licensed to practise law in Virginia who shall solicit or induce any suit or action to be brought against the State, or any citizen thereof, by verbal representations, or by writing or printing, shall be deemed guilty of barratry, and if found guilty, it is made the duty of the court to revoke his license and disbar him forever from practising law in the Commonwealth. By an Act of March 4, 1886, it was declared that all license fees required for the transaction of any

business in the State shall be paid in coin, legal-tender notes, or national bank bills; and if coupons shall be tendered in payment thereof, they shall be received by the officer for identification by the proceedings prescribed in the Act of 1882; but no license shall issue to the applicant, nor shall he have the right to conduct business or pursue his profession until said coupons have been verified in the manner prescribed by said Act; and by another Act, passed February 27, 1886, it was declared that after the 1st day of July, 1888, no petition shall be filed or other proceeding instituted to try the question whether any paper purporting to be a coupon detached from any bond of the State is genuine and legally receivable for taxes and other State dues, except within one year from said 1st day of July, 1888, if such coupon first became receivable prior to that time; and within one year from the time the coupon becomes receivable if it becomes receivable after that date. This law became incorporated in the Code of 1887 as section 415. Finally, as, according to the decisions of this court in 1885 and 1886, the collecting officers were liable to action for proceeding against the property of the tax-payers who had tendered coupons in payment of their taxes, on the 12th of May, 1887, an Act was passed authorizing suits to be brought against such tax-payers for taxes due from them, which suits were to be in the name of the Commonwealth, and to be commenced by a notice served on the party liable for the tax, or on the agent of such party who may have tendered the coupons. If the defendant relies upon the tender of coupons as payment he shall plead the same specifically in writing, and file the coupons tendered with the clerk, and the burden of proving the tender and genuineness of the coupons shall be on the defendant. If established, the judgment shall be for the defendant on the plea of tender. If the defendant fail in his defence, there shall be judgment for the Commonwealth for the taxes due and interest and costs, and execution shall issue thereon as in other cases; and if judgment be against the defendant, a fee of ten dollars is allowed to the attorney for the Commonwealth as part of the costs in the case; but the Commonwealth is not to be liable for any fees or costs. The Act is set forth in full in the case *In re Ayers*, 123 U. S. 451. . . .

Without committing ourselves to all that has been said, or even all that may have been adjudged, in the preceding cases that have come before the court on the subject, we think it clear that the following propositions have been established: —

First, that the provisions of the Act of 1871 constitute a contract between the State of Virginia and the lawful holders of the bonds and coupons issued under and in pursuance of said statute.

Second, that the various Acts of the Assembly of Virginia passed for the purpose of restraining the use of said coupons for the payment of taxes and other dues to the State, and imposing impediments and obstructions to that use, and to the proceedings instituted for establishing their genuineness, do in many respects materially impair the obli-

gation of that contract, and cannot be held to be valid or binding in so far as they have that effect.

Third, that no proceedings can be instituted by any holder of said bonds or coupons against the Commonwealth of Virginia, either directly by suit against the Commonwealth by name, or indirectly against her executive officers to control them in the exercise of their official functions as agents of the State.

Fourth, that any lawful holder of the tax-receivable coupons of the State issued under the Act of 1871 or the subsequent Act of 1879, who tenders such coupons in payment of taxes, debts, dues, and demands due from him to the State, and continues to hold himself ready to tender the same in payment thereof, is entitled to be free from molestation in person or goods on account of such taxes, debts, dues, or demands, and may vindicate such right in all lawful modes of redress, — by suit to recover his property, by suit against the officer to recover damages for taking it, by injunction to prevent such taking where it would be attended with irremediable injury, or by a defence to a suit brought against him for his taxes or the other claims standing against him. No conclusion short of this can be legitimately drawn from the series of decisions which we have above reviewed, without wholly overruling that rendered in the *Coupon Cases* [114 U. S. 269], and disregarding many of the rulings in other cases, which we should be very reluctant to do. To the extent here announced we feel bound to yield to the authority of the prior decisions of this court, whatever may have been the former views of any member of the court.

There may be exceptional cases of taxes, debts, dues, and demands due to the State which cannot be brought within the operation of the rights secured to the holders of the bonds and coupons issued under the Acts of 1871 and 1879. When such cases occur they will have to be disposed of according to their own circumstances and conditions.

It was earnestly contended in the dissenting opinion in the *Coupon Cases*, that the defence of a tender of coupons set up by a tax-payer when prosecuted for the payment of his taxes, was in the nature of a set-off and could not be enforced against a State any more than a suit could be prosecuted against it; in other words, that a set-off is in reality a cross-suit, and as such subject to the prohibition of the Eleventh Amendment. But the majority of the court held, and perhaps with better reason, that where a set-off or counter-claim is made by virtue of an agreement or contract between the parties, it no longer has the character of a mere set-off, but becomes attached to the primary claim as *pro tanto* a defeasance thereof. At all events, such was the decision of the court, and it is not our purpose to question the authority of that decision so far as it may apply to the cases now before us. . . .

The question is presented to us whether the Acts of Assembly of the State of Virginia which required the production of the bond in order to establish the genuineness of the coupons and prohibiting ex-

pert testimony to prove the said coupons, are or are not repugnant to the Constitution of the United States. On this subject we think there can be little doubt. It is well settled by the adjudications of this court, that the obligation of a contract is impaired, in the sense of the Constitution, by any Act which prevents its enforcement, or which materially abridges the remedy for enforcing it which existed at the time it was contracted, and does not supply an alternative remedy equally adequate and efficacious. *Bronson* v. *Kinzie*, 1 How. 311; *Woodruff* v. *Trapnall*, 10 How. 190; *Furman* v. *Nichol*, 8 Wall. 44; *Walker* v. *Whitehead*, 16 Wall. 314; *Von Hoffman* v. *Quincy*, 4 Wall. 535; *Tennessee* v. *Sneed*, 96 U. S. 69; *Memphis* v. *United States*, 97 U. S. 293; *Memphis* v. *Brown*, 97 U. S. 300; *Howard* v. *Bugbee*, 24 How. 461.

We have no hesitation in saying that the duty imposed upon the tax-payer of producing the bond from which the coupons tendered by him were cut, at the time of offering the same in evidence in court, was an unreasonable condition, in many cases impossible to be performed. If enforced, it would have the effect of rendering valueless all coupons which have been separated from the bonds to which they were attached, and have been sold in the open market. It would deprive them of their negotiable character. It would make them fixed appendages to the bond itself. It would be directly contrary to the meaning and intent of the Act of 1871 and the corresponding Act of 1879. It would be so onerous and impracticable as not only to affect, but virtually destroy, the value of the instruments in the hands of the holder who had purchased them. We think that the requirement was unconstitutional.

We also think that the prohibition of expert testimony in establishing the genuineness of coupons was in like manner unconstitutional. In the case of coupons made by impressions from metallic plates (as these were), no other mode of proving their genuineness is practicable; and that mode of proof is as satisfactory as the proof of handwriting by a witness acquainted with the writing of the party whose signature it purports to be. One who is expert in the inspection and examination of bank notes, engraved bonds, and other instruments of that character, is able to detect almost at a glance whether an instrument is genuine or spurious, provided he has an acquaintance with the class of instruments to which his attention is directed. It is the kind of evidence resorted to in proving the genuineness of bank notes; it is the kind of evidence naturally resorted to to prove the genuineness of coupons and other instruments of that character. To prohibit it is to take from the holder of such instruments the only feasible means he has in his power to establish their validity. . . .

The passage of a new Statute of Limitations, giving a shorter time for the bringing of actions than existed before, even as applied to actions which had accrued, does not necessarily affect the remedy to such an extent as to impair the obligation of the contract within the meaning of the Constitution, provided a reasonable time is given for

the bringing of such actions. This subject has been considered in a number of cases by this court, particularly in *Terry* v. *Anderson*, 95 U. S. 628, 632, and *Koshkonong* v. *Burton*, 104 U. S. 668, 675, where the prior cases are referred to. In *Terry* v. *Anderson*, Chief Justice Waite, speaking for the court, said: "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. 457; *Jackson* v. *Lamphire*, 3 Pet. 280; *Sohn* v. *Waterson*, 17 Wall. 596; *Christmas* v. *Russell*, 5 Wall. 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. . . . 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."

The court in that case held that the period of nine months and seventeen days given to sue upon a cause of action which had already been running nearly four years, was not unconstitutional. The liability in question was that of a stock-holder under an Act of Incorporation for the ultimate redemption of the bills of a bank which had become insolvent by the disaster of the Civil War. The Legislature of Georgia, on the 16th of March, 1869, passed a statute requiring all actions against stock-holders in such cases to be brought by or before the 1st of January, 1870.

In the case of *Koshkonong* v. *Burton*, the suit was brought upon bonds of the town of Koshkonong issued January 1, 1857, with interest coupons attached. The coupons matured at different dates from 1858 to 1877. The action was brought on the 12th of May, 1880, and the question was whether the action as to the coupons maturing more than six years before the commencement of the suit was barred by the Statute of Limitations of Wisconsin. In March, 1872, an Act was passed to limit the time for the commencement of actions against towns, counties, cities, and villages, on demands payable to bearer. It provided that no action brought to recover money on any bond, coupon, interest warrant, agreement, or promise in writing made by any town, county, city, or village, or upon any instalment of the principal or interest thereof, shall be maintained unless the action be commenced within six years from the time when such money has or shall become due, when the same has been made payable to bearer, or to some person or bearer, or to the order of some person, or to some person or his order: provided, that any such action may be brought within one year after this Act shall take effect. This court, speaking by Mr. Justice Harlan, said:

"It was undoubtedly within the constitutional power of the legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect. Whether the first proviso in the Act of 1872, as to some causes of action, especially in its application to citizens of other States holding negotiable municipal securities, is, or not, in violation of that condition, is a question of too much practical importance and delicacy to justify us in considering it unless its determination be essential to the disposition of the case in hand; and we think it is not." The case was decided without determining the question referred to.

A question of the same nature frequently arises upon statutes which require the registry of conveyances and other instruments within a limited period prescribed, and making them void, either absolutely or in their operation as against third persons, if not recorded within such time. Such laws, as applied to conveyances and other instruments in existence at the time of their passage, are, of course, retrospective in their character, and may operate very oppressively if a reasonable time be not given for the registry required. This subject was discussed in the case of *Vance* v. *Vance*, 108 U. S. 514, Mr. Justice Miller delivering the opinion of the court, where the prior cases were adverted to and commented upon. The same rule applies in those cases as in reference to statutes of limitation, namely, that the time given for the Act to be done must be a reasonable time, otherwise it would be unconstitutional and void.

It is evident from this statement of the question that no one rule as to the length of time which will be deemed reasonable can be laid down for the government of all cases alike. Different circumstances will often require a different rule. What would be reasonable in one class of cases would be entirely unreasonable in another.

It is necessary, therefore, to look at the nature and circumstances of the case before us, and of the class of cases to which it belongs. The primary obligation of the State with regard to the coupons attached to the bonds issued under the Act of 1871 was to pay them when they became due; but if they were not paid at maturity the alternative right was given to the holder of them to use them in the payment of taxes, debts, dues, and demands due to the State. The very nature of the case shows that such an application of the coupons could not be made immediately, or in any very short period of time. If all the bonds were of the denomination of one thousand dollars each, it would require twenty thousand of them to make up the funded debt of twenty millions of dollars. These twenty thousand bonds would be likely to be scattered and dispersed through many States and countries, and it

would be impracticable for the holders of them to use the coupons which the State should fail to pay in cash, in the alternative manner stipulated for in the contract, unless they had a reasonable time to dispose of them to tax-payers. No limitation of time was fixed by the Act within which the coupons should be presented or tendered in payment of taxes or other demands. The presumption would naturally be that they could be used within an indefinite period, like bank bills. Under this condition of things, a statute of limitations giving to the holders thereof but a single year for the presentation in payment of taxes of the coupons then in their possession, perhaps never severed from the bonds to which they were attached, and comprising all the coupons which had been originally attached thereto, seems, even at first blush, to be unreasonable and oppressive. Probably not one-tenth, if even so large a proportion, of the bond-holders were tax-payers of the State of Virginia. The only way in which they could, within the year prescribed, utilize their coupons, the accumulation perhaps of years, would be to sell and dispose of them to the tax-payers. How this could be done, especially in view of the onerous laws which were passed with regard to the sale of coupons in the State, it is difficult to see. Under all the circumstances of the case, and the peculiar condition of the securities in question, we are compelled to say that in our opinion the law is an unreasonable law, and that it does materially impair the obligation of the contract.[1]

THE PIQUA BRANCH OF THE STATE BANK OF OHIO *v.* KNOOP.

SUPREME COURT OF THE UNITED STATES. 1853.

[16 *How.* 369.]

Stanberry and *Vinton*, for the plaintiff; *Spalding* and *Pugh*, *contra*.

McLEAN, J., delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Ohio.

The proceeding was instituted to reverse a decree of that court, entered in behalf of Jacob Knoop, treasurer, against the Piqua Branch of the State Bank of Ohio, for a tax of twelve hundred and sixty-six dollars and sixty-three cents, assessed against the said branch bank for the year 1851. . . .

The assumption that a State, in exempting certain property from taxation, relinquishes a part of its sovereign power, is unfounded. The taxing power may select its objects of taxation; and this is generally regulated by the amount necessary to answer the purposes of the

[1] Compare *Antoni* v. *Greenhow*, 107 U. S. 769; *Parsons* v. *Slaughter*, 63 Fed. Rep. 876 (1894). — ED.

State. Now the exemption of property from taxation is a question of policy and not of power. A sound currency should be a desirable object to every government; and this in our country is secured generally through the instrumentality of a well-regulated system of banking. To establish such institutions as shall meet the public wants and secure the public confidence, inducements must be held out to capitalists to invest their funds. They must know the rate of interest to be charged by the bank, the time the charter shall run, the liabilities of the company, the rate of taxation, and other privileges necessary to a successful banking operation.

These privileges are proffered by the State, accepted by the stockholders, and in consideration funds are invested in the bank. Here is a contract by the State and the bank, a contract founded upon considerations of policy required by the general interests of the community, a contract protected by the laws of England and America, and by all civilized States where the common or the civil law is established. In *Fletcher* v. *Peck*, 6 Cranch, 135, Chief Justice Marshall says, "The principle asserted is, that one legislature is competent to repeal any Act which a former legislature was competent to pass, and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle," he says, "so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. When, then, a law is in its nature a contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community." . . .

There is no constitutional objection to the exercise of the power to make a binding contract by a State. It necessarily exists in its sovereignty, and it has been so held by all the courts in this country. A denial of this is a denial of State sovereignty. It takes from the State a power essential to the discharge of its functions as sovereign. If it do not possess this attribute, it could not communicate it to others. There is no power possessed by it more essential than this. Through the instrumentality of contracts, the machinery of the government is carried on. Money is borrowed, and obligations given for payment. Contracts are made with individuals, who give bonds to the State. So in the granting of charters. If there be any force in the argument, it applies to contracts made with individuals, the same as with corporations. But it is said the State cannot barter away any part of its sovereignty. No one ever contended that it could.

A State, in granting privileges to a bank, with a view of affording a sound currency, or of advancing any policy connected with the public interest, exercises its sovereignty, and for a public purpose, of which it is the exclusive judge. Under such circumstances, a contract made for a specific tax, as in the case before us, is binding. This tax continues, although all other banks should be exempted from taxation. Having the power to make the contract, and rights becoming vested

under it, it can no more be disregarded nor set aside by a subsequent legislature, than a grant for land. This Act, so far from parting with any portion of the sovereignty, is an exercise of it. Can any one deny this power to the legislature? Has it not a right to select the objects of taxation and determine the amount? To deny either of these, is to take away State sovereignty.

It must be admitted that the State has the sovereign power to do this, and it would have the sovereign power to impair or annul a contract so made, had not the Constitution of the United States inhibited the exercise of such a power. The vague and undefined and indefinable notion, that every exemption from taxation or a specific tax, which withdraws certain objects from the general tax law, affects the sovereignty of the State, is indefensible.

There has been rarely, if ever, it is believed, a tax law passed by any State in the Union, which did not contain some exemptions from general taxation. The Act of Ohio of the 25th of March, 1851, in the fifty-eighth section, declared that "the provisions of that Act shall not extend to any joint-stock company which now is, or may hereafter be organized, whose charter or Act of incorporation shall have guaranteed to such company an exemption from taxation, or has prescribed any other as the exclusive mode of taxing the same." Here is a recognition of the principle now repudiated. In the same Act, there are eighteen exemptions from taxation.

The Federal government enters into an arrangement with a foreign State for reciprocal duties on imported merchandise, from the one country to the other. Does this affect the sovereign power of either State? The sovereign power in each was exercised in making the compact, and this was done for the mutual advantage of both countries. Whether this be done by treaty, or by law, is immaterial. The compact is made, and it is binding on both countries.

The argument is, and must be, that a sovereign State may make a binding contract with one of its citizens, and, in the exercise of its sovereignty, repudiate it.

The Constitution of the Union, when first adopted, made States subject to the Federal judicial power. Could a State, while this power continued, being sued for a debt contracted in its sovereign capacity, have repudiated it in the same capacity? In this respect the Constitution was very properly changed, as no State should be subject to the judicial power generally. . . .

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. . . .

Having considered this case in its legal aspects, as presented in the arguments of counsel, and in the views of the Supreme Court of the State, and especially as regards the rights of the bank under the charter, we are brought to the conclusion, that in the acceptance of the charter, on its terms, and the payment of the capital stock, under an agreement to pay six per cent semi-annually on the dividends made, deducting expenses and ascertained losses, in lieu of all taxes, a contract was made binding on the State and on the bank; and that the tax law of 1851, under which a higher tax has been assessed on the bank than was stipulated in its charter, impairs the obligation of the contract, which is prohibited by the Constitution of the United States, and, consequently, that the Act of 1851, as regards the tax thus imposed, is void. The judgment of the Supreme Court of Ohio, in giving effect to that law, is, therefore, reversed.[1]

Mr. Justice Catron, Mr. Justice Daniel, and Mr. Justice Campbell dissented.

Taney, C. J., gave a separate opinion.

[1] Affirmed in *Jefferson Bank* v. *Skelly*, 1 Black, 437, 447 (1861) Compare *Gordon* v. *Appeal Tax Court*, 3 How. 133 (1844). In *Home of the Friendless* v. *Rouse*, 8 Wall. 430, 438 (1869), Davis, J., for the court, said: "The validity of this contract is questioned at the bar on the ground that the legislature had no authority to grant away the power of taxation. The answer to this position is, that the question is no longer open for argument here, for it is settled by the repeated adjudications of this court, that a State may by contract based on a consideration, exempt the property of an individual or corporation from taxation, either for a specified period, or permanently. And it is equally well settled that the exemption is presumed to be on sufficient consideration, and binds the State if the charter containing it is accepted.

"It is proper to say that the present Constitution of Missouri prohibits the legislature from entering into a contract which exempts the property of an individual or corporation from taxation, but when the charter in question was passed there was no constitutional restraint on the action of the legislature in this regard."

In this case and the next, *The Washington University* v. *Rouse*, Ib. 439, 441, Chase, C. J., and Field and Miller, JJ., dissented. Miller, J., for the three justices, said: "It is the settled doctrine of this court, that it will, in every case affecting personal rights, where, by the course of judicial proceedings, the matter is properly presented, decide whether a State law impairs the obligation of contracts; and if it does, will declare such law ineffectual for that purpose. And it is also settled, beyond

controversy, that the State legislatures may, by the enactment of statutes, make contracts which they cannot impair by any subsequent statutes.

"It may be conceded that such contracts are so far protected by the provisions of the Federal Constitution that even a change in the fundamental law of the State, by the adoption of a new constitution, cannot impair them, though express provisions to that effect are incorporated in the new constitution. We are also free to admit that one of the most beneficial provisions of the Federal Constitution, intended to secure private rights, is the one which protects contracts from the invasion of State legislation. And that the manner in which this court has sustained the contracts of individuals has done much to restrain the State legislatures, when urged by the pressure of popular discontent under the sufferings of great financial disturbances, from unwise, as well as unjust legislation. In this class of cases, when the validity of the contract is clear, and the infringement of it by the legislature of a State is also clear, the duty of this court is equally plain.

"But we must be permitted to say, that in deciding the first of these propositions, namely, the validity of the contract, this court has, in our judgment, been, at times, quick to discover a contract that it might be protected, and slow to perceive that what are claimed to be contracts were not so, by reason of the want of authority in those who profess to bind others. This has been especially apparent in regard to contracts made by legislatures of States, and by those municipal bodies to whom, in a limited measure, some part of the legislative function has been confided.

"In all such cases, where the validity of the contract is denied, the question of the power of the legislative body to make it necessarily arises, for such bodies are but the agents and representatives of the greater political body — the people, who are benefited or injured by such contracts, and who must pay, when anything is to be paid, in such cases. That every contract fairly made ought to be performed is a proposition which lies at the basis of judicial education, and is one of the strong desires of every well-organized judicial mind. That, under the influence of this feeling, this court may have failed in some instances to examine, with a judgment fully open to the question, into the power of such agents, is to be regretted, but the error must be attributed to one of those failings which lean to virtue's side. In our judgment, the decisions of this court, relied upon here as conclusive of these cases, belong to the class of errors we have described.

"We do not believe that any legislative body, sitting under a State Constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the State. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society. While under such forms of government, the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful.

"It cannot be maintained, that this power to bargain away, for an unlimited time, the right of taxation, if it exist at all, is limited, in reference to the subjects of taxation. In all the discussion of this question, in this court and elsewhere, no such limitation has been claimed. If the legislature can exempt in perpetuity, one piece of land, it can exempt all land. If it can exempt all land, it can exempt all other property. It can, as well, exempt persons as corporations. And no hindrance can be seen, in the principle adopted by the court, to rich corporations, as railroads and express companies, or rich men, making contracts with the legislatures, as they best may, and with such appliances as it is known they do use, for perpetual exemption from all the burdens of supporting the government.

"The result of such a principle, under the growing tendency to special and partial legislation, would be, to exempt the rich from taxation, and cast all the burden of the

VICKSBURG, ETC. RAILROAD COMPANY *v.* DENNIS.

SUPREME COURT OF THE UNITED STATES. 1886.

[116 *U. S.* 665.]

THE original suit was brought by the sheriff, and *ex officio* collector of taxes, of the parish of Madison in the State of Louisiana, to recover the amount of taxes assessed, under general laws of the State, in 1877 and 1878 to the Vicksburg, Shreveport & Texas Railroad Company and in 1880 to the Vicksburg, Shreveport & Pacific Railroad Company, upon thirty-four miles of railroad, with fixtures and appurtenances, in that parish. The Vicksburg, Shreveport & Texas Railroad Company was incorporated on April 28, 1853, by a statute of Louisiana, to construct and maintain a railroad from a point in the parish of Madison on the Mississippi River opposite Vicksburg, westward by way of Monroe and Shreveport, to the line of the State of Texas.

Section 2 of that statute was as follows: "The capital stock of said company shall be exempt from taxation, and its road, fixtures, workshops, warehouses, vehicles of transportation and other appurtenances, shall be exempt from taxation for ten years after the completion of said road within the limits of this State."

The eastern part of the railroad, from Vicksburg to Monroe, about seventy-five miles, was completed before January 1, 1861; and the western part, from Shreveport to the Texas line, about twenty-five miles, was completed before January 1, 1862; leaving the central part, from Monroe to Shreveport, about one hundred miles, uncompleted. The further construction of the road was prevented and suspended during the civil war, and much of the track, bridges, stations, and workshops was destroyed by the hostile armies.

Soon after the return of peace, a holder of four out of a large number of bonds secured by a mortgage executed by the corporation on September 1, 1857, of its railroad, property and franchises, commenced a suit in a court of the State of Louisiana, and obtained a decree for the sale of the whole mortgaged property, and it was sold under that decree.

support of government, and the payment of its debts, on those who are too poor or too honest to purchase such immunity.

"With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court, and that the one we have here considered is of this character. We are strengthened, in this view of the subject, by the fact that a series of dissents, from this doctrine, by some of our predecessors, shows that it has never received the full assent of this court; and referring to those dissents for more elaborate defence of our views, we content ourselves with thus renewing the protest against a doctrine which we think must finally be abandoned."

Compare *Thorpe* v. *R. & B. R. R. Co.*, *supra*, pp. 706, 707. See Prof. J. F. Colby's *Exemption from Taxation by Legislative Contract*, 13 Am. Law Rev. 26 (1878). — ED.

Upon a suit afterwards brought by a very large number of the bond-holders, in behalf of all, in the Circuit Court of the United States, that sale was, by a decree of this court at October term, 1874, annulled as fraudulent and illegal, and the railroad, property and franchises ordered to be sold for the benefit of the bond-holders and other creditors of the corporation. *Jackson* v. *Ludeling*, 21 Wall. 616.

On December 1, 1879, they were sold pursuant to this decree, and purchased by a committee of the bond-holders, who on the next day organized themselves with their associates into a corporation under the General Statute of Louisiana of March 8, 1877, by the name of the Vicksburg, Shreveport & Pacific Railroad Company, and now claimed to be entitled under this statute to all the rights, powers, privileges and immunities of the Vicksburg, Shreveport & Texas Railroad Company, including its exemption from taxation.

In 1881 and 1882 the new corporation made contracts for the completion of the railroad between Monroe and Shreveport, and began to complete it; but it has not yet been completed.

The Supreme Court of Louisiana held, that the provision of the Statute of 1853, exempting the railroad, fixtures and appurtenances "from taxation for ten years after the completion of said road," did not relieve the old corporation from taxation before the road was completed; and therefore gave judgment for the plaintiff, without determining whether the new corporation had succeeded to the rights of the old one in this respect. 34 La. Ann. 954.

A writ of error was sued out by the defendant, and allowed by the Chief Justice of that court. . . . *Mr. Edgar M. Johnson,* for plaintiff in error; *Mr. George Hoadly* and *Mr. Edward Colston* were with him on the brief. *Mr. Thomas O. Benton*, for defendant in error; *Mr. John S. Young* was with him on the brief.

Mr. Justice Gray delivered the opinion of the court. After stating the facts as above reported, he continued: —

In determining whether a statute of a State impairs the obligation of a contract, this court doubtless must decide for itself the existence and effect of the original contract (although in the form of a statute) as well as whether its obligation has been impaired. *Louisville & Nashville Railroad* v. *Palmes*, 109 U. S. 244, 256, 257, and cases cited; *Wright* v. *Nagle*, 101 U. S. 791, 794. But the construction given by the Supreme Court of Louisiana to the contract relied on in the present case accords not only with its own decision in the earlier case of *Baton Rouge Railroad* v. *Kirkland*, 33 La. Ann. 622, but with the principles often affirmed by this court.

In the leading case of *Providence Bank* v. *Billings*, 4 Pet. 514, Chief Justice Marshall, speaking of a partial release of the power of taxation by a State in a charter to a corporation, said: "That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm." "As the whole community is interested in retaining it undiminished;

that community 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." "We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction." 4 Pet. 561–563.

In *Philadelphia & Wilmington Railroad* v. *Maryland*, 10 How. 376, Chief Justice Taney said: "This court on several occasions has held, that the taxing power of a State is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms." 10 How. 393.

In the subsequent decisions, the same rule has been strictly upheld and constantly reaffirmed, in every variety of expression. It has been said that "neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken;" that exemption from taxation "should never be assumed unless the language used is too clear to admit of doubt;" that "nothing can be taken against the State by presumption or inference; 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 intent of the legislature, that doubt must be solved in favor of the State;" that a State "cannot by ambiguous language be deprived of this highest attribute of sovereignty;" that any contract of exemption "is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require;" and that such exemptions are regarded "as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the grants, construed *strictissimi juris*." *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 446; *Gilman* v. *Sheboygan*, 2 Black, 510, 513; *Delaware Railroad Tax*, 18 Wall. 206, 225, 226; *Hoge* v. *Railroad Co.*, 99 U. S. 348, 355; *Southwestern Railroad* v. *Wright*, 116 U. S. 231, 236; *Erie Railway* v. *Pennsylvania*, 21 Wall. 492, 499; *Memphis Gaslight Co.* v. *Shelby Taxing District*, 109 U. S. 398, 401; *Tucker* v. *Ferguson*, 22 Wall. 527, 575; *West Wisconsin Railway* v. *Supervisors*, 93 U. S. 595, 597; *Memphis & Little Rock Railroad* v. *Railroad Commissioners*, 112 U. S. 609, 617, 618.

It is argued in support of this writ of error, that as the exemption from taxation of the capital stock was unqualified and perpetual, and began at the very moment of the creation of the corporation, the further exemption of the railroad and its appurtenances, conferred in the same section, was intended to begin at the same moment, although limited in duration to ten years after the completion of the road; and that the legislature, while exempting the railroad from taxation for ten years after its completion, could not have intended to subject it to taxation before its completion and while its earnings were little or nothing.

On the other hand, it is argued that the consideration of the exemption from taxation, as of all the franchises and privileges granted by the State to the corporation, was the undertaking of the corporation to prosecute to completion within a reasonable time the work of building the whole railroad from the Mississippi to the Texas line; that one reason for defining the exemption of the railroad and its appurtenances from taxation as "for ten years after the completion of said road," without including any time before its completion, was to secure a prompt execution of the work, and to prevent the corporation from defeating the principal object of the grant, and prolonging its own immunity from taxation, by postponing or omitting the completion of a portion of the road; and that the State had never allowed a similar exemption to take place, except after a railroad had been entirely finished; and this argument is supported by the opinions of the Supreme Court of Louisiana in *State* v. *Morgan*, 28 La. Ann. 482, 491, and in the case at bar, 34 La. Ann. 954, 958.

Each of these arguments rests too much on inference and conjecture to afford a safe ground of decision, where the words of the statute creating the exemption are plain, definite and unambiguous.

In their natural and their legal meaning, the words "for ten years after the completion of said road" as distinctly exclude the time preceding the completion of the road, as the time succeeding the ten years after its completion. If the legislature had intended to limit the end only, and not the beginning, of the exemption, its purpose could have been easily expressed by saying "until" instead of "for," so as to read "until ten years after the completion," leaving the exemption to begin immediately upon the granting of the charter.

To hold that the words of exemption actually used by the legislature include the time before the completion of the road would be to insert by construction what is not to be found in the language of the contract; to presume an intention, which the legislature has not manifested in clear and unmistakable terms, to surrender the taxing power; and to go against the uniform current of the decisions of this court upon the subject, as shown by the cases above referred to.

The omission of the taxing officers of the State in previous years to assess this property cannot control the duty imposed by law upon their successors, or the power of the legislature, or the legal construction of the statute under which the exemption is claimed.

In the case of *Morgan* v. *Louisiana*, 93 U. S. 217, affirming the decision in 28 La. Ann. 482, neither this court nor the Supreme Court of Louisiana expressed any opinion upon the question now before us, because both courts held that, the sale of the railroad in that case having taken place before the passage of the statute of 1877, whatever rights were conferred by a similar clause of exemption had not passed to the purchasers. *Judgment affirmed.*

MR. JUSTICE FIELD, with whom concurred the CHIEF JUSTICE, MR. JUSTICE MILLER, and MR. JUSTICE BRADLEY, dissenting.

I am obliged to dissent from the judgment in this case. I agree with the majority of the court in all that is said in the opinion as to the construction of statutes, which are alleged to exempt from the taxing power of the State property within its jurisdiction. Where there is a reasonable doubt as to their construction, whether or not they create the exemption, it should be solved in favor of the State. But here it does not seem to me there can be any such doubt. The statute in question declares that the capital stock of the company "shall be exempt from taxation, and its roads, fixtures, workshops, warehouses, vehicles of transportation, and other appurtenances, shall be exempt from taxation, for ten years after the completion of said road within the State." This exemption was designed to aid the road, and was, therefore, much more needed during its construction than when completed. It seems like a perversion of the purpose of the statute to hold that it intended to impede by its burden the progress of the desired work, and relieve it of the burden only when finished. The enterprise is to be nursed, according to the majority of the court, not in its infancy, but when successfully carried out and needs no support.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE MILLER, and MR. JUSTICE BRADLEY concur with me in this dissent.[1]

[1] Compare *Morgan* v. *La.*, 93 U. S. 217, 224 (1876). "Immunity of particular property from taxation is a privilege which may sometimes be transferred under that designation, as held in *Humphrey* v. *Pegues*, 16 Wall. 244. All that we now decide is, that such immunity is not itself a franchise of a railroad corporation which passes as such without other description, to a purchaser of its property." — FIELD, J., for the court.

In *Picard* v. *East Tenn. &c. R. R. Co.*, 130 U. S. 637 (1888), on an appeal from the Circuit Court of the United States for the Middle District of Tennessee, FIELD, J., for the court, said: "This is a suit to enjoin the collection of certain taxes for the years 1883 and 1884, assessed by the Board of Railroad Tax Assessors of Tennessee against the property of the complainant, the East Tennessee, Virginia & Georgia Railroad Company. The property formerly belonged to the Cincinnati, Cumberland Gap & Charleston Railroad Company; and the claim asserted by the bill is, that the property, whilst held by that company, was exempt from taxation, and that such exemption has accompanied it in its transfer to the complainant. That company was incorporated by an Act of the Legislature of Tennessee, passed November 18, 1853. Among other things the Act provided that whenever the company should have completed its road from Cumberland Gap to the East Tennessee & Virginia Railroad, or to the southern boundary line of the State, it should 'have all the rights and privileges' conferred by its charter for a period of ninety-nine years. Statutes of Tenn. 1853–54, c. 301, § 6. It also declared that the company should be vested, except as otherwise provided by its charter, with 'all the rights, powers, and privileges, and subject to all the restrictions and liabilities, of the Nashville & Louisville Railroad Company.' [The charter of this last-named corporation, and of another one whose rights were alleged to have passed to the plaintiffs, gave exemption from taxation under certain conditions; but the court now holds that these exemptions had never taken effect.]

"Assuming, however, that we are mistaken in the construction given as to the effect of the provisions in the charters of the two companies, the Nashville & Louisville Railroad Company and the East Tennessee & Virginia Railroad Company, and that the references to those companies are to be construed as embodying all 'the rights,

powers and privileges' which it was intended the Nashville & Louisville Railroad Company should possess if the Act creating its charter had been re-enacted by Kentucky, and which it was intended the East Tennessee & Virginia Railroad Company should possess after the completion of its road, our conclusion upon the questions involved would not be affected. It is conceded that the property of the company passed upon sales and conveyances made under a decree rendered in a suit against the company, commenced by the State of Tennessee, to parties who have since conveyed the same to the complainant. That suit was brought to enforce a statutory lien reserved by the State as security for the loan of her bonds issued to the company, and the sale made under the decree, and confirmed, was of the 'property and franchises' of the railroad company.

"By this sale and the conveyance which followed, immunity from taxation did not pass. Such immunity is not in itself transferable. It has been held, and the doctrine has been so often repeated that it is no longer an open question, that the legislature of a State may exempt the property of particular persons or corporations from taxation, either for a limited period or perpetually; but to justify the conclusion that such exemption is granted, it must appear by language so clear and unmistakable as to leave no doubt of the purpose of the legislature. The power of taxation is one of the highest attributes of sovereignty, and the suspension of its exercise as to any persons or property is not a matter to be presumed or inferred. It must be declared or it will not be deemed to exist. If the legislature can lay aside a power devolved upon it for the good of the whole people of the State, for the benefit of a private party, it must speak in such unmistakable terms that they will not admit of any reasonable construction consistent with the reservation of the power. *The Delaware Railroad Tax*, 18 Wall. 206, 225.

"Yielding to the doctrine that immunity from taxation may be granted, that point being already adjudged, it must be considered as a personal privilege not extending beyond the immediate grantee, unless otherwise so declared in express terms. The same considerations which call for clear and unambiguous language to justify the conclusion that immunity from taxation has been granted in any instance must require similar distinctness of expression before the immunity will be extended to others than the original grantee. It will not pass merely by a conveyance of the property and franchises of a railroad company, although such company may hold its property exempt from taxation. As we said in *Morgan* v. *Louisiana*, 93 U. S. 217, 223: 'The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction.' It is true there are some cases where the term 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the Act have given such meaning to it. The later, and, we think, the better opinion is, that unless other provisions remove all doubt of the intention of the legislature to include the immunity in the term 'privileges,' it will not be so construed. It can have its full force by confining it to other grants to the corporation. . . .

"The decree below must therefore be reversed and the cause remanded, with directions to dismiss the bill, and it is so ordered."

In *Yazoo, &c. R. R. Co.* v. *Thomas*, 132 U. S. 174, 185 (1889), in citing and following the case in the text, FULLER, C. J., for the court, remarked: "The court [in that case] took occasion to reiterate the well-settled rule that exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the language used, construed *strictissimi juris*." And so *Wilm. & Weld. R. R.*, 146 U. S. 279, 294 (1892). Compare *Keokuk & Wash. R. R. Co.* v. *Mo.*, 152 U. S. 301, 311 (1894), *State* v. *C. B. & K. R. R. Co.*, 89 Mo. 523. — ED.

MOBILE AND OHIO RAILROAD COMPANY *v.* TENNESSEE.

SUPREME COURT OF THE UNITED STATES. 1894.

[153 *U. S.* 486.]

THE case is stated in the opinion.

Mr. E. J. Phelps and *Mr. F. W. Whitridge* (with whom was *Mr. E. L. Russell* on the brief), for plaintiff in error; *Mr. G. W. Pickle*, Attorney-General of Tennessee, *Mr. M. M. Neil*, and *Mr. J. M. Troutt*, for defendants in error; *Mr. F. W. Moore*, *Mr. John E. Wells*, *Mr. S. A. Champion*, *Mr. J. R. Deason*, *Mr. E. L. Bullock*, *Mr. A. W. Stovall*, and *Mr. James M. Head* were with them on their briefs.

MR. JUSTICE JACKSON delivered the opinion of the court.

The Federal question presented by the writ of error in this case is whether State statutes, subjecting the property of a railroad corporation to taxation, impair the obligation of the contract contained in an exemption clause of the company's charter?

It arises in this way: The State of Tennessee and certain counties therein in February, 1891, filed their bill against the Mobile and Ohio Railroad Company (hereafter styled the railroad company), and its mortgagee, the Farmers' Loan and Trust Company, to enforce the collection of State and county taxes, assessed upon the property, roadbed, and fixtures of the railroad company for the years 1885 to 1889 inclusive. The defence specially interposed, and which raises the Federal question in the case, was that the revenue statutes of the State, enacted subsequent to the granting of the charter, and under which the taxes sought to be collected were levied, impaired the obligation of the contract contained in the railroad company's charter, and were therefore unconstitutional and void.

The railroad company was chartered by an Act of the Legislature of the State of Tennessee, approved January 28, 1848. The State in granting the charter reserved no right to amend or repeal the same; nor was there any provision either in the Constitution or the general laws of the State — in existence at the time — which reserved to the State the right to alter, modify, or repeal the charter. By section 11 of the Act of incorporation it was provided: "That the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent."

Various grounds were alleged in the bill on which the effect of section 11 was sought to be avoided, or to show that the railroad company had waived or forfeited the benefits of the exemption contained in the last clause thereof. These allegations need not, however, be noticed,

as they were found and adjudged by the Supreme Court of Tennessee against the complainants, and in favor of the railroad company. The pleadings admitted and the proofs established that since the completion of the road to its original northern terminus on the Mississippi River, in April, 1861, the railroad company had neither earned nor declared any dividend, either on its whole line or upon any portion of its road lying in the State of Tennessee. It is also shown that its earnings for the years 1885 to 1889, inclusive, were insufficient to pay any dividend to its stock-holders.

The period of twenty-five years from the completion of the road, referred to in the section, having expired on April 22, 1886, the Supreme Court of the State disallowed the taxes assessed and claimed for the years 1885 and 1886, on the ground that they were covered by the twenty-five year exemption, but adjudged and decreed that the railroad company was liable to the respective complainants for the taxes of 1887, 1888, and 1889. . . .

It is contended by counsel for defendants in error that this court is without jurisdiction to review the judgment of the Supreme Court of Tennessee, because it was based, or proceeded, upon the ground that there was no contract in existence between the railroad company and the State to be impaired, and that the supposed contract was in violation of the State Constitution of 1834, and hence not within the power of the legislature to make. In support of this proposition there are cited, *Railroad Company* v. *McClure*, 10 Wall. 511, 515; *Boyd* v. *Alabama*, 94 U. S. 645; *Yazoo and Miss. Valley Railroad* v. *Thomas*, 132 U. S. 174; and *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79.

These decisions need not be specially reviewed, for they clearly do not apply to the case under consideration. It is well settled that the decision of a State court holding that, as a matter of construction, a particular charter, or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a State, by its terms or necessary operation, gives effect to some provisions of the State law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the State law complained of impairs its obligation. A brief reference to some of the authorities is sufficient to show this: . . .

In *New Orleans Water Co.* v. *Louisiana Sugar Co.*, 125 U. S. 18, 38, it was said by Mr. Justice Gray, speaking for the court: (1) "When the State court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction." (2) "When the existence and construction of a contract are undisputed, and the State court upholds a subsequent law on the

ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction." (3) "When the State court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract, and, if it is of opinion that it did not confer the right affirmed by the State court, and therefore its obligation was not impaired by the subsequent law, may, on that ground, affirm the judgment." (4) "So, when the State court upholds the subsequent law on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld." . . .

Also, in *Huntington* v. *Attrill*, 146 U. S. 657, 684, the court said: "The case in this regard is analogous to one arising under the clause of the Constitution which forbids a State to pass any law impairing the obligations of contracts, in which, if the highest court of the State decide nothing but the original construction and obligation of a contract, this court has no jurisdiction to review the decision; but if the State court gives effect to a subsequent law which is impugned as impairing the obligations of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is." . . . [Here a considerable number of other cases are cited to the same point.]

The grounds upon which the Supreme Court of the State held that the contract, claimed by the railroad company under the eleventh section of its charter, was invalid, in no way affects the jurisdiction of this court. The legal existence of the contract itself, and its proper construction, is necessarily involved in the question of the alleged impairment of the obligation thereof.

It appears from the decree of the Supreme Court of the State that the exemption clause relied on by the plaintiffs in error was held to be invalid on two grounds: First, that it was in conflict with section 28, article 2, of the State Constitution of 1834; and, second, it was invalid and unenforceable for vagueness and uncertainty, because it did not appear from the clause, or otherwise in the charter, upon what the dividends were to be declared, inasmuch as there was no amount or limit of capital stock fixed in the charter, and no means provided for either fixing the same or for ascertaining the dividends thereon.

This last ground on which the court rested its judgment is manifestly unsound, for the clause in question, that "no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent," is clearly not so incapable of any reasonable construction as to be void. On the contrary, its terms are plain and unambiguous. The only matter involving construction or interpretation is the meaning to be attached to the term "dividend." It admits of no question that the word "dividend" mentioned therein has reference to dividends on the capital stock of the company held and owned by its share-holders.

The term "dividend" in its technical as well as in its ordinary acceptation means that portion of its profits which the corporation, by its directory, sets apart for ratable division among its share-holders. *Lockhart* v. *Van Alstyne,* 31 Michigan, 76; Boone on Corporations, s. 125. . .

It must be assumed that the Legislature of Tennessee used the term "dividends," in the exemption clause under consideration, in the general sense indicated, and had reference to that portion of the net earnings of the company which legitimately constituted profits and could be rightfully apportioned or distributed among share-holders. There is no difficulty in ascertaining the amount of such profits in any year, and the stock actually issued being fixed, it is hard to understand how it could be held that the exemption clause was void and unenforceable for want of certainty. The law regards that as certain which is capable of being ascertained and definitely fixed. The State cannot complain that no method has been provided for ascertaining the amount of profits applicable to the payment of the designated dividends. That is a matter purely of administration, which does not touch in any way the validity of the contract embodied in the exemption clause. . . .

It being settled that there was no requirement of the Constitution that all property should be taxed, and that the Legislature of Tennessee, under the Constitution of 1834, had the power to grant exemption from taxation in charters of incorporations, and that such charters, after acceptance, became binding and irrevocable contracts, the real controversy in the present case, while extremely important in its consequences to both the State and the railroad company, lies within a very narrow compass, and turns upon the proper construction of the last clause of section 11 of the charter, which provides that "no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent."

Does this clause constitute an immunity, fixed, special, conditional, or contingent, from taxation?

It is undoubtedly a part of the contract of exemption from taxation contained in the eleventh section of the charter, and as such the corporation is entitled to the benefit thereof. The meaning and intent of the provision was clearly a stipulation on the part of the legislature to forego the exertion of its taxing power to the extent of allowing the corporation to pay its share-holders eight per cent dividends from the net earnings of the company. The manifest object of the clause was to invite and encourage the investment of private capital in the enterprise of building the road. By the previous clauses of the section the capital stock was exempt from taxation forever, and the road, with all its fixtures and franchises, was exempt for the period of twenty-five years from its completion. These exemptions were primarily for the benefit of the corporation. The shares of stock were subject to taxation against the owners or holders thereof, and this last clause was clearly intended for their benefit to the extent of securing, as far as an immunity from taxation would do so, any reduction of dividends on their stock below eight per cent per annum.

The constitutional power to grant exemption, wholly or partially, and for fixed or indefinite periods, necessarily includes the power to exempt upon conditions or contingencies which are to happen in the future. To hold that an exemption is good for a term of years, and is not good if made to depend upon a plain contingency by which it may take effect in some years and not in others, is, as counsel for the plaintiffs in error justly insist, a distinction neither sound in principle nor supported by authority.

The intent and purpose of the clause in question are clear, not only from its language, but from the history and circumstances preceding and surrounding the grant of the charter. The State Constitution of 1834 declared that a well-regulated system of internal improvement should be encouraged. The incorporating Act recited that "it is deemed a matter of vital importance to this State that a direct communication by railroad to the Gulf of Mexico be established." The State was practically without railroad facilities and needed a line of transportation extending through the interior of its western division, and connecting it with the Gulf of Mexico on the south and the Mississippi River and its tributaries on the north. Its special interest in the road in question was manifested by the third section of the charter, which "required the company to open books for the subscription of shares in the capital stock of the company in the State of Tennessee, so as to afford citizens of the State an opportunity to take stock to the amount of one-fourth of the capital of the company;" and to induce its own citizens, as well as outside capitalists, to invest and risk their money in the enterprise, more or less hazardous, was the manifest object of the exemption contained in section 11 of the railroad company's charter, the latter clause of which was especially designed to secure or to give an assurance of a reasonable return to the parties taking the stock of the company by postponing the taxing power of the State to the payment of the designated dividends. . . .

In dealing with an exemption from taxation, like that under consideration, good faith is required on the part of both parties to the contract. While the State may not impair or restrict its operation, neither may the railroad company enlarge it at will and without limitation. It is not shown that the railroad company has made any improper or fictitious increase, either of its capital stock or of its bonded indebtedness. On the contrary, the proof establishes that the par value of the 53,206 shares of capital stock outstanding was realized therefor, dollar for dollar, and this amount of capital stock, together with the existing bonded indebtedness of the company, represents the cost of constructing and equipping the railroad. The legislature, in granting the exemption in question, doubtless had in contemplation the cost of the enterprise, and may have intended the immunity from taxation to be estimated on that basis, as in the Mississippi charter.

But however this may be, in sustaining the validity of the exemption in the present case we do not mean to be understood as holding that

the railroad company has the right in its discretion, hereafter, to issue additional capital stock, or to increase its bonded indebtedness, even for legitimate purposes, and have the same taken into consideration upon the question of its liability for taxation under the eight per cent dividend clause of the charter.

Our conclusion upon the whole case, which has received careful consideration, is that the decree of the Supreme Court of the State declaring the exemption clause of the company's charter void, and holding the statutes of the State, under which the taxes sought to be collected were levied, to be valid and constitutional, was erroneous.

Judgment reversed and cause remanded to the Supreme Court of the State of Tennessee for further proceedings not inconsistent with this opinion.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE GRAY, MR. JUSTICE BREWER, and MR. JUSTICE SHIRAS, dissenting.

In my opinion, the judgment of the Supreme Court of Tennessee should be affirmed. It is well settled that the taxing power of a State cannot properly be held to have been relinquished in any instance, unless the deliberate purpose of the State to that effect clearly appears. Exemption therefrom is in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the grant, construed *strictissimi juris.* An exemption is claimed in this case under the eleventh section of the company's charter from the State of Tennessee. . . . The reasonable meaning of this section seems to me plainly to be that the capital stock is exempted forever, and the road, its fixtures, etc., for twenty-five years from the completion of the road, after which the exemption has spent its force, and the road, fixtures, etc., become taxable, but the taxation must be so laid as not to reduce the dividends below eight per cent. The closing words prescribe a rule of taxation, and do not operate to continue an exemption which has expired by the express terms of the grant. What is forbidden is the laying of a tax in such manner as will produce a particular result. If this be not clear, as I think it is, yet any other construction is certainly not so, and doubt is fatal to the claim.

If the exemption exists as insisted, then the capital stock is free from taxation forever, and the road and its property is likewise free until, after deducting from its earnings all expenses, fixed charges (which include interest on all its bonded debt), and eight per cent upon its capital stock, there remains a surplus sufficient to pay all the taxes on its property according to the current rate. By the company's Alabama charter it was provided that the capital stock should not exceed ten millions; the Mississippi Act set forth that Act in full; the Tennessee Act provided that the citizens of that State might subscribe to the amount of one-fourth of the capital. So far as the eleventh section is concerned, the amount of capital stock at any particular time, or what the taxes on the company's property in any particular year might

be, is left undefined. The view contended for practically leaves it to the company to say when it may be taxed and when not; and while a State must be held to the bargains it makes, however improvident, it ought not to be held to have made such a contract as it is argued this is, unless its terms are so plain as not to be open to construction.

The difference between this provision and that in the company's charter in Mississippi, referring to the same subject, is significant. The latter reads: "That whenever any portion of said railroad shall be completed through this State, and is paying an interest of eight per cent per annum on its cost, and not before, such portion may be taxed the same percentage, and no more, upon the capital expended in the construction thereof, as lands in this State shall be taxed." That difference explains why the Supreme Courts of Mississippi and Tennessee arrived at different conclusions.

In a certain line of cases, absolute exemptions from taxation have been recognized as secured in consideration of certain amounts to be paid, sometimes called taxes, although really merely the consideration paid as under contract; but the principle of commutation has no application here.

I concur with the Supreme Court of Tennessee in regarding the last part of the eleventh section as prescribing a special and discriminative rule of taxation; and as that court held it void as such, because in conflict with the equality and uniformity clause of the Constitution of 1834, that conclusion should be accepted.

I am constrained, therefore, to dissent from the opinion and judgment just announced, and am authorized to say that Mr. Justice Gray, Mr. Justice Brewer, and Mr. Justice Shiras concur in this dissent.

TOMLINSON *v.* JESSUP.

Supreme Court of the United States. 1872.

[15 *Wall.* 454.]

Appeal from the Circuit Court for the District of South Carolina; the case being this: Jessup, of New York, an owner of a number of shares in the Northeastern Railroad Company, a corporation created in 1851 by the State of South Carolina, filed a bill in the court below against Tomlinson and others, officers of the State of South Carolina, to enjoin them from levying a tax on the property of the road. The question was whether the property was liable to taxation under the legislation of the State. . . . The court below granted an injunction; at first temporary, and then final; and from the final injunction the officers of the State appealed.

Messrs. D. T. Corbin and *D. H. Chamberlain,* for the appellants; *T. G. Barker, contra.*

Mr. Justice Field delivered the opinion of the court.

The Constitution of South Carolina, adopted in 1868, declares that the property of corporations then existing or thereafter created, shall be subject to taxation, except in certain cases, not material to the present inquiry. The subsequent legislation of the State carried out this requirement and provided for the taxation of the property of railroad companies; and the question presented is, whether the Act of December, 1855, to amend the charter of the Northeastern Railroad Company, exempted the property of that company from such taxation. The company was incorporated in 1851, and at that time a general law of the State was in existence, passed in 1841, which enacted that the charter of every corporation subsequently granted, and any renewal, amendment, or modification thereof, should be subject to amendment, alteration, or repeal by legislative authority, unless the Act granting the charter or the renewal, amendment, or modification, in express terms excepted it from the operation of that law. The provisions of that law, therefore, constituted the condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made. They were as operative and as much a part of the charter and amendment, as if incorporated into them.

The Act amending the charter of the Northeastern Railroad Company, passed in December, 1855, provided that the stock of the company, and the real estate it then owned, or might thereafter acquire, connected with or subservient to the works authorized by its charter, should be exempted from taxation during the continuance of the charter. This Act contained no clause excepting the amendment from the provisions of the general law of 1841. It was, therefore, itself subject to repeal by force of that law.

It is true that the charter of the company when accepted by the corporators constituted a contract between them and the State, and that the amendment, when accepted, formed a part of the contract from that date and was of the same obligatory character. And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stock-holders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to

preserve to the State control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation.

There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. It has nevertheless been held by this court, not, however, without occasional earnest dissent from a minority, that the power of taxation over particular parcels of property, or over property of particular persons or corporations, may be surrendered by one legislative body, so as to bind its successors and the State. It was so adjudged at an early day in *New Jersey* v. *Wilson*, 7 Cranch, 164; the adjudication was affirmed in *Jefferson Bank* v. *Skelly*, 1 Black, 436, and has been repeated in several cases within the past few years, and notably so in the cases of *The Home of the Friendless* v. *Rouse*, 8 Wallace, 430, and *Wilmington Railroad* v. *Reed*, 13 Id. 264. In these cases, and in others of a similar character, the exemption is upheld as being made upon considerations moving to the State which give to the transaction the character of a contract. It is thus that it is brought within the protection of the Federal Constitution. In the case of a corporation the exemption, if originally made in the Act of incorporation, is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter. When made, as in the present case, by an amendment of the charter, it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation. Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State. Rights acquired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here. The State only asserts in the present case the power under the reservation to modify its own contract with the corporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired.

Decree reversed, and the cause remanded with directions to

Dismiss the suit.[1]

[1] And so *Louisv. Water Co.* v. *Clark*, 143 U. S. 1 (1891). In *Ham. Gas Light, &c. Co.* v. *Hamilton*, 146 U. S. 258, 270 (1892), HARLAN, J., for the court, said: "A legislative grant to a corporation of special privileges, if not forbidden by the Constitution,

SINKING-FUND CASES.

UNION PACIFIC RAILROAD COMPANY *v.* UNITED STATES. CENTRAL PACIFIC RAILROAD COMPANY *v.* GALLATIN.

SUPREME COURT OF THE UNITED STATES. 1878.

[99 *U. S.* 700.]

APPEAL from the Court of Claims. Appeal from the Circuit Court of the United States for the District of California.

The Union Pacific Railroad Company filed its petition in the Court of Claims against the United States. The court found the following facts: —

1. That during the month of July, 1878, the claimant, at the request

may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation."

In citing this passage, in *People* v. *Cook*, 148 U. S. 397, 412 (1893), the court (JACKSON, J.), said: "This principle should be especially maintained and applied in cases like the present, where the taxing power of the State is involved." Compare *McCardless* v. *Richm. &c. R. R. Co.*, 38 So. Ca. 103 (1892); *Leep* v. *St. Louis, &c. Ry. Co.*, 25 S. W. Rep. 75, 81 (Ark. 1894); *State* v. *Brown Man. Co.*, 25 Atl. Rep. 246 (R. I. 1892).

In *New Jersey* v. *Yard*, 95 U. S. 104, 111 (1877), MILLER, J., for the court, said: "The case before us differs from those in which, by the Constitution of some of the States, this right to alter, amend, and repeal all laws creating corporate privileges becomes an inalienable legislative power. The power thus conferred cannot be limited or bargained away by any Act of the legislature, because the power itself is beyond legislative control. The right asserted in this case to amend or repeal legislative grants to corporations, being itself but the expression of the will or purpose of the legislature for one particular session or term of the State of New Jersey, cannot bind any succeeding legislature which may choose to make a grant or a contract not subject to be altered or repealed; or, if any succeeding legislature to that of 1846, which enacted that 'the charter of every corporation which shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal in the discretion of the legislature,' shall grant a charter or amend a charter, declaring in the Act that it shall not be subject to alteration and repeal, the former Act is of no force in that case. So it can by a general law repeal this general reservation of the right to repeal, and all special reservations in separate charters. . . . The writer of this opinion has always believed, and believes now, that one legislature of a State has no power to bargain away the right of any succeeding legislature to levy taxes in as full a manner as the Constitution will permit. But, so long as the majority of this court adhere to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been made." It was held that in this case such a contract had been made. — ED.

of the defendant, transported troops of the United States over the claimant's road, as averred in the petition.

2. That the amount and value of said service so rendered by the claimant for the defendant, as stated in proposition first, was and is the sum of $10,451.73, the same being fair and reasonable compensation for said service, and not exceeding the amounts paid by private parties for the same kind of service.

3. That said amount was duly allowed and audited by the acccounting officers of the treasury for the said service, on the eighth day of October, 1878.

4. That on the twenty-eighth day of October, 1878, the claimant demanded of the defendant the one-half of the said sum, to wit, $5,225.68½, and protested against the payment of said one-half into any sinking-fund, or its application to the payment of bonds issued by the United States to said company, or to the interest thereon, and against the retention of said one-half by the United States on any account whatever.

5. That on the fourth day of November, 1878, the proper officers of the Treasury Department of the United States issued a warrant, No. 5950, for the said amount of $10,451.73, on account of the transportation aforesaid.

6. That on the fifth day of November, 1878, the Secretary of the Treasury refused to pay the said one-half to the claimant, giving as his reason therefor that the same was required by an Act of Congress, approved May 7, 1878, hereinafter referred to, to be turned into a sinking-fund, as provided in said Act.

7. That on Nov. 6, 1878, a draft to the order of the Secretary of the Treasury, assignee of the Union Pacific Railroad Company, for $10,451.13 was issued. That the Secretary of the Treasury made the following indorsement on the draft: —

"Pay to the Treasurer of the United States, to be by him deposited in the United States Treasury, in general account, on account of moneys received from the Union Pacific Railroad Company, being the compensation found due it for transportation performed for the War Department in July, 1878, and withheld in accordance with the provisions of sect. 2, Act May 7, 1878, as follows: —

"One-half, $5,225.86, on account of reimbursement of interest paid on bonds issued to the Union Pacific Railroad Company.

"Credit to be given under date of August —, and one-half, $5.225.87, on account sinking-fund, Union Pacific Railroad Company, to be carried to credit under sect. 4 of the above Act.

"JOHN SHERMAN,
"*Secretary of the Treasury, Assee. Union Pacific Railroad.*"

And the Assistant Treasurer of the United States indorsed the same.

8. That the Assistant Treasurer of the United States issued a certificate of deposit, showing that $10,451.73 on account of moneys re-

ceived from the Union Pacific Railroad Company, being compensation found due it for transportation performed in July, 1878, and withheld, etc., have been deposited in the treasury.

9. That revenue covering warrants were issued, showing the moneys before mentioned have been covered into the treasury, one-half, viz. $5,225.86, on account of reimbursement of interest, and one-half, viz. $5,225.87, on account of sinking-fund.

10. That the Secretary of the Treasury directed the Treasurer of the United States to purchase at the end of each month five per cent bonds of the United States, to the amount of the moneys withheld from the Union and Central Pacific Railroad Companies since July 1, 1878, and apply the same to the credit of the company from which the money may have been withheld, the bonds to be registered in the name of the Treasurer of the United States. In a schedule annexed, the sum of $5,225.87 appears as having been withheld on this account.

11. That the Treasurer of the United States, in accordance with the directions above recited, purchased bonds of the funded loan of 1881, for account of the sinking-fund, Union Pacific Railroad Company, to a large amount.

12. That an appropriation warrant was issued on account of sinking-fund, Union Pacific Railroad Company, for the amount expended by the Treasurer of the United States in the purchase of five per cent bonds as before recited, and there was included in the amount appropriated the sum of $5,225.87, which had been deposited and covered into the treasury, as shown in the other findings.

13. That the claimant never assigned or in any way parted with the claim sued for; but the issuing of said warrant mentioned in finding No. 5, in favor of the Secretary of the Treasury as assignee of the Union Pacific Railroad Company, and the issuing of the draft on said warrant, as found in finding No. 7, payable to the order of the Secretary of the Treasury as assignee of the Union Pacific Railroad Company, was each the act of the defendant, done without the consent of the claimant; and the said warrant and draft were issued in that form for the purpose of enabling the proper officers of the Treasury Department to place the said money in the treasury, as found in the preceding findings.

14. That the said amount placed to the credit of the sinking-fund, to wit, the sum of $5,225.87, as hereinbefore found, is the one half of the money earned by the claimant, as found in the above findings, Nos. 1 and 2, and for which half this action is prosecuted.

The court adjudged that the petition be dismissed, and the company thereupon appealed.

Gallatin, a stock-holder of the Central Pacific Railroad Company, filed his bill against it and the persons constituting its board of directors, to compel them to comply with the requirements of the said Act of May 7, 1878. He alleges that the board has threatened to disregard

them and that, Aug. 27, 1878, it declared a dividend of one per cent upon the capital stock of the company, payable out of the earnings accumulated since June 30, 1878, although the company was then in default in respect of the payment of five per cent of the net earnings as required by the said Act; that one of the consequences of its conduct, if persisted in, will be a forfeiture of the company's property and franchises, to his irreparable injury. He prays for an injunction to restrain the directors from paying a dividend while the company is in default in respect to any of the terms, requirements, or provisions of said Act, and from doing any other or further thing whatever in the premises in contravention or disregard thereof, or that will jeopardize or imperil, or cause or tend to cause, thereunder a forfeiture of any of the rights, privileges, grants, or franchises derived or obtained by said company from the United States.

The defendants filed a demurrer, which was overruled, and on their declining to answer, the court passed a decree in conformity with the prayer of the bill. They thereupon appealed. . . .

[An Act of Congress of July 1, 1862 (12 Stat. 489), as amended by an Act of 1864, incorporated the Union Pacific Railroad Co. to construct a railroad and telegraph from longitude 100° west from Greenwich to the western boundary of Nevada, with a land grant and various privileges, and promised an issue to the company of United States thirty-year six per cent bonds at the rate of $1,000 for each twenty miles of completed road, the repayment of the amount thereof to be secured by a first mortgage on the line and property of the company. Section 6 of the statute was as follows: —

"SECT. 6. That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and all compensation [by Act of 1864 reduced to half] for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof."

The Central Pacific Company of California, incorporated by that State, was authorized by the same statute to construct its road from the Pacific Ocean eastward until it connected with the Union Pacific Railroad, upon similar terms. The United States was to have the right, in case of unreasonable delay on the part of the companies, to cause the roads to be built at the cost of the corporations, and if a continuous through line was not finished by July 1, 1876, the whole prop-

erty was to be forfeited to the United States. Section 18 was as follows: —

"SECT. 18. That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, — including repairs, and the furnishing, running, and managing of said road, — shall exceed ten per centum upon its cost (exclusive of the five per centum to be paid to the United States), Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. And the better to accomplish the object of this Act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time — having due regard for the rights of said companies named herein — add to, alter, amend, or repeal this Act."

An Act of July 2, 1864 (13 Stat. 356), allowed the companies to issue their own first mortgage bonds on each section of the road, as completed, to an amount equal to the bonds of the United States issued to the road, and corresponding to those bonds in date, rate of interest, and otherwise, and the lien of the United States bonds previously established was subordinated to these bonds of the company, except as to the provisions of section six.

On May 7, 1878, an Act was passed (20 Stat. 56), to amend those just referred to, reciting the issue, under the foregoing statutes, by the United States and by the corporations of large amounts of bonds still outstanding, and the payment of large amounts of interest on its bonds by the United States. This Act provided what should be deemed to be net earnings, and required that *all* the compensation which should become due to the corporations for government work should be retained by the government, and half of it paid into a sinking-fund. The Act went on to establish in the United States Treasury a sinking-fund, to be invested in government bonds. This fund was to be credited with the said one-half of the compensation for government work, and with $1,200,000 in the case of the Central Pacific Railroad Company, and $850,000 in the case of the other corporation, to be paid in by the companies February 1, yearly, or so much thereof as should make, with what was before provided for, twenty-five per cent of the net earnings of the company. No dividends were to be declared until such payments were made. This fund was to be applied, in the case of each company, to the protection of the bonds of the United States and of any securities having a prior lien. A lien was created upon all the franchises and property of the companies for all sums due or thereby required to be paid to the United States; and the requirements of the Act were to be enforced by forfeiture of all the franchises and other property of the companies. The right to further amend or alter and to repeal the previous Acts, as well as the present one, was declared.

In 1864 the State of California had passed an Act in aid of the U. S. Act of 1862; and in 1866 Nevada had passed a similar Act.]

The cases were heard at the same time.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson*, for the Union Pacific Railroad Company; *The Attorney-General* and *Mr. Edwin B. Smith*, Assistant Attorney-General, for the United States; *Mr. Benjamin H. Hill* and *Mr. S. W. Sanderson*, for the Central Pacific Railroad Company, and *Mr. George H. Williams*, for Gallatin.

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

The single question presented by the case of the Union Pacific Railroad Company is as to the constitutionality of that part of the Act of May 7, 1878, which establishes in the treasury of the United States a sinking-fund. The validity of the rest of the Act is not necessarily involved.

It is our duty, when required in the regular course of judicial proceedings, to declare an Act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.

The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.

The contract of the company in respect to the subsidy bonds is to pay both principal and interest when the principal matures, unless the debt is sooner discharged by the application of one-half the compensation for transportation and other services rendered for the government, and the five per cent of net earnings as specified in the charter. This was decided in *Union Pacific Railroad Co.* v. *United States*, 91 U. S. 72. The precise point to be determined now is, whether a statute which requires the company in the management of its affairs to set aside a portion of its current income as a sinking-fund to meet this and

other mortgage debts when they mature, deprives the company of its property without due process of law, or in any other way improperly interferes with vested rights.

This corporation is a creature of the United States. It is a private corporation created for public purposes, and its property is to a large extent devoted to public uses. It is, therefore, subject to legislative control so far as its business affects the public interests. *Chicago, Burlington, & Quincy Railroad Co.* v. *Iowa*, 94 U. S. 155.

It is unnecessary to decide what power Congress would have had over the charter if the right of amendment had not been reserved; for, as we think, that reservation has been made. In the Act of 1862, sect. 18, it was accompanied by an explanatory statement showing that this had been done "the better to accomplish the object of this Act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but especially in time of war) the use and benefits of the same for postal, military, and other purposes," and by an injunction that it should be used with "due regard for the rights of said companies." In the Act of 1864, however, there is nothing except the simple words (sect. 22) "that Congress may at any time alter, amend, and repeal this Act." Taking both Acts together, and giving the explanatory statement in that of 1862 all the effect it can be entitled to, we are of the opinion that Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through Mr. Justice Clifford, in *Miller* v. *The State*, 15 Wall. 498, "It may safely be affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stock-holders and of creditors, and for the proper disposition of its assets;" and again, in *Holyoke Company* v. *Lyman*, Id. 519: "To protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation." Mr. Justice Field, also speaking for the court, was even more explicit when, in *Tomlinson* v. *Jessup*, Id. 459, he said: "The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State;" and again, as late as *Railroad Company* v. *Maine*, 96 U. S. 510: "By the reservation . . . the State retained the power to alter it [the charter] in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges, and immunities." Mr. Justice Swayne, in *Shields* v. *Ohio*,

95 U. S. 324, says, by way of limitation: "The alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the Act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration." The rules as here laid down are fully sustained by authority. Further citations are unnecessary.

Giving full effect to the principles which have thus been authoritatively stated, we think it safe to say, that whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment. In so doing it cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking-fund to meet it at maturity. Not having done so at first, it cannot now by direct legislation vacate mortgages already made under the powers originally granted, nor release debts already contracted. A prohibition now against contracting debts will not avoid debts already incurred. An amendment making it unlawful to issue bonds payable at a distant day, without at the same time establishing a fund for their ultimate redemption, will not invalidate a bond already out. All such legislation will be confined in its operation to the future.

Legislative control of the administration of the affairs of a corporation may, however, very properly include regulations by which suitable provision will be secured in advance for the payment of existing debts when they fall due. If a State under its reserved power of charter amendment were to provide that no dividends should be paid to stockholders from current earnings until some reasonable amount had been set apart to meet maturing obligations, we think it would not be seriously contended that such legislation was unconstitutional, either because it impaired the obligations of the charter contract or deprived the corporation of its property without due process of law. Take the case of an insurance company dividing its unearned premiums among its stock-holders without laying by anything to meet losses, would any one doubt the power of the State under its reserved right of amendment to prohibit such dividends until a suitable fund had been established to meet losses from outstanding risks? Clearly not, we think, and for the obvious reason that while stock-holders are entitled to receive all dividends that may legitimately be declared and paid out of the current net income, their claims on the property of the corporation are always subordinate to those of creditors. The property of a corporation constitutes the fund from which its debts are to be paid, and if the officers improperly attempt to divert this fund from its legitimate uses, justice requires that they should in some way be restrained. A

court of equity would do this, if called upon in an appropriate manner; and it needs no argument to show that a legislative regulation which requires no more of the corporation than a court would compel it to do without legislation is not unreasonable.

Such a regulation, instead of being destructive in its character, would be eminently conservative. Railroads are a peculiar species of property, and railroad corporations are in some respects peculiar corporations. A large amount of money is required for construction and equipment, and this to a great extent is represented by a funded debt, which, as well as the capital stock, is sought after for investment, and is distributed widely among large numbers of persons. Almost as a matter of necessity it is difficult to secure any concert of action among the different classes of creditors and stock-holders, and consequently all are compelled to trust in a great degree to the management of the corporation by those who are elected as officers, without much, if any, opportunity for personal supervision. The interest of the stock-holders, who, as a rule, alone have the power to select the managers, is not unfrequently antagonistic to those of the debt-holders, and it therefore is especially proper that the government, whose creature the corporation is, should exercise its general powers of supervision, and do all it reasonably may to protect investments in the bonds and stock from loss through improvident management.

No better case can be found for illustration than is presented by the history of this corporation. Without undertaking in any manner to cast censure upon those by whose matchless energy this great road was built and, as if by magic, put into operation, it is a fact which cannot be denied, that, when the road was in a condition to be run, its bonds and stocks represented vastly more than the actual cost of the labor and material which went into its construction. Great undertakings like this, whose future is at the time uncertain, requiring as they do large amounts of money to carry them on, seem to make it necessary that extraordinary inducements should be held out to capitalists to enter upon them, since a failure is almost sure to involve those who make the venture in financial ruin. It is not, however, the past with which we are now to deal, but rather the present and the future. We are not sitting in judgment upon the history of this corporation, but upon its present condition. We now know that when the road was completed its funded debt alone was as follows: First mortgage, $27,232,000, subsidy bonds, $27,236,512, all maturing thirty years after date, and that the average time of its maturity is during the year 1897. In addition to this are now the sinking-fund bonds, the land-grant bonds, and the Omaha-bridge bonds, amounting to at least $20,000,000 more. The interest on the first mortgage and all other classes of bonds, except the subsidy bonds, will undoubtedly be met as it falls due; but on the subsidy bonds, as has already been seen, no interest is payable, except out of the half of the earnings for government service and the five per cent of net earnings, until the maturity of

the principal. Thus far, as we have had occasion to observe in the various suits which have come before us during the past few years, involving an inquiry into these matters, the payments from these sources have fallen very far short of keeping down the accruing interest, and according to present appearances it is not probably too much to say that when the debt is due there will be as much owing the United States for interest paid as for principal. There will then become due from this company, in less than twenty years from this date, in the neighborhood of $80,000,000, secured by the first and subsidy mortgages. In addition to this are the capital stock, representing $36,000,000 more, and the funded debt inferior in its lien to that of the subsidy bonds. All these different classes of securities have become favorites in the market for investments, and they are widely scattered at home and abroad. They have taken to a certain extent the place of the public funds as investments. With the exception of the land-grant, which is first devoted to the payment of the land-grant bonds, but little if anything, except the earnings of the company, can be depended on to meet these obligations when they mature. The company has been in the receipt of large earnings since the completion of its road, and, after paying the interest on its own bonds at maturity, has been dividing the remainder, or a very considerable portion of it, from time to time among its stock-holders, without laying by anything to meet the enormous debt which, considering the amount, is so soon to become due. It is easy to see that in this way the stock-holders of the present time are receiving in the shape of dividends that which those of the future may be compelled to lose. It is hardly to be presumed that this great weight of pecuniary obligation can be removed without interfering with dividends hereafter, unless at once some preparation is made by sinking-fund or otherwise to prevent it. Under these circumstances, the stock-holders of to-day have no property right to dividends which shall absorb all the net earnings after paying debts already due. The current earnings belong to the corporation, and the stock-holders, as such, have no right to them as against the just demands of creditors.

The United States occupy towards this corporation a twofold relation, — that of sovereign and that of creditor. *United States* v. *Union Pacific Railroad Co.*, 98 U. S. 569. Their rights as sovereign are not crippled because they are creditors, and their privileges as creditors are not enlarged by the charter because of their sovereignty. They cannot, as creditors, demand payment of what is due them before the time limited by the contract. Neither can they, as sovereign or creditors, require the company to pay the other debts it owes before they mature. But out of regard to the rights of the subsequent lien-holders and stock-holders, it is not only their right, but their duty, as sovereign to see to it that the current stock-holders do not, in the administration of the affairs of the corporation, appropriate to their own use that which in equity belongs to others. A legislative regulation which does no more than require them to submit to their just contribution towards

the payment of a bonded debt cannot in any sense be said to deprive them of their property without due process of law.

The question still remains, whether the particular provision of this statute now under consideration comes within this rule. It establishes a sinking-fund for the payment of debts when they mature, but does not pay the debts. The original contracts of loan are not changed. They remain as they were before, and are only to be met at maturity. All that has been done is to make it the duty of the company to lay by a portion of its current net income to meet its debts when they do fall due. In this way the current stock-holders are prevented to some extent from depleting the treasury for their own benefit, at the expense of those who are to come after them. This is no more for the benefit of the creditors than it is for the corporation itself. It tends to give permanency to the value of the stock and bonds, and is in the direct interest of a faithful administration of affairs. It simply compels the managers for the time being to do what they ought to do voluntarily. The fund to be created is not so much for the security of the creditors as the ultimate protection of the public and the corporators.

To our minds it is a matter of no consequence that the Secretary of the Treasury is made the sinking-fund agent and the Treasury of the United States the depository, or that the investment is to be made in the public funds of the United States. This does not make the deposit a payment of the debt due the United States. The duty of the manager of every sinking-fund is to seek some safe investment for the moneys as they accumulate in his hands, so that when required they may be promptly available. Certainly no objection can be made to the security of this investment. In fact, we do not understand that complaint is made in this particular. The objection is to the creation of the fund and not to the investment, if that investment is not in law a payment.

Neither is it a fatal objection that the half of the earnings for services rendered the government, which by the Act of 1864 was to be paid to the companies, is put into this fund. The government is not released from the payment. While the money is retained, it is only that it may be put into the fund, which, although kept in the treasury, is owned by the company. When the debts are paid, the securities into which the moneys have been converted that remain undisposed of must be handed over to the corporation. Under the circumstances, the retaining of the money in the treasury as part of the sinking-fund is in law a payment to the company.

Not to pursue this branch of the inquiry any further, it is sufficient now to say that we think the legislation complained of may be sustained on the ground that it is a reasonable regulation of the administration of the affairs of the corporation, and promotive of the interests of the public and the corporators. It takes nothing from the corporation or the stock-holders which actually belongs to them. It oppresses no one, and inflicts no wrong. It simply gives further assurance of the continued solvency and prosperity of a corporation in which the public

are so largely interested, and adds another guaranty to the permanent and lasting value of its vast amount of securities.

The legislation is also warranted under the authority by way of amendment to change or modify the rights, privileges, and immunities granted by the charter. The right of the stock-holders to a division of the earnings of the corporation is a privilege derived from the charter. When the charter and its amendments first became laws, and the work on the road was undertaken, it was by no means sure that the enterprise would prove a financial success. No statutory restraint was then put upon the power of declaring dividends. It was not certain that the stock would ever find a place on the list of marketable securities, or that there would be any bonds subsequent in lien to that of the United States which could need legislative or other protection. Hence, all this was left unprovided for in the charter and its amendments as originally granted, and the reservation of power of amendment inserted so as to enable the government to accommodate its legislation to the requirements of the public and the corporation as they should be developed in the future. Now it is known that the stock of the company has found its way to the markets of the world; that large issues of bonds have been made beyond what was originally contemplated, and that the company has gone on for years dividing its earnings without any regard to its increasing debt, or to the protection of those whose rights may be endangered if this practice is permitted to continue. For this reason Congress has interfered, and, under its reserved power, limited the privilege of declaring dividends on current earnings, so as to confine the stock-holders to what is left after suitable provision has been made for the protection of creditors and stock-holders against the disastrous consequences of a constantly increasing debt. As this increase cannot be kept down by payment unless voluntarily made by the corporation, the next best thing has been done, that is to say, a fund safely invested, which increases as the debt increases, has been established and set apart to meet the debt when the time comes that payment can be required.

The only material difference between the Central Pacific Company and the Union Pacific lies in the fact that in the case of the Central Pacific the special franchises, as well as the land and subsidy bonds, were granted by the United States to a corporation formed and organized under the laws of California, while in that of the Union Pacific Congress created the corporation to which the grants were made. The California corporation was organized under a State law with an authorized capital of $8,500,000, to build a road from the city of Sacramento to the eastern boundary of the State, a distance of about one hundred and fifteen miles. Under the operation of its California charter, it could only borrow money to an amount not exceeding the capital stock, and must provide a sinking-fund for the ultimate redemption of the bonds. Hittell's Cal. Laws, 1850-64, sect. 840. No power was

granted to build any road outside the State, or in the State except between the termini named. By the Act of 1862, Congress granted this corporation the right to build a road from San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of the State, and from there through the Territories of the United States until it met the road of the Union Pacific Company. For this purpose all the rights, privileges, and franchises were given this company that were granted the Union Pacific Company, except the franchise of being a corporation, and such others as were merely incident to the organization of the company. The land-grants and subsidy-bonds to this company were the same in character and quantity as those to the Union Pacific, and the same right of amendment was reserved. Each of the companies was required to file in the Department of the Interior its acceptance of the conditions imposed, before it could become entitled to the benefits conferred by the Act. This was promptly done by the Central Pacific Company, and in this way that corporation voluntarily submitted itself to such legislative control by Congress as was reserved under the power of amendment.

No objection has ever been made by the State to this action by Congress. On the contrary, the State, by implication at least, has given its assent to what was done, for in 1864 it passed "An Act to aid in carrying out the provisions of the Pacific Railroad and Telegraph Act of Congress," and thereby confirmed and vested in the company "all the rights, privileges, franchises, power, and authority conferred upon, granted to, or vested in said company by said Act of Congress," and repealed "all laws, or parts of laws inconsistent or in conflict with . . . the rights and privileges herein (therein) granted." Hittell's Laws, sect. 4798; Acts of 1863-64, 471. Inasmuch as by the Constitution of California then in force (art. 4, sect. 31) corporations, except for municipal purposes, could not be created by special Act, but must be formed under general laws, the legal effect of this Act is probably little more than a legislative recognition by the State of what had been done by the United States with one of the State corporations.

In so doing, the State but carried out its original policy in reference to the same subject-matter, for as early as May 1, 1852, an Act was passed reciting "that the interests of this State, as well as those of the whole Union, require the immediate action of the government of the United States, for the construction of a national thoroughfare connecting the navigable waters of the Atlantic and Pacific oceans, for the purposes of national safety, in the event of war, and to promote the highest commercial interests of the Republic," and granting the right of way through the State to the United States for the purpose of constructing such a road. Hittell's Laws, sect. 4791; Acts of 1852, 150. In 1859 (Acts of 1859, 391), a resolution was passed calling a convention "to consider the refusal of Congress to take efficient measures for the construction of a railroad from the Atlantic States to the Pacific, and to adopt measures whereby the building of said railroad

can be accomplished;" and at the same session of the legislature a memorial was prepared asking Congress to pass a law authorizing the construction of such a road, and asking also a grant of lands to aid in the construction of railroads in the State. Acts of 1859, 395. Nothing was done, however, by Congress until the Rebellion, which at once called the attention of all who were interested in the preservation of the Union to the immense practical importance of such a road for military purposes, and then, as soon as a plan could be matured and the necessary forms of legislation gone through with, the Act of July 1, 1862, was passed. But this was not enough to interest capitalists in the undertaking, and although the Legislature of California during the year 1863 passed several Acts intended to hold out further inducements, but little was accomplished until the Amendatory Act of Congress in 1864, which, besides authorizing the first mortgage, and changing in some important particulars the conditions on which the subsidy-bonds were to be issued, conferred additional powers on the corporation, some of which — such as the right of eminent domain in the Territories — the State could not grant, and others — such as the right of issuing first-mortgage bonds without a sinking-fund, and in excess of the capital stock — it had seen fit to withhold. This Act also reserved to Congress full power of amendment, and was promptly accepted by the corporation. With this addition of corporate powers and pecuniary resources the work was pushed forward to completion with unexampled energy. But for the corporate powers and financial aid granted by Congress it is not probable that the road would have been built. The first-mortgage bonded debt was created without a sinking-fund, and the road in the Territories built under the authority of Congress, assented to and ratified by the State.

The Western Pacific Company, now, by consolidation, a part of the Central Pacific Company, was also organized, Dec. 13, 1862 (Acts of 1863, 81), under the general railroad law of California, with power to construct a road from a point on the San Francisco and San José Railroad, at or near San José, to Sacramento, and there connect with the road of the Central Pacific Company. Afterwards the Central Pacific Company assigned to this corporation its rights, under the Act of Congress, to construct the road between San José and Sacramento; and this assignment was ratified by Congress, "with all the privileges and benefits of the several Acts of Congress relating thereto and subject to all the conditions thereof." 13 Stat. 504. By the same Act further privileges were granted by the United States both to the Central Pacific and Western Pacific Companies, in respect to their issue of first-mortgage bonds.

Under this legislation, we are of the opinion that, to the extent of the powers, rights, privileges, and immunities granted these corporations by the United States, Congress retains the right of amendment, and that in this way it may regulate the administration of the affairs of the company in reference to the debts created under its own authority,

in a manner not inconsistent with the requirements of the original State charter, as modified by the State Aid Act of 1864, accepting what had been done by Congress. This is as far as it is necessary to go now. It will be time enough to consider what more may be done when the necessity arises. As yet, the State has not attempted to interfere with the action of Congress. All complaint thus far has come from the corporation itself, which, to secure the government aid, accepted all the conditions that were attached to the grants, including the reservation of power to amend.

It is clear that the establishment of a sinking-fund by the Act of 1878 is not at all in conflict with anything contained in the original State charter, for by that charter no such debt could be created without provision for such a fund. This part of the Act of 1878 is, therefore, in the exact line of the policy of the State, and does no more than place the company again, to some extent, under obligations from which it had been released by congressional legislation. So, too, the reservation of the power of amendment by Congress is equally consistent with the settled policy of the State; for not only the State charter, in terms, makes such a reservation in favor of the State, but the Constitution expressly provides that all laws for the creation of corporations "may be altered from time to time, or repealed." Art. 4, sect. 31.

It is not necessary now to inquire whether, in ascertaining the net earnings of the company for the purpose of fixing the amount of the annual contributions of the sinking-fund, the earnings of all the roads owned by the present corporation are to be taken into the account, or only of those in aid of which the land-grants were made and the subsidy-bonds issued. The question here is only as to the power of Congress to establish the fund at all. If disputes should ever arise as to the manner of stating the accounts, they can be settled at some future time. *Judgment affirmed. Decree affirmed.*[1]

Mr. Justice Field, Mr. Justice Strong, and Mr. Justice Bradley, dissented. [The dissenting opinions of Justices Field and Strong are omitted. That of Bradley, J. (p. 744), is given below in a note.] [2]

[1] Compare *Norwood* v. *N. Y. & N. E. R. R. Co.*, 161 Mass. 259, 264-265. — Ed.

[2] Mr. Justice Bradley. I am unable to concur in the judgment of the court in these cases, and will very briefly state the grounds of my dissent. . . .

The contract between the Union and Central Pacific Railroad Companies and the government was an executed contract, and a definite one. It was in effect this: that the government should loan the companies certain moneys, and that the companies should have a certain period of time to repay the amount, the loan resting on the security of the companies' works. Congress, by the law in question, without any change of circumstances, and against the protest of the companies, declares that the money shall be paid at an earlier day, and that the contract shall be changed *pro tanto*. This is the substance and effect of the law. Calling the money paid a sinking-fund makes no substantial difference. The pretence or excuse for the law is that the stipulated security is not good. Congress takes up the question, *ex parte*, discusses and decides it, passes judgment, and proposes to issue execution, and to subject the companies to heavy penalties if they do not comply. That is the plain English of the law. In view of the limitations referred to, has Congress the power to do this? In my judgment it

has not. The law virtually deprives the companies of their property without due process of law; takes it for public use without compensation; and operates as an exercise by Congress of the judicial power of the government.

That it is a plain and flat violation of the contract there can be no reasonable doubt. But it is said that Congress is not subject to any inhibition against passing laws impairing the validity of contracts. This is true; and the reason why the inhibition to that effect was imposed upon the States and not upon Congress evidently was, that the power to pass bankrupt laws should be exclusively vested in Congress, in order that the bankruptcy system might be uniform throughout the United States. When the States exercised the power, they often did it in such a manner as to favor their own citizens at the expense of the citizens of other States and of foreign countries. It was deemed expedient, therefore, to take the power from the States so far as it might involve the impairing the validity of contracts. State bankrupt laws, since the Constitution went into effect, have only been sustained when operating prospectively upon contracts, and then only in the absence of a national law. The inhibition referred to undoubtedly had its origin in these considerations.[1] It fully explains the fact that no such inhibition was laid upon the national legislature; and the absence of such an inhibition, therefore, furnishes no ground of argument in favor of the proposition that Congress may pass arbitrary and despotic laws with regard to contracts any more than with regard to any other subject-matter of legislation. The limitations already quoted exist in their full force, and apply to that subject as well as to all others. They embody the essential principles of Magna Charta, and are especially binding upon the legislative department of the government. Under the English Constitution, notwithstanding the theoretical omnipotence of Parliament, such a law as the one in question would not be tolerated for a moment. The famous denunciation that "it would cut every Englishman to the bone," would be promptly reiterated.

It will not do to say that the violation of the contract by the law in question is not a taking of property. In the first place, it is literally a taking of property. It compels the companies to pay over to the government, or its agents, money to which the government is not entitled. That it will be entitled by the contract to a like amount at some future time does not matter. Time is a part of the contract. To coerce a delivery of the money is to coerce without right a delivery of that which is not the property of the government, but the property of the companies. It is needless to refer to the importance to the companies of the time which the contract gives. If it be alleged that the security of the government requires this to be done in consequence of waste or dissipation by the companies of the mortgage security, that is a question to be decided by judicial investigation with opportunity of defence. A prejudgment of the question by the legislative department is a usurpation of the judicial power.

But if it were not, as it is, an actual or physical taking of property, — if it were merely the subversion of the contract and the substitution of another contract in its place, — it would be a taking of property within the spirit of the constitutional provisions. A contract is property. To destroy it wholly or to destroy it partially is to take it; and to do this by arbitrary legislative action is to do it without due process of law.

The case bears no analogy to the laws which were passed in time of war and public necessity, making treasury notes of the government a legal tender. The power to pass those laws was found in other parts of the Constitution: in the power to borrow money on the credit of the United States, to regulate the value of money, to raise and support armies, to suppress insurrections, and to pass all laws necessary and proper for carrying into execution the general powers of the government. My views on that subject were fully expressed in the *Legal-Tender Cases*, reported in 12 Wallace, and I have yet seen no reason to modify them. The legal-tender laws may have indirectly affected contracts, but did not abrogate them. The case before us is totally different. It is a direct abrogation of a contract, and that, too, of a contract of the government itself, — a repudiation of its own contract.

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[1] See *supra*, pp. 1433, 1434, and 1534 n. — Ed.

Nor does the case in hand bear any analogy to what are familiarly known as the *Granger Cases*, reported in 94 U. S. under the names of *Munn* v. *Illinois*, etc. The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the 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, it is subject to regulation by the legislative power. It is obvious that the present case does not belong to that category. It is an individual case of private contract between the companies and the government. It is a question of dollars and cents, and terms and conditions, in a particular case. To call the law an exercise of the police power would be a misuse of terms.

Great stress, however, is laid upon the reservation in the charter of the right to amend, alter, or repeal the Act.

As a matter of fact, the reservation referred to really has no office in an Act of Congress; for Congress is not subject, as the States are, to the inhibition against passing any law impairing the obligation of contracts. It has become so much the custom to insert it in all charters at the present day, that its original intent and purpose are sometimes forgotten. Since, however, it is contained in the charter of the Union Pacific Railroad Company, it is proper that its meaning and effect should be adverted to.

It seems to me that this clause has been greatly misunderstood. It is a sort of proviso peculiar to American legislation, growing out of the decision in the Dartmouth College Case. Mr. Justice Story, in his opinion in that case (4 Wheat. 675), says: "When a private eleemosynary corporation is thus created by the charter of the Crown, it is subject to no other control on the part of the Crown than what is expressly or impliedly reserved by the charter itself. Unless a power be reserved for this purpose, the Crown cannot in virtue of its prerogative, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises." This hint, that such a reservation would authorize an alteration or amendment to be made in a charter, has been freely availed of by legislatures and constitutional conventions in order to be freed from the constitutional restriction against impairing the validity of contracts, so far as it applied to charters of incorporation. The application of that restriction to such charters, by construing them to be contracts within the meaning of the Constitution, was a surprise to many statesmen and jurists of the country. Chief Justice Marshall, indeed, in his opinion in that case, says: "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 the instrument" (p. 644). Probably in view of this somewhat unexpected application of the clause, operating as it did to deprive the States of nearly all legislative control over corporations of their own creation, the courts have given liberal construction to the reservation of power to alter, amend, and repeal a charter; and have sustained some acts of legislation made under such a reservation which are at least questionable.

In my judgment, the reservation is to be interpreted as placing the State legislature back on the same platform of power and control over the charter containing it as it would have occupied had the constitutional restriction about contracts never existed; and I think the reservation effects nothing more. It certainly cannot be interpreted as reserving a right to violate a contract at will. No legislature ever reserved such a right in any contract. Legislatures often reserve the right to terminate a continuous contract at will; but never to violate a contract, or change its terms without the consent of the other party. The reserved power in question is simply that of legislation, — to alter, amend, or repeal a charter. This is very different from the power to violate, or to alter the terms of a contract at will. A reservation of power to violate a contract, or alter it, or impair its obligation, would be repugnant to the contract itself, and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute, is void. Interpreted as a reservation of the right to legis-

GREENWOOD *v.* FREIGHT COMPANY.

SUPREME COURT OF THE UNITED STATES. 1881.

[105 U. S. 13.]

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The facts are stated in the opinion of the court.

The case was argued by *Mr. George F. Edmunds*, with whom was *Mr. Alonzo B. Wentworth*, for the appellant, and by *Mr. Darwin E. Ware* and *Mr. William G. Russell*, for the appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

The appellant, Greenwood, a citizen of the State of New York, brought his bill of complaint against the Union Freight Railroad Company, a corporation established by the laws of Massachusetts; against

late, the reserved power is sustainable on sound principles; but interpreted as the reservation of a right to violate an executed contract, it is not sustainable.

The question then comes back to the extent of the power to legislate. But that is a restricted power, — restricted by other constitutional provisions, to which reference has already been made. Certainly the legislature cannot in a charter of incorporation, or in any other law, reserve to itself any greater power of legislation than the Constitution itself concedes to it. It seems to me clear, therefore, that the power reserved cannot authorize a flat abrogation of the contract by Congress, because, as before shown, such an abrogation would be a violation of those clauses which inhibit the taking of property without process of law and without compensation.

It may be said that by reason of the reserved power to alter and repeal a charter, this court has sustained legislative acts imposing taxes from which the corporation by the charter was exempted. This is true. But the imposition of taxes is pre-eminently an act of legislation. Its temporary suspension, conceded in a charter, is a suspension of the legislative power *pro tanto*. Being such, a reservation of the right to legislate, or, which is the same thing, to alter, amend, or repeal the charter, necessarily includes the right to resume the power of taxation. The same observations apply to the regulation of fares and freights; for this is a branch of the police power, applicable to all cases which involve a common charge upon the people.

I conclude, therefore, that the power reserved to alter, amend, and repeal the charter of the Union Pacific Railroad Company is not sufficient to authorize the passage of the law in question.

I will only add, further, that the initiation of this species of legislation by Congress is well calculated to excite alarm. It has the effect of announcing to the world, and giving it to be understood, that this government does not consider itself bound by its engagements. It sets the example of repudiation of government obligations. It strikes a blow at the public credit. It asserts the principle that might makes right. It saps the foundations of public morality. Perhaps, however, these are considerations more properly to be addressed to the legislative discretion. But when forced upon the attention by what, in my judgment, is an unconstitutional exercise of legislative power, they have a more than ordinary weight and significance.

Compare *Sioux City Str. Ry. Co.* v. *Sioux City*, 138 U. S. 98: "No question can arise as to the impairment of the obligation of a contract when the company accepted all of its corporate powers, subject to the reserved power of the State to modify its charter and to impose additional burdens upon the enjoyment of its franchises." BLATCHFORD, J., for the court. — ED.

the Marginal Freight Railroad Company, likewise a Massachusetts corporation; against the city of Boston, its mayor and aldermen by name; and against the directors of the Marginal Freight Railroad Company, — all citizens of Massachusetts.

The Union Freight Railroad Company demurred to the bill, and the demurrer was sustained and the bill dismissed. It is this decree which we are called on to review on appeal taken by complainant.

The case made by the bill is that the Marginal Freight Railroad Company, which we shall hereafter call the Marginal Company, was organized under an Act of the Legislature of Massachusetts of the date of April 26, 1867, to build and operate a railroad through various streets in the city of Boston, "with all the privileges and subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street-railway corporations, so far as they are applicable." The right of way of this company for part of its route lay over the line of a railway previously granted to the Commercial Freight Railroad Company; and the Marginal Company, by virtue of a provision in its charter, purchased and paid the Commercial Company for the joint use of its track, so far as it ran through the same streets. Afterwards, on May 6, 1872, the Legislature of Massachusetts incorporated, by an Act of that date, the Union Freight Railroad Company, which, by virtue of its charter and the authority of the board of aldermen of Boston, was authorized to run its track through the same streets and over the same ground covered by the track of the Marginal Company, and to take possession of the track of that and any other street-railroad company, on payment of compensation. This latter Act also repealed the charter of the Marginal Company.

Sections 4, 6, and 7 of this Act constitute the foundation of complainant's grievance, because they are said to impair the obligation of the contract found in the charter of the Marginal Company, and, as they are short, they are here given *verbatim*. [See the foot-note below.][1]

[1] "SECT. 4. Said corporation may, within its authorized limits and for the purposes of this Act, enter upon and use any part of the tracks of any other street railroad, and may suitably strengthen and improve such tracks; and if the corporations cannot agree upon the manner and conditions of such entry and use, or the compensation to be paid therefor, the same shall be determined in accordance with the provisions of the thirty-eighth section of chapter three hundred and eighty-one of the Acts of the year eighteen hundred and seventy-one."

"SECT. 6. Said corporation shall, within four months from the passage of this Act, take the tracks, or any part thereof, of the Marginal Freight Railway Company, subject to the laws relating to the taking of land by railroad companies and the compensation to be made therefor.

"SECT. 7. Chapter one hundred and seventy of the Acts of the year eighteen hundred and sixty-seven, entitled an 'Act to incorporate the Marginal Freight Railway Company,' and so much of chapter four hundred and sixty-one of the Acts of the year eighteen hundred and sixty-nine as relates to said Marginal Freight Railway Company are hereby repealed."

The bill avers that the Union Freight Railroad Company has been organized, and is about to proceed in such a manner under this Act that the Marginal Company will be utterly destroyed, and its several contracts, franchises, rights, easements, and properties will be impaired and destroyed, and the stock of complainant in said company will be destroyed and made valueless, and he will sustain irreparable damage and mischief.

Complainant then alleges that he had requested and urged the directors of the Marginal Company to take steps to assert the rights and franchises of the company against what he believes to be unconstitutional legislation, and that they had declined and refused to do so. He also sets out a vote or resolution of said directors, in which they respond to his demand by saying that the assertion of the rights of the corporation in the State courts is accompanied with so many embarrassments that they decline to attempt it. The prayer of the bill is for an injunction against all the defendants, to prevent these acts so injurious to the rights of the Marginal Freight Railroad Company.

The first ground of demurrer to this bill is that the complainant, whose interest is merely that of a stock-holder in the Marginal Company, shows no right to sustain this bill, the object of which is to assert rights that are those of the corporation, which is itself under no disability to sue.

This whole subject was fully considered in the recent opinion of the court in *Hawes* v. *Oakland*, 104 U. S. 450, in the decision of which we had the benefit of the able argument of counsel in this case, which was argued before that was decided. We refer to that opinion for the principles which must govern this branch of the present case. It is sufficient to say that this bill presents so strong a case of the total destruction of the corporate existence, and of the annihilation of all corporate powers under the Act of 1872, that we think complainant as a stock-holder comes within the rule laid down in that opinion, and which authorizes a share-holder to maintain a suit to prevent such a disaster, where the corporation peremptorily refuses to move in the matter.

As none of the defendants are charged with a purpose to exercise any power or to perform any acts not authorized by the terms of the Act of May 6, 1872, the remaining question to be decided is, whether the features of that Act to which complainant objects in his bill are beyond the power of the Legislature of Massachusetts, or are forbidden by anything in the Constitution of the United States.

These exercises of power in the statute complained of are divisible into two: —

1. The repeal of the charter of the Marginal Company.

2. The authority vested in the Union Company to take its track for the use of the latter company.

It is the argument of counsel, pressed upon us with much vigor, that the two taken together constitute a transfer of the property of the one corporation to the other, and with it all the corporate franchises, rights, and powers belonging to the elder corporation.

We are not insensible to the force of the argument as thus stated; and we think it must be conceded that, according to the unvarying decisions of this court, the unconditional repeal of the charter of the Marginal Company is void under the Constitution of the United States, as impairing the obligation of the contract made by the acceptance of the charter between the corporators of that company and the State, unless it is made valid by that provision of the General Statutes of Massachusetts, called the reservation clause, concerning Acts of incorporation; or unless it falls within some enactment covered by that part of its own charter which makes it "subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street-railway corporations, so far as they may be applicable."

The first of these reservations of legislative power over corporations is found in sect. 41 of chap. 68 of the General Statutes of Massachusetts, in the following language: "Every Act of Incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal, at the pleasure of the legislature." [1]

It would be difficult to supply language more comprehensive or expressive than this.

Such an Act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be repealed? It is the Act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it. This expression, "the pleasure of the legislature," is significant, and is not found in many of the similar statutes in other States.[2]

This statute having been the settled law of Massachusetts, and representing her policy on an important subject for nearly fifty years before the incorporation of the Marginal Company, we cannot doubt the authority of the Legislature of Massachusetts to repeal that charter. Nor is this seriously questioned by counsel for appellant; and it may, therefore, be assumed that if the repealing clause of the Act of May 6, 1872, stood alone, its validity must be conceded. *Crease* v. *Babcock*, 23 Pick.

[1] For the Mass. St. 1808, c. 65, § 7 (March 3, 1809), see *supra*, p. 1552, n. — Ed.

[2] In *Ham. Gas Lt. Co.* v. *Hamilton*, 146 U. S. 258, 271 (1892), the court (Harlan, J.) says: "The words 'at the pleasure of the legislature' are not in the clauses of the Constitution of Ohio, or in the statutes to which we have referred. But the general reservation of the power to alter, revoke, or repeal a grant of special privileges necessarily implies that the power may be exerted at the pleasure of the legislature." — Ed.

(Mass.) 334; *Erie & N. E. Railroad Co.* v. *Casey*, 26 Pa. St. 287; *Pennsylvania College Cases*, 13 Wall. 190; 2 Kent, Com. 306.

It is argued, however, that the Act is to be examined as a whole, and that as the earlier sections of the statute bestow upon the Union Company the right to seize the track and other property of the Marginal Company, this repealing clause is inserted merely to aid in the general purpose of transferring a valuable property and its appurtenant franchise from one corporation to another.

Whether this is sufficient to invalidate that branch or feature of the statute may depend somewhat upon the effect of the repealing clause upon the rights of the Marginal Company, as well as upon other matters; but we do not doubt the validity of the repealing clause of that Act, whatever may have been the reasons which influenced the legislature to enact it, for the exercise of this power is by express terms declared to be at the pleasure of the legislature.

The forty-first section of chapter 68, as we have cited it, had a proviso, as it was originally enacted, "that no Act of incorporation shall be repealed, unless for some violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same." So that charters subject to the pleasure of the legislative will were only those of perpetual duration. This proviso was, however, either repealed by express enactment or intentionally left out in subsequent revisions of the statutes, for it is not found in that of 1860, known as the General Statutes of Massachusetts, nor in that of the present year, just published, called the Public Statutes of Massachusetts.

What is the effect of the repeal of the charter of a corporation like this?

One obvious effect of the repeal of a statute is that it no longer exists. Its life is at an end. Whatever force the law may give to transactions into which the corporation entered and which were authorized by the charter while in force, it can originate no new transactions dependent on the power conferred by the charter. If the corporation be a bank, with power to lend money and to issue circulating notes, it can make no new loan nor issue any new notes designed to circulate as money.

If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights.

Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the share-holders

of such a corporation, to their interest in its property, are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights.

And while we are conscious that no definition, at once comprehensive and satisfactory, can be here laid down of what those rights and powers are that remain to the stock-holders and the creditors of such a corporation after the Act of repeal, we are of opinion that the foregoing observations are sufficient for the case before us.

A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power.

As early as 1806, in the case of *Wales* v. *Stetson*, 2 Mass. 143, the Supreme Court of that State made the declaration "that the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the Act of incorporation."[1] In *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, decided in 1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim, under the clause of the Federal Constitution against impairing the obligation of contracts, which, though received at the time with some dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in *Fletcher* v. *Peck*, 6 Cranch, 87, and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the State to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the State could not impair.

It became obvious at once that many Acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed. It was, no doubt, with a view to suggest a method by which the State legislatures could retain in a large measure this important power, without violating the provision of the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the Dartmouth College Case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the

[1] And see Mass. Stat. 1808, c. 65, § 7 (March 3, 1809), *supra*, p. 1552, n. — Ed.

right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observations we have already quoted from the case of *Wales* v. *Stetson*, 2 Mass. 143.

It would seem that the States were not slow to avail themselves of this suggestion,[1] for while we have not time to examine their legislation for the result, we have in one of the cases cited to us as to the effect of a repeal (*McLaren* v. *Pennington*, 1 Paige (N. Y.), 102), in which the Legislature of New Jersey, when chartering a bank with a capital of $400,000 in 1824, declared by its seventeenth section that it should be lawful for the legislature at any time to alter, amend, and repeal the same. And Kent (2 Com. 307), speaking of what is proper in such a clause, cites as an example a charter by the New York Legislature, of the date of Feb. 25, 1822.[2] How long the Legislature of Massachusetts continued to rely on a special reservation of this power in each charter as it was granted, it is unnecessary to inquire, for in 1831 it enacted as a law of general application, that all charters of corporations thereafter granted should be subject to amendment, alteration, and repeal at the pleasure of the legislature, and such has been the law ever since.

This history of the reservation clause in Acts of incorporation supports our proposition, that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal.

This view is sustained by the decisions of this court and of other courts on the same question. *Pennsylvania College Cases, supra; Tomlinson* v. *Jessup*, 15 Wall. 454; *Railroad Company* v. *Maine*, 96 U. S. 499; *Sinking Fund Cases*, 99 Id. 700; *Railroad Company* v. *Georgia*, 98 Id. 359; *McLaren* v. *Pennington*, *supra; Erie & N. E. Railroad* v. *Casey*, *supra; Miners' Bank* v. *United States*, 1 Greene (Iowa), 553; 2 Kent, Com. 306, 307.

It results from this view of the subject that whatever right remained in the Marginal Company to its rolling-stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets, or any of the streets, of Boston. It no longer had the right to cumber these streets

[1] For the earlier Massachusetts provision, see *supra*, p. 1552, n. For one in Pennsylvania of January, 1802, see the court's construction in *Pennsylvania College Cases*, 13 Wall. 190, 192, 214. CLIFFORD, J., for the court, there said: "The fifth section of the charter, by necessary implication, reserves to the State the power to alter, modify, or amend the charter without any prescribed limitation. Provision is there made that the constitution of the college shall not be altered or alterable by any ordinance or law of the trustees, 'nor in any other manner than by any Act of the Legislature of the Commonwealth,' which is in all respects equivalent to an express reservation to the State to make any alterations in the charter which the legislature in its wisdom may deem fit, just, and expedient to enact, and the donors of the institution are as much bound by that provision as the trustees." — ED.

[2] For other like provisions in New York, see *Miller* v. *The State*, 15 Wall. 478. — ED.

with a railroad track which it could not use, for these belonged by law to no person of right, and were vested in defendants only by virtue of the repealed charter.

It was, therefore, in the power of the Massachusetts Legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal Company. Whether this action was oppressive or unjust in view of the public good, or whether the legislature was governed by sufficient reason in thus repealing the charter of one company and in chartering another at the same time to perform as part of its functions the duties required of the first, is not, as we have seen, a judicial question in this case. It may well be supposed, if answer were required to the complainant's bill, that it was made to appear that the Marginal Company had shown its incapacity to fulfil the objects for which it was created, and that another corporation, embracing larger area, connecting with more freight depots and wharves, and with more capital, could better serve the public in the matter for which both franchises were given.

That in creating the later corporation, whose object was to fulfil a public use, it could authorize it to take such property of other corporations as might be necessary to that use, as well as that of individuals, can hardly admit of question. Sect. 4 of the Act gives this power to the Union Company with reference to the tracks of all street railroads in the city, and provides that in the event of an inability to agree with the owners of these tracks as to compensation, that shall be determined in accordance with the provisions of general laws previously enacted on that subject. To this there can be no valid legal objection. The property of corporations, even including their franchises, when that is necessary, may be taken for public use under the power of eminent domain, on making due compensation. *West River Bridge Co.* v. *Dix*, 6 How. 507; *Central Bridge Corporation* v. *City of Lowell*, 4 Gray (Mass.), 474; *Boston Water-power Co.* v. *Boston & Worcester Railroad Corporation*, 23 Pick. (Mass.) 360; *Richmond, &c. Railroad Co.* v. *Louisa Railroad Co.*, 13 How. 71.

But it is the sixth section of the Act which is most bitterly assailed as an invasion of appellant's rights. It declares that the Union Freight Company, within four months from the passage of the Act, *shall* take the tracks, or any part thereof, of the Marginal Freight Company, subject to the laws relating to taking land by railroad companies and the compensation therefor. If, as the language seems to imply, the new company is bound to take so much of the track of the old one as it shall need or elect to use, and pay for it within four months, it is a requirement favorable to this company in preference to others, and with especial reference to the fact that its power to use the track for railroad purposes has ceased. If it is merely a permission to take the track on payment of compensation, it is still a favor to the Marginal Company to require this to be done within four months.

A suggestion is made that the Marginal Company acquired by purchase, for $15,000, the right to the use of the track of the Commercial Freight Company, and that this property stands on different grounds from the remainder of its track.

We are unable to discover any difference in principle. If the new company takes this track, or takes the Marginal Company's right to use it, we suppose the latter will be entitled to compensation for its interest in it, as for other property taken for a public use.

In fact, in regard to the whole question discussed as to the mode of making compensation, and its sufficiency to indemnify the Marginal Company for what is taken, it seems to us to be premature; for whenever the attempt to adjust the compensation is made, the question of its sufficiency and its compliance with the law on that subject may arise, and it can then be decided.

Nor are we satisfied of the soundness of the argument of counsel that the clause in the Marginal Company's charter, which declares it to be subject to the restrictions and liabilities contained in the general laws relating to street railways, withdraws it from the operation of the forty-first section of chapter 68 of the General Laws of the State. The latter clause declares *all* Acts of incorporation subject to its provisions. This subjection is not impaired by the fact that a particular corporation is made by its charter subject to other laws also of a general character.

We are of opinion that the question of the repeal of the charter of the Marginal Company is to be decided by the construction of the general statute, whose effect and history we have discussed.

These considerations require the affirmance of the decree of the Circuit Court sustaining the demurrer to appellant's bill.

Decree affirmed.[1]

Mr. Justice Gray did not sit in this case, nor take any part in deciding it.

[1] For an account of the abuses which induced the legislation considered in this case, see Leg. Doc. Mass. House (1872), No. 219, being a report of the Committee on Railways, dated March 25, 1872.

"A franchise granted by the State with a reservation of a right of repeal must be regarded as a mere privilege while it is suffered to continue; but the legislature may take it away at any time, and the grantees must rely for the perpetuity and integrity of the franchises granted to them, solely upon the faith of the sovereign grantor." — Cooley, *Const. Lim.* (6th ed.) 472.

See *Richardson* v. *Sibley*, 11 Allen, 65; *East Boston, &c. R. R. Co.* v. *East. R. R. Co.*, 13 Allen, 422; *Memphis, &c. R. R. Co.* v. *R. R. Com'rs*, 112 U. S. 609; *Holyoke Co.* v. *Lyman*, 15 Wall. 500; *State* v. *Montgom. Lt. Co.*, 2 So. W. Rep. 1042 (Fla. 1894); *McCandless* v. *Richm. & Danv. R. R. Co.*, 38 So. Car. 103 (1892); *Norwood* v. *N. Y., &c. R. R.*, 161 Mass. 259, 265–266. — Ed.

BRIDGE COMPANY *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1881.

[105 *U. S.* 470.][1]

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The plaintiff, in 1868, was authorized by the Legislatures of Kentucky and Ohio to bridge the Ohio River between Newport and Cincinnati; and Congress, in 1869, gave the assent of the United States, adding this clause: "But Congress reserves the right to withdraw the assent hereby given, in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge." In 1871, while the bridge was still unfinished, Congress declared it unlawful to proceed with the structure unless certain changes were made in the plan of it, declaring it lawful to proceed if these were made. The same Act allowed the plaintiff to bring a bill in equity against the United States in the Circuit Courts, to determine, among other things, "the liability of the United States, if any there be, to the said company, by reason of the changes by this Act required to be made," with an appeal to the Supreme Court. The company promptly yielded to these new requirements, and, having completed its bridge on the altered plan, brought in the court below this suit in equity against the United States to recover the increased cost. After hearing, the court dismissed the bill, and from that decree this appeal was taken.

Mr. William M. Ramsey, for the appellant.

The Attorney-General and *the Solicitor-General*, for the United States.

MR. CHIEF JUSTICE WAITE, after stating the case, delivered the opinion of the court.

[The court first reviewed the course of legislation in cases of this sort, and held that the reservation left Congress free to revoke its permission, and that Congress could ascertain for itself whether the bridge would materially obstruct navigation.]

It is next insisted that if in the judgment of Congress the public good required the bridge to be removed, or alterations to be made in its structure, just compensation must be made the company for the loss incurred by what was directed. It is true that one cannot be deprived of his property without due process of law, and that private property cannot be taken for public use without just compensation. In the present case the bridge company asked of Congress permission to erect its bridge. In response to this request permission was given, but only

[1] The statement of facts is shortened. — ED.

on condition that it might be revoked at any time if the bridge was found to be detrimental to navigation. This condition was an essential element of the grant, and the company in accepting the privileges conferred by the grant assumed all risks of loss arising from any exercise of the power which Congress saw fit to reserve. What the company got from Congress was the grant of a franchise, expressly made defeasible at will, to maintain a bridge across one of the great highways of commerce. This franchise was a species of property, but from the moment of its origin its continued existence was dependent on the will of Congress, and this was declared in express terms on the face of the grant by which it was created. In the use of the franchise thus granted, the company might, and it was expected would, acquire property. The property thus acquired Congress could not appropriate to itself by a withdrawal of its assent to the maintenance of the bridge that was to be built, but the franchise, by express agreement, was revocable whenever in the judgment of Congress it could not be used without substantial and material detriment to the interest of navigation. A withdrawal of the franchise might render property acquired on the faith of it, and to be used in connection with it, less valuable; but that was a risk which the company voluntarily assumed when it expended its money under the limited license which alone Congress was willing to give. It was optional with the company to accept or not what was granted, but having accepted, it must submit to the control which Congress, in the legitimate exercise of the power that was reserved, may deem it necessary for the common good to insist upon.

We are aware that this is a power which may be abused, but it is one Congress saw fit to reserve. For protection against unjust or unwise legislation, within the limits of recognized legislative power, the people must look to the polls and not to the courts. It would be an abuse of judicial power for the courts to attempt to interfere with the constitutional discretion of the legislature.

What has been done seems to have been with due regard to the rights of all concerned. The Constitution made it the duty of Congress to protect all commerce which extends beyond State lines against obstruction by or under the authority of the States. Two States had been applied to for leave to bridge an important national river. They gave the leave, but made it subject to the constitutional control of Congress. Congress, when applied to, assented to what was wanted, but in express terms reserved to itself the power to revoke what had been done, or require alterations to be made, in case experience proved that the structure which was to be put up substantially and materially interfered with navigation. Under this authority work was at once begun. The next year, by the Act of July 10, 1870, c. 240, sect. 5 (16 Stat. 227), making large appropriations for the improvement of rivers and harbors, the Secretary of War was required to detail three engineers to examine all the bridges erected or in the process of erection across the Ohio, and report to the next Congress whether, in their opinion, such bridges, or any of

them, as constructed or proposed to be constructed, did or would interfere with free and safe navigation; and if they did or would so interfere, to report what extent of space and elevation above water would be required to prevent obstruction, and an estimate of the cost of changing the bridges built, and in the process of building, so as to conform to what was recommended. At the next session the Act was passed which required the Newport and Cincinnati Company to alter its bridge, and allowed this suit to be brought for the purpose of determining whether any liability for pecuniary damages had been incurred by the United States to the company for what was done. In this way Congress recognized fully the obligation resting on every government, when it is guilty of a wrong, to make reparation. Exemption from suit does not necessarily imply exemption from liability. Here Congress gave the courts jurisdiction to determine whether a wrong had been done, and, if so, to award compensation in money by the payment of the cost of what had been improperly required. In our opinion Congress did no more than it was authorized to do, and there is no liability resting on the United States to answer in damages.

It is next insisted that by the terms of the statute authorizing the suit the liability of the United States is established, if it shall be determined that the bridge, as far as it had progressed, was "constructed so as to substantially comply with the provisions of law relating thereto." We do not so understand the statute. The language is as follows: "Full jurisdiction is hereby conferred upon said court to determine: *first*, whether the bridge, according to the plans on which it has progressed, at the passage of this Act, has been constructed so as substantially to comply with the provisions of law relating thereto; and, *second*, the liability of the United States, if any there be, to the said company, by reason of the changes by this Act required to be made, and if the said court shall determine that the United States is so liable, and that said bridge was so being built, then the said court shall further ascertain and determine the amount of the actual and necessary cost and expenditures," &c.

The rule of damages has been fixed by the statute. As to that the court has no discretion beyond ascertaining the excess of cost. But before damages can be given, it must appear both that the United States was, in law, liable, and that the bridge had been constructed in accordance with the requirements of the law, down to the time the change of plan was directed. That the liability of the United States was not made to depend entirely on the fact that the law in respect to the form of the structure had been complied with is apparent, because if such had been the intention of Congress it would have been entirely unnecessary to submit the second question for determination. But the second is as clearly submitted as the first. Damages are not to be given if either is found in favor of the United States. No matter whether the United States was, in law, liable or not, if the bridge had not been constructed so as substantially to comply with the law, there could be no recovery.

That is expressly declared. If, however, it had been properly built, the determination of the question of legal liability became important, and that, in our opinion, depended entirely on the right of Congress, under the Constitution and laws of the United States, to require the change without making just compensation in money.

Decree affirmed.

[The JUSTICES MILLER, FIELD, and BRADLEY gave dissenting opinions. MILLER, J., did not deny the power of Congress, as asserted by the majority, but went upon the construction of the statute.]

"I repeat," he said, "that it was competent for Congress to have declared that the bridge, as it was in process of construction, had proved to be a substantial and material obstruction to the free navigation of the river, and for that reason the assent of Congress to its erection was withdrawn. Or that it would be such an obstruction unless certain modifications of the plan were made, which Congress could prescribe, and require them to be made. But it did neither. It based no action on the assumption that the bridge was or would be an obstruction to navigation; but it determined to change the bridge from a low bridge with a draw, to a high bridge without a draw. The difference in these two is well known to every one who has travelled over our Western rivers, and I myself am familiar with no less than ten drawbridges across the Mississippi built under Acts of Congress, which are not substantial or material obstructions to the navigation of that great river. Congress, therefore, never intended to act on the reservation contained in the resolution. No reference is made to that resolution in the Act of 1871 requiring this total change of plan. . . .

I think Congress intended to waive that question [of its constitutional power], and in favor of justice and fair dealing to pay for the losses incurred under the very act which gave the compensation, if it was found that the bridge, as far as it had progressed, was in conformity to law, and would not be a substantial and material obstruction to navigation if completed on that plan.

PEOPLE *v.* O'BRIEN ET AL.

NEW YORK COURT OF APPEALS. 1888.

[111 *N. Y.* 1.][1]

Charles F. Tabor, Attorney-General, and *William A. Poste*, for the People; *Denis O'Brien*, for the Receiver; *James C. Carter* and *Elihu Root*, for the Broadway and Seventh Avenue Railroad Company, defendant; *Albert Stickney* and *Nelson S. Spencer*, for the Twenty-third Street Railway Company and Jacob Sharp, defendants; *Edward*

[1] The reporter's statement is omitted. — ED.

Winslow Paige, for Mr. Palmer, trustee, etc., respondent; *Thomas Allison*, for the Mayor, etc., respondent; *William C. Gulliver*, for James A. Richmond and Others, respondents.

RUGER, C. J. It will not be unprofitable at the outset to recall some of the prominent incidents attending the origin and operation of the Broadway Surface Railroad Company, for the purpose of obtaining a clearer view of the situation of the parties and their relation to the subject of the action.

On May 13, 1884, that company filed articles of association and became incorporated as a street railroad company under the provisions of chapter 252 of the Laws of 1884, a general Act passed to authorize the formation of such corporations, pursuant to the mode introduced by the amendment to the Constitution of 1874. By such incorporation the company became an artificial being, endowed with capacity to acquire and hold such rights and property, both real and personal, as were necessary to enable it to transact the business for which it was created, and allowed to mortgage its franchises as security for loans made to it, but having no present authority to construct or operate a railroad upon the streets of any municipality. This right, under the Constitution, could be acquired only from the city authorities, and they could grant or refuse it at their pleasure. The Constitution not only made the consent of the municipal authorities indispensable to the creation of such a right, but, by implication, conferred authority upon them to grant the consent, upon such terms and conditions as they chose to impose, and upon the corporation the right to acquire it by purchase.

The framers of the Constitution, evidently treating the privilege as a valuable one, which should be disposed of for the benefit of the municipality, to those who would pay the highest price for it, gave the municipal authorities the exclusive right to grant the privilege, which had theretofore been exercised by the legislature alone, and authorized its acquisition by contract from such municipality. (*In Re Cable Co.*, 109 N. Y. 32; *Mayor, etc.*, v. *T. & L. R. R. Co.*, 49 Id. 657.) The subsequent legislation of the State confirms this view, for at times it has provided that such right might be sold at auction, and by chapters 65 and 642 of the Laws of 1886, makes it obligatory upon the municipalities to dispose of such right by public auction to the highest bidder.

Previous to December 5, 1884, this company applied to the municipality of New York for authority to lay tracks and run cars over Broadway from the Battery to Fifteenth Street, and on that day, by resolution of the Common Council, the consent of the city was given upon the terms and conditions prescribed in the resolution granting it, among which was the annual payment of a considerable sum of money to the municipality. It is conceded that the Broadway Surface Company duly accepted the grant, and fully complied with and performed all of the terms and conditions provided therein, to entitle it to acquire, construct, and operate its road. We know, not only from contemporary history, but from cases which have already reached this court, that

serious questions have arisen, with reference to the propriety of the means by which the corporators of the company obtained this consent from the municipal authorities, but they are not involved in this case, and have no bearing upon the questions presented for discussion by the record. They were neither alleged in the complaint, supported by proof, or presented in the arguments of counsel. The company subsequently obtained the favorable report of a commission duly appointed by the Supreme Court in lieu of the consent of abutting property owners, and the order of the court confirming the action of the commissioners.

After its incorporation, the Broadway Surface Company mortgaged its property and franchises as security for contemplated loans, and authorized its bonds to be put upon the market for sale to the public generally, and they were largely purchased by investors, without notice of any defect in their origin or execution. It also made contracts with other street railroad companies owning, respectively, lines of road connecting with the contemplated line of the Broadway Surface Company, and diverging therefrom to distant parts of the city, for the use of their several tracks by each other, for which it received a large present pecuniary consideration from each of said companies besides the exchange of mutual benefits and accommodations.

It is not disputed but that upon the entry of the order of confirmation, the Broadway Surface Railroad Company became vested with the right of constructing a railroad on Broadway and running cars thereon, to as full an extent as it had power to acquire, or the State and city authorities had authority to grant.

In the spring of 1885 the company caused its track to be constructed over the ronte authorized, and from that time to the 4th day of May, 1886, when it was dissolved by an Act of the Legislature, in connection with other railroad companies, ran its cars over such road and the connecting lines.

On May 14, 1886, in an action between the People, as plaintiff, and James A. Richmond, the former President of the Broadway Surface Railroad Company, as sole defendant, upon the application of the Attorney-General, one John O'Brien was appointed receiver of the property formerly belonging to the Broadway Surface Company, by a justice of the Supreme Court of the third judicial district, in an *ex parte* order based upon the summons and complaint in that action, in pursuance of and under the authority alone of the provisions of chapter 310 of the Laws of 1886.

The present action was a supplementary action brought July 8, 1886, by the Attorney-General in the name of the People of the State against the city of New York, the receiver of the Broadway Surface Railroad Company, and numerous other corporations and persons, alleged to have had dealings with such company, either as stock-holders, mortgagees, creditors, or contractors, for the purpose of obtaining a judgment declaratory of the rights and liabilities of the several parties, as affected by the dissolution of the corporation, determining the fact as

to what were assets of the company, and the extent of the interests of the several parties therein, and restraining the mortgagees, contractors, and others from taking legal proceedings to enforce their rights in, and liens upon the property of the corporation. . . .

We think the material question for discussion here is whether the franchise to maintain tracks and run cars on Broadway survived the dissolution of the corporation, and if so, upon whom the right of administering its affairs devolved. . . . A review of the judgment brings up for consideration propositions very grave in character, not only on account of the extent of the private interests affected, but because their determination will affect great public questions arising out of the limitations imposed by the Constitution upon the legislative power, over the property of corporations lawfully acquired.

The statutes upon which the action is predicated, confessedly assume the right and power of the legislature to wrest from the company its franchises; to transfer them to other persons, and bestow their value upon the donees of the State. The statutes contemplate the absolute destruction of the property of the corporation, and the loss of its value to the creditors who have made loans in good faith upon the security of such property, and this action is avowedly prosecuted to accomplish the purposes of the legislation. It is, therefore, urgently contended by the Attorney-General that none of the franchises of the corporation survived its dissolution, and that the mortgages previously given thereon, as well as all contracts made with connecting street railroads for the mutual use of their respective roads, fell with the repeal and could not be enforced.

If it could be supposed for a moment that this claim was reasonably supported by authority, or maintainable in logic or reason, it would give grave cause for alarm to all holders of corporate securities.

The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the Constitution gives to property, and are subject to the arbitrary will of successive legislatures, to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice as well as the traditions of the Anglo-Saxon race in respect to the security of rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary, and we desire in unqualified terms to express our disapprobation of such a doctrine. Whatever might have been the intention of the legislature or even of the framers of our Constitution in respect to the effect of the power of repeal reserved in Acts of incorporation, upon the property rights of a corporation, such power must still be exercised in subjection to the provisions of the Federal Constitution.

Considering the power which the State has to terminate the life of corporations organized under its laws, and the authority which its Attorney-General has by suit to forfeit its franchises for misuse or abuse, and to regulate and restrain corporations in the exercise of their cor-

porate powers, there is little danger to be apprehended in the future from the overgrowth of power, or the monopolistic tendencies of such organizations, but whatever that danger may be, it is trivial in comparison with the widespread loss and destruction which would follow a judicial determination, that the property invested in corporate securities was beyond the pale of the protection afforded by the fundamental law. It is not perhaps strange, in the great variety of cases bearing upon the subject, and the manifold aspects in which questions relating to corporate rights and property have been presented to the courts that *dicta*, couched in general language, may be found giving color to the plaintiff's claim; but we think that there are no reported cases in which the judgment of the court has ever taken the franchises or property of a corporation from its stock-holders and creditors, through the exercise of the reserved power of amendment and repeal, or transferred it to other persons or corporations, without provision made for compensation.

Among other claims made by the State, it is contended that the stated term of one thousand years prescribed in its charter, for the duration of the company, constitutes a limitation upon the estate granted, and that, therefore, the corporation took a qualified estate only in its franchises, and that the rights reserved by the Revised Statutes (Laws of 1884 and 1850), and the Constitution, to alter, amend, and repeal the charters or laws under which corporations might be organized, also constituted a limitation upon the estate granted, and that the exercise of the right of repeal by the State accomplished the destruction of the corporation and the annihilation of all franchises acquired under its charter.

It will be convenient in the first instance to consider the nature of the right acquired by the corporation under the grant of the Common Council, with respect to its terms or duration. This is to be determined by a consideration of the language of the grant and the extent of the interest which the grantor had authority to convey. We think this question has been decided by cases in this court, which are binding upon us as authority in favor of the perpetuity of such estates. That a corporation, although created for a limited period, may acquire title in fee to lands or property necessary for its use was decided in *Nicoll* v. *New York & Erie Railroad Company* (12 N. Y. 121), where it was held that a railroad corporation, although created for a limited period only, might acquire such title, and that where no limitation or restriction upon the right conveyed was contained in the grant, the grantee took all of the estate possessed by the grantor.

The title to streets in New York is vested in the city in trust for the People of the State, but under the Constitution and statutes it had authority to convey such title as was necessary for the purpose, to corporations desiring to acquire the same for use as a street railroad. The city had authority to limit the estate granted either as to the extent of its use or the time of its enjoyment, and also had power to grant an

interest in its streets for a public use in perpetuity, which should be irrevocable. (*Yates* v. *Van De Bogert*, 56 N. Y. 526; *In re Cable Co., supra.*)

Grants similar in all material respects to the one in question have heretofore been before the courts of this State for construction, and it has been quite uniformly held that they vest the grantee with an interest in the street in perpetuity, for the purposes of a street railroad. (*People* v. *Sturtevant*, 9 N. Y. 263; *Davis* v. *Mayor, etc.*, 14 Id. 506; *Milhau* v. *Sharp*, 27 Id. 611; *Mayor, etc.*, v. *Second Ave. R. R. Co.*, 32 Id. 261; *Sixth Ave. R. R. Co.* v. *Kerr*, 72 Id. 330.) . . .

The resolution of the Common Council in this case expressly provided for traffic contracts by which the Broadway and Seventh Avenue Railroad Company should obtain a right to run cars over the tracks of the Broadway Surface Railroad, and no conditions upon the right granted to the Broadway Surface Railroad Company, in respect to the duration of such contract rights or otherwise, were imposed by the terms of the grant. It was clearly contemplated by its provisions that the rights granted should be exercised in perpetuity, if public convenience required it, by that corporation, or those who might lawfully succeed to its rights.

When we consider the mode required by the statutes and the Constitution, to be pursued in disposing of this franchise, the inference as to its perpetuity seems to be irresistible, for it cannot be supposed that either the legislature or the framers of the Constitution intended to offer for public sale property the title to which was defeasible at the option of the vendor, or that such property could be made the subject of successive sales to different vendees, as often as popular caprice might require it to be done. Neither can it be supposed that they contemplated the resumption of property, which they had expressly authorized their grantee to mortgage and otherwise dispose of, to the destruction of interests created therein by their consent.

We are, therefore, of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway through its grant from the city, under the authority of the Constitution and the Act of the legislature. It is also well settled by authority in this State that such a right constitutes property within the usual and common signification of that word. (*Sixth Ave. R. R. Co.* v. *Kerr*, 72 N. Y. 330; *People* v. *Sturtevant*, 9 Id. 263.)

When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country; the numerous laws adopted in the several States providing for their security and enjoyment, and the extent of litigation conducted in the various courts, State and Federal, in which they have been upheld and enforced, there is no question, but that in the view of legislatures, courts, and the public at large, certain corporate franchises have been uniformly regarded as indestructible by legislative authority, and as constituting property in the highest sense of the term.

It is, however, earnestly contended for the State that such a franchise is a mere license or privilege enjoyable during the life of the grantee only, and revocable at the will of the State. We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country. The laws of this State have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested them with the attributes of property generally. . . . These rights of property having been acquired and created under the express sanction and authority of the State, it remains to inquire whether they were defeasible and subject to be taken away through the exercise of any power reserved by the State to alter, amend, and repeal laws or charters. . . . These Acts should be read and construed together, and, as thus considered, provide that the legislature may at any time alter, amend, and repeal these Acts, and may also annul and dissolve charters formed thereunder, but such dissolution shall not take away or impair any remedy against such corporation, its officers and trustees, for any liability previously incurred. The contract proved between the corporation and the State was intended, in respect to a repeal of the charter, to survive the dissolution of the corporation, and to determine the rights of parties interested in the property, in the event of dissolution. By virtue of this contract the corporation secured rights subject to be taken away under certain restrictions, and protected itself from any consequences following a repeal of its charter, except those expressly agreed upon.

But even if it be conceded that the constitutional provisions place the right to repeal charters, as well as laws, beyond the power of legislatures to waive or destroy, the question still remains as to the effect of such a repeal upon the franchises of the corporation; whether it contemplates anything more than the extinction of the corporate life, and consequent disability to continue business, and exercise corporate functions after that time, or has a wider scope and effect.

It may be assumed in this discussion that the authority of the legislature to repeal a charter, if it has expressed its intention to reserve such power in its grant, constitutes a valid reservation. Parties to a contract may lawfully provide for its termination at the election of either party, and it may, therefore, be conceded that the State had authority to repeal this charter, provided no rights of property were thereby invaded or destroyed. In speaking of the franchises of a corporation we shall assume that none are assignable except by the special authority of the legislature. We must also be understood as referring only to such franchises as are usually authorized to be transferred by statute, viz., those requiring for their enjoyment the use of corporeal property, such as railroad, canal, telegraph, gas, water, bridge, and similar companies, and not to those which are in their nature purely incorporeal and inalienable, such as the right of corporate life, the exercise of banking, trading, and insurance powers, and similar privi-

leges. The franchises last referred to being personal in character and dependent upon the continued existence of the donee for their lawful exercise, necessarily expire with the extinction of corporate life, unless special provision is otherwise made. (*People* v. *B., F. & C. I. R. R. Co.*, 89 N. Y. 84; *People* v. *Metz*, 50 Id. 61.) In the former class it has been held that at common law real estate acquired for the use of a canal company could not be sold on execution against the corporation separate from its franchise, so as to destroy or impair the value of such franchise. (*Gue* v. *Tide Water Canal Co.*, 24 How. [U. S.] 257), and by parity of reasoning it must follow that the tracks of a railroad company, and the franchise of maintaining and operating its road in a public street, are equally inseparable, in the absence of express legislative authority providing for their severance.

The statute of our State authorizing the sale of the franchise and property of a railroad company on execution, seems to recognize the indissolubility of the connection between the corporeal property and its incorporeal right of enjoyment. It is also to be observed that in none of the provisions for repeal in this State is there anything contained which purports to confer power to take away or destroy property or annul contracts, and the contention that the property of a dissolved corporation is forfeited, rests wholly upon what is claimed to be the necessary consequence of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his. (*Mumma* v. *Potomac Co.*, 8 Pet. 281, 285.) The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done under power lawfully conferred. (*Butler* v. *Palmer*, 1 Hill, 335.)

The authorities seem to be uniform to the effect that a reservation of the right to repeal enables a legislature to effect a destruction of the corporate life, and disable it from continuing its corporate business (*People ex rel. Kimball* v. *B. & A. R. R. Co.*, 70 N. Y. 569; *Philips* v. *Wickham*, 1 Paige, 590), and a reservation of the right to alter and amend confers power to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by the Federal Constitution upon legislation impairing the obligation of contracts. (*Munn* v. *Illinois*, 94 U. S. 113, 123.)

We think no well-considered case has gone further than this, while in many cases such power has been expressly held to be limited to the effect stated. In the language of Chief Justice Marshall in *Fletcher* v. *Peck* (6 Cranch, 87, 135): "If an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in the nature of a con-

tract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights." It would seem to be quite obvious that a power existing in the legislature by virtue of a reservation only, could not be made the foundation of an authority to do that which is expressly inhibited by the Constitution, or afford the basis of a claim to increase jurisdiction over the lives, liberty, or property of citizens beyond the scope of express constitutional power.

Since the decision of the celebrated *Trustees Dartmouth College* v. *Woodward* (4 Wheat. 518), the doctrine that a grant of corporate powers by the sovereign, to an association of individuals, for public use constitutes a contract, within the meaning of the Federal Constitution, prohibiting State legislatures from passing laws impairing its obligations, has, although sometimes criticised, been uniformly acquiesced in by the courts of the several States as the law of the land, and may be regarded as too firmly established to admit of question or dispute. (*People* v. *Sturtevant*, *supra; Milhau* v. *Sharp*, *supra; Brooklyn Cent. R. R. Co.* v. *Brooklyn City R. R. Co.* [32 Barb. 364.]) The intimation, by Judge Story, in that case, that the rule might be otherwise if the legislature should reserve the power of amending or repealing it, led to the adoption by the legislatures of the various States of the practice of incorporating such reservations in Acts of incorporation. Whatever may be the effect of such reservations, it is immaterial whether they are embraced in the Act of incorporation or in general statutes or provisions of the Constitution. In either case they operate upon the contract according to the language of the reservation. (Morawetz on Corp. 464.) It is manifest, therefore, that in the absence of such reserved power, legislatures have no authority to violate, destroy, or impair chartered rights and privileges, or power over corporations, except such as they possess by virtue of their legislative authority over persons and property generally. It is obvious that this reserved power does not, in any sense, constitute a condition of the grant, and cannot have effect as such, but is simply a power to put an end to the contract, with such effect upon the rights of the parties thereto as the law ascribes to it. (*Sinking-Fund Cases*, 99 U. S. 700, 748; *Tomlinson* v. *Jessup*, 15 Wall. 454, 457.) In speaking of the exercise of this power by Congress in the *Sinking-Fund Cases*, Chief Justice Waite says: "Congress not only retains . . . [Here follows a passage which may be found *supra* at p. 1699.]

The judges dissenting in that case contended that the reserved power could not be construed as authorizing the alteration, violation, or nullification of any of the material provisions of the grant, but should be held to mean simply a reservation of the power to legislate, freed from the restrictions imposed by the constitutional provisions against legislation impairing the obligations of contracts. Mr. Justice Bradley said: "The reserved power in question is simply that of legislation, to alter, amend, or repeal a charter. This is very different from the power to violate or to alter the terms of a contract at will. A reserva-

tion of power to violate a contract, or alter it, or impair its obligation, would be repugnant to the contract itself and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute, is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles; but interpreted as the reservation of the right to violate an executed contract it is not sustainable."

This dissent proceeded upon the ground that the Acts of Congress under consideration changed some of the essential features of the contract, and were, therefore, void, as being obnoxious to the provisions of the Constitution for the protection of life, liberty, and property. The majority of the court held, however, that such Acts were simply an exercise of the power of Congress to regulate the internal administration of the affairs of a corporation, which, to a certain extent, it was unanimously agreed that it possessed. There was no dispute or disagreement as to the correctness of the rule stated, that the power of amendment and repeal was a restricted power, limited by the provisions of the Constitution. An interpretation conferring the power of violating a contract at will upon one of its parties, under a clause authorizing its amendment or repeal, would seem to be inconsistent with any reasonable notion of the nature of such an instrument, and beyond the power of parties lawfully to create.

If it is possible to conceive the idea of a repealable grant, certainly such a grant, accompanied with power to convey or pledge the interest granted, must, on the execution of the power, necessarily preclude a resumption by the grantor of the subject of the grant, or any right of property acquired under it. An express reservation by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly, would be equally ineffectual and void. . . .

We are, therefore, of the opinion that the Broadway Surface Company took an indefeasible title to the land necessary to enable it to construct and maintain a street railroad in Broadway, and to run cars thereon for the transportation of freight and passengers, which survived its dissolution. . . .

The judgments of the Special and General Terms should be reversed and the complaint dismissed, with costs to the defendant other than the receiver.

All concur, except PECKHAM and GRAY, JJ., not sitting.[1]

[1] This case presents the final aspect of the long protracted efforts of Jacob Sharp and others to place a street railway on Broadway, in the city of New York. See also *People* v. *Sharp*, 107 N. Y. 427 (1887).

In *Davis et al.* v. *The Mayor &c. of New York et al.*, 14 N. Y. 506 (1856), these persons had been authorized by a resolution of the Common Council of the city of New York of Dec. 29, 1852, to lay a double track for a horse railway on Broadway. Upon an appeal from an order granting an injunction to restrain the construction of the

track, a new trial was granted on special grounds; but a majority of the court were of opinion that the resolution was void.

In *Milhau et al.* v. *Sharp et al.*, 27 N. Y. 611 (1863), where the same general question came up, this was distinctly held, and the defendants were perpetually enjoined SELDEN, J., for the court, said: "Neither the corporation nor the Common Council has been authorized to create a franchise of the character of that described in the resolution under consideration. It follows that the resolution, relating to a subject not within the powers of the body passing it, is merely void.

"On other grounds, without reference to its character as creating a franchise, the resolution is equally objectionable. It was not, as has been insisted, an act of legislation, but on the contrary, it possesses all the characteristics of, and was in fact, a contract. It was held to be a contract in the case of *The People* v. *Sturtevant* (9 N. Y. 273), and but a slight examination of its provisions is requisite to show the correctness of that decision. Prior to its acceptance by the defendants, the resolution was only a proposition, having no binding force whatever. It was certainly not then a law, and since that time the Common Council have taken no action upon it. Upon its acceptance (if valid), it became a contract between two parties, binding each to the observance of all its provisions. It was something more than a mere executory contract between the parties. It amounted also to an immediate grant of an interest, and, it would seem, of a freehold interest in the soil of the streets to the defendants. The rails, when laid, would become a part of real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors, and assigns. I say perpetually, because there is no limitation in point of time to the continuance of the franchise, and no direct power is reserved to the corporation to terminate it. Indirectly such termination might, perhaps, be effected, after the expiration of ten years, by making the exercise of the privileges so burdensome through the increase of license fees as to compel their abandonment. This, however, could only be accomplished through the aid of State legislation; and if we assume that the laws of the State in that respect are to remain unchanged, the privileges granted are perpetual. The title to the rails when permanently attached to the land, and such right in the land as may be requisite for their perpetual maintenance, are therefore granted to the defendants by the resolution. The exclusive use of the rails when laid for the purpose for which they were designed, would also, as I think, belong to the defendants. Other people might drive across them, and to some extent along them, with ordinary carriages, but they would have no right to run cars upon them for their own convenience or profit. Any use which the public could have of them, not exercised through the defendants' franchise, would depend upon the fact that the rails would not entirely exclude from the ground they might occupy, the character of a public street. The public might continue to pass over the track (when not in use by the defendants), but that must be done with such inconvenience, more or less, as the rails might occasion. No direct benefit could be derived by the public, or by individuals not interested in the road, from its construction, otherwise than through the use of the cars to be run upon it. Indirectly, other benefits might arise, and possibly of sufficient magnitude to overbalance the inconvenience arising from its construction and use. Whether this would be so or not, is a question the solution of which does not belong to this tribunal, and I should express no opinion in regard to it if I had formed any. So far as that question is involved in the present case, it is already conclusively determined against the defendants, and my present purpose is only to show the importance, the exclusive character, and the permanency of the powers conferred, or attempted to be conferred, upon the defendants by the resolution. If that resolution should be sustained, no power would remain in the corporation to remove the railway after its construction, if it should prove to be a nuisance, or to reduce the rate of fare, if it should be found unreasonably high, or to compel the introduction of any improved method of conveyance, if at any future time such method should be invented, without the consent of the defendants or their successors; and the powers of the corporation over the street in many other respects would be abridged. Those powers were given to the corporation as a trust, to be held and exercised for the benefit of the public, from time to time, as occasion might require.

RAILROAD COMMISSION CASES.

SUPREME COURT OF THE UNITED STATES. 1886.

[116 *U. S.* 307.]

THIS was a suit brought by the Farmers' Loan and Trust Company, a New York corporation, to enjoin the Railroad Commission of Mississippi from enforcing against the Mobile and Ohio Railroad Company the provisions of the statute of Mississippi passed March 11, 1884, entitled "An Act to provide for the regulation of freight and passenger rates on railroads in this State, and to create a commission to supervise the same, and for other purposes." . . .

The case was heard on demurrer to the bill. The Circuit Court [of the United States for the Southern District of Mississippi] rendered a decree allowing the injunction, and from that decree this appeal was taken.

Mr. John W. C. Watson, for appellants; *Mr. P. Hamilton* also filed a brief for appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court. After stating the facts in the language above reported, he continued:

The argument in support of the decree below is:

and they could neither be delegated to others, nor effectually abridged by any Act of the corporate authorities. (*The People* v. *Kerr*, 27 N. Y. 188; *Presbyterian Church* v. *Mayor, &c.*, 5 Cowen, 538; *Coates* v. *Mayor, &c.*, 7 Id., 585; *Goszler* v. *Corporation of Georgetown*, 6 Wheat. 593.) Such trust is, in this respect, governed by the general principle, that the duties of a trustee cannot be delegated without express power for that purpose conferred by the author of the trust. (Hill on Trustees, 175, 540, Phil. ed., 1846.)

"The defendants' counsel insists that the resolution is not a contract, but a license, revocable at the pleasure of the Common Council. This position cannot be reconciled with the decision in *The People* v. *Sturtevant*, *supra*, nor with the principle declared by the Supreme Court of the United States, in the Dartmouth College case (4 Wheat. 519), and other kindred cases, in substance, that grants of such franchises, though made by Acts in form legislative, become, when accepted and acted upon, contracts, not subject to be recalled or modified, except in accordance with express reservations contained in the grants. No such reservation is made by the resolution in question, and the privileges which it grants, if within the power of the Common Council, are already beyond the control of any future Act of that body. (Smith's Com. §§ 252, 253.) No reservation of that kind, however, would have been of any service, as it could not supply the defect of power. The resolution is, therefore, void, for the reasons that it purports to create a franchise which the common council had no power to create; to vest in the defendants an exclusive interest in the street, which the Common Council had no power to convey; and to divest the corporation of the exclusive control over the street, which has been given to it as a trust for the use of the public, and which it is not authorized to relinquish."

And so *N. O. &c. R. R. Co.* v. *N. O.* 44 La. Ann. 728 (1892); *Parkhurst* v. *Cap. City Ry. Co.*, 23 Oreg. 471 (1893); *Lake Roland Elev. Ry. Co.* v. *Mayor &c. of Baltimore et al.*, 77 Md. 352 (1893); *Balt. Trust, &c. Co.* v. *Mayor, &c. Balt.*, 64 Fed. Rep. 153 (1894). Compare *Belleville* v. *Citiz. Horse Ry. Co.*, 38 N. E. Rep. 584 (Ill. 1894). — ED.

1. That the statute under which the commissioners are to act impairs the obligation of the charter contract of the Mobile & Ohio Railroad Company;

2. That it is, so far as that company is concerned, a regulation of commerce among the States;

3. That it denies the company the equal protection of the laws; and deprives it of its property without due process of law;

4. That it confers both legislative and judicial powers on the commission, and is thus repugnant to the Constitution of Mississippi; and

5. That it is void on its face by reason of its inconsistencies and uncertainties.

These several positions will be considered in their order.

1. The provisions of the charter on which the claim of contract rests are found in §§ 1, 7, and 12, as follows: . . . [These sections give the usual power to transport by steam or otherwise, to make by-laws, manage their affairs, and to fix and regulate charges.]

From this it is claimed that the State granted to the company, for the full term of its corporate existence, that is to say, forever, the right of managing its own affairs and regulating its charges for the transportation of persons and property, free of all legislative control.

It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce. *Railroad Co.* v. *Maryland*, 21 Wall. 456; *Chicago, Burlington, & Quincy Railroad Co.* v. *Iowa*, 94 U. S. 155; *Peik* v. *Chicago & Northwestern Railway Co.*, 94 U. S. 164; *Winona & St. Peter Railroad Co.* v. *Blake*, 94 U. S. 180; *Ruggles* v. *Illinois*, 108 U. S. 526, 531. This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. . . .

Such being the rule, and such its practical operation, we return to the special provisions of the charter on which this case depends, and find, first, the authority given the corporation to carry persons and property. This of itself implies authority to charge a reasonable sum for the carriage. In this way the corporation was put in the same position a natural person would occupy if engaged in the same or like business. Its rights and its privileges in its business of transportation are just what those of a natural person would be under like circumstances; no more, no less. The natural person would be subject to legislative control as to the amount of his charges. So must the corporation be. That was decided in *Railroad Co.* v. *Maryland*; *Chicago, Burlington, & Quincy Railroad Co.* v. *Iowa*; *Peik* v. *Chicago & Northwestern Railway Co.*; *Winona & St. Peter Railroad Co.* v. *Blake*; and *Ruggles* v. *Illinois*; all cited above.

Next follows the power of the directors to make by-laws, rules, and regulations for the management of the affairs of the company, but it is expressly provided that such by-laws, rules, and regulations shall not be contrary to the laws of the State. This we held in *Ruggles* v. *Illinois* included laws in force when the charter was granted, and those which came into operation afterwards as well. It is true that the clause which thus limits the power of the directors is found in the middle of the sentence which confers the power, but it clearly was intended to refer to everything that might be done in this way "touching . . . all matters whatsoever that may appertain to the concerns of said company." There is nothing here, therefore, which in any manner implies a contract on the part of the State to exempt the company from the operation of laws enacted within the scope of legislative power for the regulation of the business in which it is authorized to engage.

The case turns consequently on § 12, which is, "that it shall be lawful for the company . . . from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation," etc. This would have been implied from the rest of the charter if there had been no such provision, and it is argued that, unless it had been intended to surrender the power of control over fares and freights, this section would not have been inserted. The argument concedes that the power of the company under this section is limited by the rule of the common law which requires all charges to be reasonable. In *Munn* v. *Illinois*, 94 U. S. 113, and *Chicago, Burlington & Quincy Railroad Co.* v. *Iowa*, above cited, this court decided that, as to natural persons and corporations subject to legislative control, the State could, in cases like this, fix a maximum beyond which any charge would be unreasonable, and that such maximum when fixed would be binding on the courts in their adjudications, as well as on the parties in their dealings. The claim now is that by § 12 the State has surrendered the power to fix a maximum for this company, and has declared that the courts shall be left to determine what is reasonable, free of all legislative control. We see no evidence of any such intention. Power is granted to fix reasonable charges, but what shall be deemed reasonable in law is nowhere indicated. There is no rate specified, nor any limit set. Nothing whatever is said of the way in which the question of reasonableness is to be settled. All that is left as it was. Consequently, all the power which the State had in the matter before the charter, it retained afterwards. The power to charge being coupled with the condition that the charge shall be reasonable, the State is left free to act on the subject of reasonableness within the limits of its general authority as circumstances may require. The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered. If there had been an intention of surrendering this power, it would have been easy to say so. Not having said so, the conclusive presumption is there was no such intention. . .

From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. What would have this effect we need not now say, because no tariff has yet been fixed by the commission, and the statute of Mississippi expressly provides "that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defence that such tariff so fixed is unjust."

It is also claimed that the charter contains a contract binding the State to allow the company, at all times and in all ways, to manage its own affairs through its own board of directors, and that the obligation of this contract will be impaired if the provisions of the statute are enforced by the commissioners. As has already been seen, the power of the directors is coupled with a condition that their management shall be in accordance with the laws of the State. This undoubtedly means with such laws as may be constitutionally enacted touching the administration of the affairs of the company. The present statute requires the company, 1, to furnish the commissioners with copies of its tariffs for all kinds of transportation; 2, to post in some conspicuous place at each of its depots the tariff approved by the commissioners, with the certificate of approval attached; 3, to conform to the tariff as approved without discrimination in favor of or against persons or localities; 4, to furnish the commissioners with all the information they require relative to the management of its line, and particularly with copies of all leases, contracts, and agreements for transportation with express, sleeping-car, or other companies to which they are parties; 5, to report all accidents within the limits of the State attended with any serious personal injury; 6, to make quarterly returns of its business to the commissioners, which returns shall embrace all the receipts and expenditures of its railroad; 7, to provide at least one comfortable and suitable reception room at each depot for the use and accommodation of persons desiring or awaiting transportation over its road; and 8, to keep at all times in such reception rooms a bulletin board which shall show the time of the arrival and departure of trains, and when any passenger or other train transporting passengers is delayed, notice of the extent of the delay and the probable time of arrival as near as it can be ascertained.

The second and third of these requirements relate only to the duty of the company to keep its charges within the limit of the tariff approved by the commissioners without discrimination in favor of or against persons or localities. The first, fourth, and sixth are clearly intended as a means of furnishing the commissioners with the information necessary to enable them to act understandingly in fixing the

tariff. Whether under these provisions the company can be required to make a report of or give information about its business outside of Mississippi is a question we do not now undertake to decide. The second, fifth, seventh, and eighth are nothing more than reasonable police regulations for the comfort, convenience, and safety of those travelling upon the road or doing business with the company in the State.

The commissioners have power, 1, to approve, and if need be to fix the tariff of charges for transportation, both of persons and property, by which the company must be governed, and to exercise a watchful and careful supervision over such tariff; 2, to notify the company of the times and places when and where the propriety of a change in existing tariffs will be considered; 3, to entertain complaints made by any person against a tariff which has been approved, on the ground that the same is in any respect for more than a just compensation, or that the charges amount to or operate so as to effect unjust discrimination, and, after due notice to the company and proper inquiry had, to make any changes that may be deemed proper; 4, to repair to the scene of an accident within the State attended with serious personal injury, and inquire into the facts and circumstances thereof, to be recorded in the minutes of their proceedings, and embraced in the annual report they are required to make to the Governor for transmission to the legislature; 5, to inspect the depots of all railroads operated in the State, and to see that comfortable and suitable reception rooms are provided; and 6, to institute all necessary suits for the recovery of the penalties prescribed by the statute for a violation of its provisions. The first three of these relate entirely to proceedings for fixing charges and supervising the tariff, and the rest, like the correlative requirements of the company, are mere police regulations which the commissioners are to enforce. All this comes clearly within the supervising power of the State in the administration of the affairs of its domestic corporations.

We conclude, therefore, that the charter of the company contains no contract the obligation of which is in any way impaired by the statute under which the commissioners are to act.[1]

[Justices Harlan and Field gave dissenting opinions. Blatchford, J., did not sit. In the course of his opinion, Harlan, J., said:] "The court concedes that the power which the State asserts, by the statute of 1884, of limiting and regulating rates, does [not] involve the power to destroy or to confiscate the property of these companies; and, consequently, it is said, the State cannot compel them to carry persons or property without reward, nor do that which in law would amount to a taking of private property for public use without just compensation. And reference is made to that clause of

[1] See *Minn. & St. Louis Ry.* v. *Emmons*, 149 U. S. 364, 367 (1892); *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S 556, 567; s. c. *supra*, pp. 687, 689; *Eagle Ins. Co.* v. *Ohio*, 153 U. S. 446 (1894). — Ed.

the statute which provides 'that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defence that such tariff so fixed is unjust.' But if I do not misapprehend the effect of the opinion, it means to declare that where the tariff of charges fixed by the commissioners does not certainly work the destruction or confiscation of these properties, or amount in law to taking them for public use without just compensation, the charges so established must be accepted by the courts, as well as by the companies, as reasonable, and, therefore, not be held or treated as 'unjust' in any prosecution under the Act for disregarding such tariff. I cannot otherwise interpret the observation that the legislature may establish a maximum, any charge in excess of which must be deemed by the courts and the parties to be unreasonable.

"In expressing the foregoing views I would not be understood as denying the power of the State to establish a railroad commission, or to enforce regulations — not inconsistent with the essential charter rights of the companies — in reference to the general conduct of their merely local business. My only purpose is to express the conviction that each of these companies has a contract with the State whereby it is exempted from absolute legislative control as to rates, and under which it may, through its directors, from time to time, within the limit of reasonableness, establish such rates of toll for the transportation of persons and property as it deems proper, — such rates to be respected by the courts and by the public, unless they are shown affirmatively to be unreasonable."

In *Buffalo East Side R. R. Co.* v. *Buff. Str. R. R. Co.*, 111 N. Y. 132 (1888), Ruger, C. J., for the court, said: "The plaintiff and defendant are respectively incorporated street railroad companies, located in the city of Buffalo, and the action was brought upon a contract to recover a sum stipulated to be paid, as liquidated damages, upon a breach thereof by either party, that should reduce its rates of fare below the prices authorized to be charged under the statutes in force on May 3, 1872, each party thereby agreeing to make no change therein, without the consent of the other. This contract was claimed to have been made by authority of chapter 474 of the Laws of 1872. Subsequent to this contract the legislature, by chapter 600 of the Laws of 1875, enacted, in substance, that it should be unlawful for any street railroad company in Buffalo to charge more than five cents for each passenger carried on their respective roads, without regard to the distance travelled. This price was considerably less than the amount authorized to be charged by the former statute.

"Immediately thereafter the defendant reduced its rates of fare to the price authorized by the Act of 1875, and this reduction constitutes the breach of the contract relied upon for a recovery.

"No question is made but that if the Act of 1875 was a valid enactment, the defendant was required to conform to it, and would have a

good defence to the action. It is, however, claimed by the plaintiff that the Act was unconstitutional and void, inasmuch as it impaired the obligation of contracts. The only contract claimed to have been impaired is the one sued upon.

"Among the defences made to the action is the claim that the agreement had terminated before the alleged breach by virtue of its own limitation, and it is also urged that a reasonable construction of the language of the agreement shows that its obligations were not intended to survive any statutory reduction of the rates of fare chargeable upon such railroads.

"There is no express provision in the contract providing for the period of its duration, but there are several which furnish strong grounds for the inference that the parties did not intend that it should continue after an unfavorable change in the rates of fare. Among these provisions it is only necessary to refer to one, providing that 'the said party of the first part, so long as it receives for the transportation of passengers the fare allowed by law on the 3d day of May, 1872, and no longer,' will make connections with roads to be built by the party of the second part, and run a sufficient number of cars to accommodate all passengers applying for transportation, etc.; and another contained in the fifth paragraph, which provides that the party of the first part agrees that it will, during the continuance of the contract, charge the same rates for the transportation of passengers over its railroads, or any part thereof, that it is 'permitted to charge by the statutes in force regulating the same on the 3d day of May, 1872, and that it will not make any change in such rates without the consent of the party of the second part.' Similar provisions were contained in the contract relating to the obligations of the party of the second part, and contemplating the termination of the contract upon the same contingency.

"It is quite clear that the parties had in view a condition of affairs under which they would not be permitted to charge and receive the rates of fare authorized by former Acts, and in that event expressly provided for the termination of the contract.

"But the plaintiff contends that the rates authorized on May 3, 1872, still continue, so far as these two companies are concerned, by force of the obligations of their contract, and the constitutional inhibition upon the State from passing any law impairing its effect. We are not impressed with the soundness of this contention. It was competent for the parties to agree upon any period as the duration of their contract, and they might, if they chose to do so, provide that it should cease upon the passage of even an unconstitutional law. . . . We are, therefore, of the opinion that the contract, so far as this provision was concerned, had terminated by force of its own limitation when the Act of 1875 was enacted. . . .

"But we are further of the opinion that the Act of 1875 was a valid exercise of legislative power, and did not impair the obligations of any contract, within the meaning of the constitutional provision.

"The inability of one legislature to limit or control the legislative action of its successors is a familiar principle which needs no citation to support it. (*Pres. Church* v. *City of New York*, 5 Cow. 538.)

"The same authority which confers upon one body the power of legislation authorizes its successors, in the exercise of their duty, to change, alter, and annul existing laws when, in their judgment, the public interest requires it. In the performance of their duty of legislating for the public welfare, each successive body must, from necessity, be left untrammelled except by the restraints of the fundamental law, and when called upon to act upon subjects which concern the health, morals, or interests of the people, as affected by a public use of property for which compensation is exacted by its owners, they are unlimited by constitutional restraint. It is unnecessary to discuss this proposition with much fulness, as it was conceded by the appellant upon the argument, and is repeated in its printed brief, that the authority of the legislature in the exercise of its police powers could not be limited or restricted by the provisions of contracts between individuals or corporations. *Pacta privata publico juri derogare non possunt.*

"This proposition is also abundantly established by authority." [1] . . .

[1] And so *Ballard* v. *No. Pac. R. R. Co.*, 10 Mont. 168.

In *Mayor* v. *Twenty-third St. Ry. Co.*, 113 N. Y. 311, 317, in holding valid a statute requiring a street railway company to pay into the treasury of the City of New York one per cent of the gross receipts of its business, instead of a license fee, as before prescribed, EARL, J., for the court, said: "Under its reserved power [the legislature] cannot deprive a corporation of its property, or interfere with or annul its contracts with third persons (*People* v. *O'Brien*, 111 N. Y. 1). But it may take away its franchise to be a corporation, and may regulate the exercise of its corporate powers. As it has the power utterly to deprive the corporation of its franchise to be a corporation, it may prescribe the conditions and terms upon which it may live and exercise such franchise. It may enlarge or limit its powers, and it may increase or limit its burdens. It is sometimes said that the alteration under such reserved power must, however, be reasonable, and it must always be legislative in its character, and consistent with the scope and objects of the corporation as it was originally constituted."

In *Pennsylvania R. R. Co.* v. *Miller*, 132 U. S. 75, 82 (1889), BLATCHFORD, J., for the court, said: "Prior to the Constitution of 1873, and under the constitutional provisions existing in Pennsylvania before that time, the Supreme Court of that State had uniformly held that a corporation with such provisions in its charter as those contained in the charter of the defendant, was liable, in exercising the right of eminent domain, to compensate only for property actually taken, and not for a depreciation of adjacent property. The 8th section of Article XVI. of the Constitution of 1873 was adopted in view of those decisions, and for the purpose of remedying the injury to individual citizens caused by the non-liability of corporations for such consequential damages. Although it may have been the law in respect to the defendant, prior to the Constitution of 1873, that under its charter and the statutes in regard to it, it was not liable for such consequential damages, yet there was no contract in that charter, or in any statute in regard to the defendant, prior to the Constitution of 1873, that it should always be exempt from such liability, or that the State, by a new constitutional provision, or the legislature, should not have power to impose such liability upon it, in cases which should arise after the exercise of such power. But the defendant took its original charter subject to the general law of the State, and to such changes as might be made in such general law, and subject to future constitutional provisions or future

In *N. Y., Lake Erie, and Western R. R. Co.* v. *Pa.*, 153 U. S. 628 (1894), on error to the Supreme Court of Pennsylvania, the question related to the validity of certain taxes assessed under authority of Pennsylvania, in respect to bonds and evidences of debt issued by the plaintiff in error, and held and owned by residents of Pennsylvania. The company contended that a statute of 1885, purporting to authorize the assessment, was repugnant to the Constitution of the United States. *E. J. Phelps* and *M. E. Olmstead*, for plaintiff in error; *W. U. Hensel*, Attorney-General of Pennsylvania, for defendant in error.

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

The principal question in the case is whether the Commonwealth of Pennsylvania may, consistently with the Constitution of the United States, impose upon the New York, Lake Erie, and Western Railroad Company the duty — when paying in the city of New York the interest due upon scrip, bonds, or certificates of indebtedness held by residents of Pennsylvania — of deducting from the interest so paid the amount assessed upon bonds and moneyed capital in the hands of such residents of Pennsylvania. The court recognizes the far-reaching consequences of its determination of this question, and has, therefore, bestowed upon it the careful consideration which its importance demands. . . .

The fundamental propositions upon which the argument of counsel for the State is based are that the New York, Lake Erie, and Western Railroad Company is a private corporation of another State; that it has no right to do business in Pennsylvania without the permission of that State, and that it is, therefore, subject at all times to such reasonable regulations as may be prescribed by Pennsylvania, whether those regulations relate to taxation or to the business or property of the company in that Commonwealth. . . .

Assuming, for the purposes of this case, the correctness of the position taken by the learned Attorney-General of Pennsylvania that the commerce clause of the Constitution of the United States has no bearing upon the present inquiry, we are of opinion that the fourth section of the Act of 1885, in its application to this railroad company, impairs the obligation of the contract between it and Pennsylvania, as disclosed by the Acts of 1841 and 1846, and by what was done by that company upon the faith of those Acts. Those Acts prescribe the terms and conditions upon which Pennsylvania assented to the company's constructing and operating its road through limited portions of its territory. Those terms have been fully indicated in the statement of this case, and need not be repeated. When the State, by the Acts of 1841 and 1846, gave this assent the possibility that the company might misuse or abuse the privileges granted to it, or violate the provisions of those Acts, was

general legislation, since there was no prior contract with the defendant, exempting it from liability to such future general legislation, in respect of the subject-matter involved."

And so *Curtis* v. *Whitney*, 13 Wall. 68. — Ed.

not overlooked; for, by the seventh section of the Act of 1846, into which, by its second section, all the restrictions, prohibitions, privileges, and provisions contained in the Act of 1841 were imported, it was declared that the right of the legislature to repeal it was reserved, "if the said company shall misuse or abuse the privileges hereby granted, or shall violate any of the privileges [provisions] of this Act." And the question whether the privileges granted had been misused or abused, or the provisions of the Act violated, was to be determined by *scire facias* issued out of the Supreme Court of Pennsylvania. § 7. There is no claim in the present case of any violation by the railroad company of the provisions of the Acts of 1841 and 1846 specifying the terms and conditions upon which it acquired the right, so far as it depended upon State legislation, to enter Pennsylvania and construct and operate a part of its road within the territory of that Commonwealth. Consistently with those terms and conditions, Pennsylvania cannot withdraw the assent which it gave, upon a valuable consideration, to the construction and operation of the defendant's road within its limits. Nor can the right of the company to enjoy the privileges so obtained be burdened with conditions not prescribed in the Acts of 1841 and 1846, except such as the State, in the exercise of its police powers, for purposes of taxation, and for other public objects, may legally impose in respect to business carried on and property situated within its limits.

The argument in behalf of the State leads, logically, to the conclusion that notwithstanding the provisions of the Acts of 1841 and 1846, prescribing the terms upon which the company acquired the privilege of constructing and operating its road in that State, Pennsylvania could, in its discretion, change those terms and impose any others it deemed proper. If the State amended those Acts so as to increase the sum to be paid annually into the State treasury, as a bonus, from ten thousand to one hundred thousand dollars, the argument made by its Attorney-General would sustain such legislation upon the ground that the State, at the outset, could have exacted the larger amount from the company as a condition of its entering the State with its road. To any view which assumes that the State could — so long, at least, as the railroad company performed the conditions of the Acts of 1841 and 1846 — burden the company with conditions that would substantially impair the right to maintain and operate its road within Pennsylvania upon the terms stipulated in those Acts, we cannot give our assent. No such terms as those named in the Act of 1885 were imposed prior to the building of the road in Pennsylvania, and the road having been constructed in that State upon the faith of the legislation of 1841 and 1846, and with the assent of the State given for a valuable consideration paid by the company, its maintenance in Pennsylvania cannot be made the pretext for imposing such conditions as those prescribed in the Act of 1885.

But it is said that regulations prescribed after the construction of the road, applicable to railroad companies doing business in the State, —

such regulations being reasonable in their character, — should be deemed to have been within the contemplation of the parties when those Acts were passed, and, therefore, not in violation of the agreement under which the company entered the State for the purpose of transacting business there; and that it should not be assumed that the State intended to surrender or bargain away its authority to establish such regulations.

Of the soundness of this general proposition, there can be no doubt, in view of the settled doctrines of this court. The contract in question left unimpaired the power of the State to establish such reasonable regulations as it deemed proper touching the management of the business done and the property owned by the railroad company in Pennsylvania, which did not materially interfere with or obstruct the substantial enjoyment of the rights previously granted. But the fourth section of the Act of 1885 is not within that category. It assumes to do what the State has no authority to do, to compel a foreign corporation to act, in the State of its creation, as an assessor and collector of taxes due in Pennsylvania from residents of Pennsylvania. Under the sanction of the laws of New York, the defendant corporation executed prior to the passage of the Act of 1885 bonds, with interest coupons attached, payable in that State and not elsewhere. It gave mortgages to secure the payment of those bonds and coupons, according to their tenor. Neither the bonds, nor the coupons, nor the mortgages, contain anything that would, in law, justify the company in refusing to meet its obligations, according to their terms and without deduction on account of taxes due from the holders of such bonds or coupons residing in another State. We have seen that the bonds and coupons in question were payable to bearer, and that it was practically impossible for the company, when the coupons were presented for payment, to ascertain who, at that time, really owned them or the bonds from which they were detached, or whether the coupons were owned by the same person or corporation that owned the bonds. This fact is quite sufficient to show the unreasonable character of the regulations attempted to be applied to this company under the Act of 1885. This view is strengthened by the fact that the coupons were negotiable instruments, and, being detached from the bonds, were separate obligations, passing by delivery, upon which an action could have been maintained by the holder, independently of the ownership of the bonds. Such is the settled doctrine of commercial law as declared by this court. *Clark* v. *Iowa City*, 20 Wall. 583; *Hartman* v. *Greenhow*, 102 U. S. 672, 684; *Koshkonong* v. *Burton*, 104 U. S. 668. And it is the doctrine of the Supreme Court of Pennsylvania, which has declared that "the coupons of railroad bonds are negotiable instruments, and may be sued on by the holder separately from the bonds, and interest from the date of demand and refusal of payment may be recovered." *County of Beaver* v. *Armstrong*, 44 Penn. St. 63.

If Pennsylvania, in order to collect taxes assessed upon bonds issued

by its own corporations and held by its resident citizens, could require those corporations to deduct the required amount from the interest when the coupons are presented by holders known at the time by the corporation paying the interest to be residents of that State, — and it may be admitted, in this case, that the State, if not restrained by a valid contract to which it was a party, could establish such a regulation, — it does not follow that the State may impose upon foreign corporations, because of their doing business in that State with its permission given for a valuable consideration, any duty in respect to the mode in which they shall perform their obligations in other States.

The New York, Lake Erie, and Western Railroad Company is not subject to regulations established by Pennsylvania in respect to the mode in which it shall transact its business in the State of New York. The money in the hands of the company in New York to be applied by it in the payment of interest, which by the terms of the contract is payable in New York and not elsewhere, is property beyond the jurisdiction of Pennsylvania, and Pennsylvania is without power to say how the corporation holding such money, in another State, shall apply it, and to inflict a penalty upon it for not applying it as directed by its statutes; especially may not Pennsylvania, directly or indirectly, interpose between the corporation and its creditors, and forbid it to perform its contract with creditors according to its terms and according to the law of the place of performance. No principle is better settled than that the power of a State, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction. *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319; *Railroad Co.* v. *Jackson*, 7 Wall. 262; *St. Louis* v. *Ferry Co.*, 11 Wall. 423; *Delaware Railroad Tax*, 18 Wall. 206.

The fallacy of the contrary view is in the assumption that this railroad company, by purchasing from Pennsylvania the privilege of constructing and operating a part of its road through the territory of that State, thereby impliedly agreed to submit to such regulations as that State should, at any subsequent period, adopt in respect to the mode in which it should, in the State of New York, apply money in its hands in discharge of the obligation to pay interest to the holders of its bonds residing in Pennsylvania. But, for the reasons stated, this assumption is unwarranted by any sound principle of law, or by the circumstances under which the railroad company obtained the assent of Pennsylvania to build and maintain its road through that State.

It is due to the learned counsel who argued this case that something be said, before concluding this opinion, about certain authorities upon which great reliance was placed.

Reference was made by counsel for the company to the decision of this court in the case of *State Tax on Foreign-held Bonds*, 15 Wall. 300, 320, which case involved the validity of a Pennsylvania statute of 1868, requiring corporations, created by and doing business in that State, to deduct from the interest paid on its obligations the tax assessed on such interest by the State. It was attempted to make that statute

applicable to interest payable on bonds held by non-residents of Pennsylvania. . . . [For this case see *supra*, p. 1258. The court here quotes a passage from the opinion, beginning at "The tax laws," near the bottom of p. 1265, followed by another on p. 1262, beginning at "It is a law which interferes."]

If the present case involved any question as to the authority or duty of the railroad company to deduct anything from the interest paid on its scrip, bonds, or certificates of indebtedness, when held by non-residents of Pennsylvania, the case of *State Tax on Foreign-held Bonds* would be decisive against the State. But no such question is here presented. The statute of 1885 only applies to scrip, bonds, or certificates of indebtedness issued to and held by residents of Pennsylvania.

Counsel for the State insisted that the present case is controlled by *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, reaffirmed in *Jennings* v. *Coal Ridge Improvement and Coal Co.*, 147 U. S. 147. It is only necessary to observe that the corporations which complained in those cases of the tax assessed, under a Pennsylvania statute, upon their loans held by residents of Pennsylvania, were Pennsylvania corporations. No question arose in either of those cases as to the authority of Pennsylvania to make a corporation of another State an assessor or collector of taxes assessed by or under the authority of Pennsylvania against residents of Pennsylvania. Nor does the case now before us involve any question as to the extent to which the State may tax property within its limits belonging to the railroad company.

The views we have expressed are sufficient for the disposition of the case, without considering other grounds upon which, it is contended, the judgment below was erroneous.

The judgment of the Supreme Court of Pennsylvania is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

REAGAN *v.* FARMERS' LOAN AND TRUST COMPANY.

SUPREME COURT OF THE UNITED STATES. 1894.

[154 *U. S.* 362.][1]

ON April 3, 1891, the Legislature of Texas passed an Act to establish a railroad commission with power, among other things, to regulate rates for the transportation of passengers and freight. The commission was directed to make "reasonable rates;" before these were fixed, the railroad companies to be affected were entitled to notice and a hearing. The rates fixed were to be incontrovertible and to be deemed reasonable, fair, and just, until finally found otherwise upon a direct action brought by the dissatisfied party, such actions to take precedence of all

[1] The statement of facts is shortened. — ED.

others on the docket. In the trial of these actions "the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations [&c.], complained of are unreasonable and unjust." Under this Act the plaintiffs in error were appointed commissioners, and after due proceedings established regulations. The defendant in error above named, as trustee under an instrument to secure certain bonds of the International and Great Northern Railroad Company, filed a bill in the Circuit Court of the United States for the Western District of Texas to restrain the commissioners and the Attorney-General from enforcing these regulations, alleging them to be unreasonable and unjust. From a decree in favor of the plaintiffs below, the commissioners and the Attorney-General appealed to the Supreme Court.

Mr. Charles A. Culberson, Attorney-General of the State of Texas, for appellants, to the point that the suit was against the State of Texas; *Mr. John F. Dillon* and *Mr. E. B. Kruttschnitt* (with whom were *Mr. Herbert B. Turner* and *Mr. John J. McCook* on the brief), for appellee, upon the effect of the Fourteenth Amendment upon the power of the States to regulate and control railway fares and charges; *Mr. Alexander G. Cochran*, *Mr. Winslow S. Pierce*, and *Mr. R. S. Lovell* filed a brief for the International and Great Northern Railroad Company, cross-complainant and appellee; *Mr. J. W. Terry* and *Mr. George W. Peck* filed a brief in the interest of the Gulf, Colorado, and Santa Fé Railroad Company; *Mr. Henry C. Coke* (with whom was *Mr. W. S. Simkins* on the brief), closed for appellants.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court. [The court first considered some objections to the jurisdiction.]

Still another matter is worthy of note in this direction. In the famous Dartmouth College case, 4 Wheat. 518, it was held that the charter of a corporation is a contract protected by that clause of the National Constitution, which prohibits a State from passing any law impairing the obligation of contracts. The International and Great Northwestern Railroad Company is a corporation created by the State of Texas. The charter which created it is a contract whose obligations neither party can repudiate without the consent of the other. All that is within the scope of this contract need not be determined. Obviously, one obligation assumed by the corporation was to construct and operate a railroad between the termini named; and on the other hand, one obligation assumed by the State was that it would not prevent the company from so constructing and operating the road. If the charter had in terms granted to the corporation power to charge and collect a definite sum per mile for the transportation of persons or of property, it would not be doubted that that express stipulation formed a part of the obligation of the State which it could not repudiate. Whether, in the absence of an express stipulation of that character, there is not implied in the grant of the right to construct and operate, the grant of a right to

charge and collect such tolls as will enable the company to successfully operate the road and return some profit to those who have invested their money in the construction, is a question not as yet determined. It is at least a question which arises as to the extent to which that contract goes, and one in which the corporation has a right to invoke the judgment of the courts; and if the corporation, a citizen of the State, has the right to maintain a suit for the determination of that question, clearly a citizen of another State, who has, under authority of the laws of the State of Texas, become pecuniarily interested in, equitably indeed the beneficial owner of, the property of the corporation, may invoke the judgment of the Federal courts as to whether the contract rights created by the charter, and of which it is thus the beneficial owner, are violated by subsequent acts of the State in limitation of the right to collect tolls. Our conclusion from these considerations is that the objection to the jurisdiction of the Circuit Court is not tenable, and this, whether we rest upon the provisions of the statute or upon the general jurisdiction of the court existing by virtue of the statutes of Congress, under the sanction of the Constitution of the United States.

Passing from the question of jurisdiction to the Act itself, there can be no doubt of the general power of a State to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation. *Railroad Commission Cases*, 116 U. S. 307. No valid objection, therefore, can be made on account of the general features of this Act; those by which the State has created the railroad commission and intrusted it with the duty of prescribing rates of fares and freights as well as other regulations for the management of the railroads of the State.

Specific objections are made to the Act, on the ground that, by section 5, the rates and regulations made by the commission are declared conclusive in all actions between private individuals and the companies, and that by section 14 excessive penalties are imposed upon railroad corporations for any violation of the provisions of the Act; and thus, as claimed, there is not only a limitation but a practical denial to railroad companies of the right of a judicial inquiry into the reasonableness of the rates prescribed by the commission. The argument is, in substance, that railroad companies are bound to submit to the rates prescribed until in a direct proceeding there has been a final adjudication that the rates are unreasonable, which final adjudication, in the nature of things, cannot be reached for a length of time; that meanwhile a failure to obey those regulations exposes the company, for each separate fare or freight exacted in excess of the prescribed rates, to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property; that even if in a direct proceeding the rates should be adjudged unreasonable, there is nothing to prevent the commission from

re-establishing rates but slightly changed and still unreasonable, to set aside which requires a new suit, with its length of delay; and thus, as is claimed, the railroad companies are tied hand and foot and bound to submit to whatever illegal, unreasonable, and oppressive regulations may be prescribed by the commission.

It is enough to say in respect to these matters, at least so far as this case is concerned, that it is not to be supposed that the legislature of any State, or a commission appointed under the authority of any State, will ever engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals; and also that no legislation of a State, as to the mode of proceeding in its own courts, can abridge or modify the powers existing in the Federal courts, sitting as courts of equity. So that if in any case, there should be any mistaken action on the part of a State, or its commission, injurious to the rights of a railroad corporation, any citizen of another State, interested directly therein, can find in the Federal court all the relief which a court of equity is justified in giving. We do not deem it necessary to pass upon these specific objections because the fourteenth section or any other section prescribing penalties may be dropped from the statute without affecting the validity of the remaining portions; and if the rates established by the commission are not conclusive, they are at least *prima facie* evidence of what is reasonable and just. . . . The penalties and provision, as to evidence, were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment. Take a similar body of legislation — a tax law. There may be incorporated into such a law a provision giving conclusive effect to tax deeds, and also a provision as to the penalties incurred by non-payment of taxes. These two provisions may, for one reason or another, be obnoxious to constitutional objections. If so, they may be dropped out, and the balance of the statute exist. It would not for a moment be presumed that the whole tax system of the State depended for its validity upon the penalties for non-payment of taxes or the effect to be given to the tax deed. We, therefore, for the purposes of this case, assume that these two provisions of the statute are open to the constitutional objections made against them. We do not mean by this to imply that they are so in fact, but simply that it is unnecessary to consider and determine the matter, and we leave it open for future consideration.

It appears from the bill that, in pursuance of the powers given to it by this Act, the State commission has made a body of rates for fares and freights. This body of rates, as a whole, is challenged by the plaintiff as unreasonable, unjust, and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into that matter, insisting that the fixing of rates for carriage by

a public carrier is a matter wholly within the power of the legislative department of the government and beyond examination by the courts.

It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates.[1] The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation. In *Chicago, Burlington & Quincy Railroad* v. *Iowa*, 94 U. S. 155, and *Peik* v. *Chicago & Northwestern Railway*,

[1] See *supra*, p. 672. There are several quite different situations, viz.: 1. Where, as in this case, an appeal to the courts on the general question of reasonableness is expressly allowed; 2. Where, as in *Chic. Ry. Co.* v. *Minnesota*, *supra*, p. 660, no appeal to the courts is provided for; 3. Where, as in the English case of *Pickering Phipps* v. *The Lond. & N. W. Ry. Co.*, 66 L. T. Rep. 721 (1892), the right of appeal from the railway commissioners is qualified (Eng. Stat. 1888, ch. 25, s. 17), by excluding all "questions of fact." As to the effect of such an exclusion on the question of reasonableness, see that case.

In *Austin* v. *Cem. Assoc.* 28 So. W. Rep. 528, 530 (Dec., 1894), the Supreme Court of Texas (GAINES, C. J.), in considering the question whether the court could adjudge unreasonable an ordinance authorized by the city charter, said: "It is doubtless within the power of the legislature to make arbitrary laws, provided they neither infringe the Constitution of the State nor that of the United States. We are not prepared to say that it could not delegate that power to a municipal corporation. But, before it should be held that such grant was intended, it would seem that the language of the charter should be sufficiently explicit clearly to manifest that intention; and in the absence of such language we think it should also be held that it was not the intention to confer authority to make an arbitrary and unreasonable law. It occurs to us that it is upon this principle that the court proceed when they hold, as is generally held, that the ordinance of a municipal corporation must be reasonable. We are therefore of opinion that it was not the intention of the legislature to confer power upon the City Council of the city of Austin either to prohibit the burial of the dead within the limits of the city or to unreasonably restrict the right of its citizens to provide places for that purpose within such limits. In a case like this, whether the ordinance be reasonable or not must depend upon the circumstances of the particular restriction as affecting the people who are to be subjected to its control. When the facts are determined, we think the question of the reasonableness of the ordinance is one of law, which must be decided by the court." — ED.

94 U. S. 164, the question of legislative control over railroads was presented, and it was held that the fixing of rates was not a matter within the absolute discretion of the carriers, but was subject to legislative control. As stated by Mr. Justice Miller, in *Wabash &c. Railway* v. *Illinois*, 118 U. S. 557, 569, in respect to those cases:

"The great question to be decided, and which was decided, and which was argued in all those cases, was the right of the State, within which a railroad company did business, to regulate or limit the amount of any of these traffic charges."

There was in those cases no decision as to the extent of control, but only as to the right of control. This question came again before this court in *Railroad Commission Cases*, 116 U. S. 307, 331, and while the right of control was reaffirmed a limitation on that right was plainly intimated in the following words of the Chief Justice:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

This language was quoted in the subsequent case of *Dow* v. *Beidelman*, 125 U. S. 680, 689. Again, in *Chicago & St. Paul Railway* v. *Minnesota*, 134 U. S. 418, 458, it was said by Mr. Justice Blatchford, speaking for the majority of the court: "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its determination."

And in *Chicago & Grand Trunk Railway* v. *Wellman*, 143 U. S. 339, 344, is this declaration of the law:

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

Budd v. *New York*, 143 U. S, 517, announces nothing to the contrary. The question there was not whether the rates were reasonable, but whether the business, that of elevating grain, was within legislative control as to the matter of rates. It was said in the opinion: "In the cases before us, the records do not show that the charges fixed by the statute are unreasonable." Hence there was no occasion for saying anything as to the power or duty of the courts in case the rates as established had been found to be unreasonable. It was enough that upon examination it appeared that there was no evidence upon which it could be adjudged that the rates were in fact open to objection on that ground.

These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a

part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was, therefore, within the competency of the Circuit Court of the United States for the Western District of Texas, at the instance of the plaintiff, a citizen of another State, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was in so doing only exercising a power expressly named in the Act creating the commission.

A classification was made by the commission, and different rates established for different kinds of goods. These rates were prescribed by successive circulars. Classification of rates is based on several considerations, such as bulk, value, facility of handling, etc.: it is recognized in the management of all railroads, and no complaint is here made of the fact of classification, or the way in which it was made by the commission. By these circulars, rates all along the line of classification were reduced from those theretofore charged on the road. The challenge in this case is of the tariff as a whole, and not of any particular rate upon any single class of goods. As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi legislation. If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this.

We pass then to the remaining question, Were the rates, as prescribed by the commission, unjust and unreasonable? . . .

And now, what deductions are fairly to be drawn from all the facts before us? Is there anything which detracts from the force of the general allegation that these rates are unjust and unreasonable? This clearly appears. The cost of this railroad property was $40,000,000; it cannot be replaced to-day for less than $25,000,000. There are $15,000,000 of mortgage bonds outstanding against it, and nearly $10,000,000 of stock. These bonds and stock represent money invested in the construction of this road. The owners of the stock have never received a dollar's worth of dividends in return for their investment. The road was thrown into the hands of a receiver for default in payment of the interest on the bonds. The earnings for the last three years prior to the establishment of these rates was insufficient to pay the operating expenses and the interest on the bonds. In order to make good the deficiency in interest the stock-holders have put their hands in their pockets and advanced over a million of dollars. The supplies for the road have been purchased at as cheap a rate as possible. The officers and employés have been paid no more than is necessary to secure men of the skill and knowledge requisite to suitable operation of the road. By the voluntary action of the company the rate in cents per ton per mile has decreased in ten years from 2.03 to 1.30. The actual reduction by virtue of this tariff in the receipts during the six or eight months that it has been enforced amounts to over $150,000. Can it be that a tariff which under these circumstances has worked such results to the parties whose money built this road is other than unjust and unreasonable? Would any investment ever be made of private capital in railroad enterprises with such as the proffered results?

It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road.

But we do hold that a general averment in a bill that a tariff as established is unjust and unreasonable, is supported by the admitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money in-

vested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company have been for ten years steadily decreasing until the aggregate decrease has been more than fifty per cent; that under the rates thus voluntarily established, the stock, which represents two-fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one-half the interest on the bonded debt above the operating expenses; and that such an averment so supported will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable, and a decree reversing it being put in force.

It follows from these considerations that the decree as entered must be reversed in so far as it restrains the railroad commission from discharging the duties imposed by this Act, and from proceeding to establish reasonable rates and regulations; but must be affirmed so far only as it restrains the defendants from enforcing the rates already established. The costs in this court will be divided.[1]

THE BINGHAMTON BRIDGE.

SUPREME COURT OF THE UNITED STATES. 1865.

[3 *Wall.* 51.][2]

D. S. Dickenson, for the Binghamton Bridge Co.; *Mr. Mygatt*, *contra*.

MR. JUSTICE DAVIS delivered the opinion of the court.[3] . . .

The plaintiffs in error brought a suit in equity in the Supreme Court in New York, alleging that they were created a corporation by the legislature of that State, on the 1st of April, 1808, to erect and maintain a bridge across the Chenango River, at Binghamton, with perpetual succession, the right to take tolls, and a covenant that no other bridge should be built within a distance of two miles either way from their bridge; which was a grant in the nature of a contract that cannot be impaired. The complaint of the bill is, that notwithstanding

[1] And so *Com.* v. *Cov. Bridge Co.*, 21 S. W. Rep. 1042 (Ky. 1893). Compare *Brass.* v. *No. Dak.*, 153 U. S. 391; *Budd* v. *N. Y.*, 143 U. S. 517; s. c. *supra*, p. 804; *Chic. &c. Ry. Co.* v. *Minnesota*, 134 U. S. 418; s. c. *supra*, p. 660; *Wellman* v. *Chic. &c. Ry. Co.* 83 Mich. 592, 620 (1890); and the note *supra*, pp. 668–673. — ED.

[2] The statement of facts is omitted. — ED.

[3] NELSON, J., not sitting, being indisposed.

the Chenango Bridge Company have faithfully kept their contract with the State, and maintained for a period of nearly fifty years a safe and suitable bridge for the accommodation of the public, the Legislature of New York, on the 5th of April, 1855, in plain violation of the contract of the State with them, authorized the defendants to build a bridge across the Chenango River within the prescribed limits, and that the bridge is built and open for travel.

The bill seeks to obtain a perpetual injunction against the Binghamton Bridge Company, from using or allowing to be used the bridge thus built, on the sole ground that the statute of the State, which authorizes it, is repugnant to that provision of the Constitution of the United States which says that no State shall pass any law impairing the obligation of contracts. Such proceedings were had in the inferior courts of New York, that the case was finally reached and heard in the Court of Appeals, which is the highest court of law or equity of the State in which a decision of the suit could be had. And that court held that the Act, by virtue of which the Binghamton Bridge was built, was a valid Act, and rendered a final decree dismissing the bill. Everything, therefore, concurs to bring into exercise the appellate power of this court over cases decided in a State court, and to support the writ of error, which seeks to re-examine and correct the final judgment of the Court of Appeals in New York.

The questions presented by this record are of importance, and have received deliberate consideration.

It is said that the revising power of this court over State adjudications is viewed with jealousy. If so, we say, in the words of Chief Justice Marshall, "that the course of the judicial department is marked out by law. As this court has never grasped at ungranted jurisdiction, so it never will, we trust, shrink from that which is conferred upon it." 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.

A great deal of the argument at the bar was devoted to the consideration of the proper rule of construction to be adopted in the interpretation of legislative contracts. In this there is no difficulty. All contracts are to be construed to accomplish the intention of the parties; and in determining their different provisions, a liberal and fair construction will be given to the words, either singly or in connection with the subject-matter. It is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not. In the case of the *Charles River Bridge*, 11 Peters, 544, the rules of construction known to the English common

law were adopted and applied in the interpretation of legislative grants, and the principle was recognized, that charters are to be construed most favorably to the State, and that in grants by the public nothing passes by implication. This court has repeatedly since reasserted the same doctrine; and the decisions in the several States are nearly all the same way. The principle is this: that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State. But if there is no ambignity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts. What, then, are the rights of the parties to this controversy?

In 1805 the State of New York passed an Act, in forty-two sections, creating five different corporations. The main purpose of the Act was, at that early day, to secure for the convenience of the public good turnpike roads; but the country was new; the undertaking hazardous; the roads crossed large and rapid streams, and the legislature, in its wisdom, thought proper to create two separate and distinct bridge incorporations, with larger powers than were conferred on the turnpike corporations. . . .

The Delaware Bridge Company having been constituted with great minuteness of detail, a few words and a single section sufficed to bring into existence the Susquehanna Bridge Company. The thirty-eighth section of the Act created the latter corporation, to erect and maintain toll bridges across the Susquehanna and Chenango rivers, at certain localities; and further, declared that the "Susquehanna Bridge Company be, and hereby are, invested with all and singular the powers, rights, privileges, immunities, and advantages, and shall be subject to all the duties, regulations, restraints, and penalties which are contained in the foregoing incorporation of the Delaware Bridge Company; and all and singular the provisions, sections, and clauses thereof, not inconsistent with the particular provisions therein contained, shall be, and hereby are, fully extended to the president and directors of this corporation." No one can read the entire Act through, and fail to perceive that the legislature intended to create two bridge incorporations, exactly similar in all material respects. Protection was alike necessary to both; the public wants required both; the scheme of improvement embraced both; the danger of present loss applied to both; and there were the same motives to give valuable franchises to both.

The inquiry, then, is, has the legislature used language that clearly conveys that intention? and on this point we entertain no doubt.

It is not questioned that the provision limiting the Delaware charter to thirty years was carried into the Susquehanna charter; but it is denied that the prohibition against competition was also imported.

The clause in the Delaware charter on that subject is in the following words: "that it shall not be lawful for any person or persons to erect any bridge, or establish any ferry across the said west and east branches of the Delaware River, within two miles, either above or below the bridges, to be erected and maintained in pursuance of this Act." This was, undoubtedly, a covenant with the Delaware Company that they should be free from competition within the prescribed limits. It is argued, because the east and west branches of the Delaware are named, that the prohibition was not intended to reach the Susquehanna company. But this construction is narrow and technical, and would defeat the very end the legislature had in view. . . .

The history of the subsequent legislation of the State, on the subject of these bridges, is explanatory of the intention of the Legislature of 1805, and confirmatory of the view already taken. In 1808, the Susquehanna and Chenango bridges were not built, and longer time and greater privileges were required to insure the success of that enterprise. The legislature, in fear that the scheme of internal improvement, which was not complete without the bridges, would fail, furnished still greater inducements to the parties proposing to erect them. The thirty years limitation was repealed, and the charter made perpetual, and the time limited for building the bridges was extended four years. And these provisions of the Susquehanna charter, which were thus altered, and treated by the Legislature of 1808 as belonging to it, were, if part of it, imported from the Delaware charter. Can it be supposed, when the Susquehanna Company was demanding higher privileges in order to live, that it was the intention of the legislature to deprive it of the right to shut out competition, with which the Delaware Company was invested, and which was nearly as valuable as the right to take tolls?

The intention of the legislature was manifest to confer on the Susquehanna corporation all the advantages enjoyed by the Delaware Company that were applicable to it, and consistent with the different locality it occupied; and the language it used, in our opinion, gives effect to that intention; and the two-mile restriction is as much a part of the charter of the Susquehanna Company, as if it had been directly inserted in it. It is argued that the restriction cannot apply to the Chenango Bridge, because it is located less than two miles from the confluence of the Chenango River with the Susquehanna. But the restriction is for two miles, either above or below the bridges, and is applicable to a bridge built above and within the prohibitory limits, although a question might arise, whether it was extended to a bridge which was built below the junction of the streams. The Susquehanna Company, by the original charter, was to erect bridges over both the Susquehanna

and Chenango rivers; but, with the amendments which were made in 1808, it was declared to exist for the sole purpose of building and maintaining a bridge over the Susquehanna, while at the same time the privilege of bridging the Chenango was given to "The Chenango Bridge Company," a new corporation, created with the same faculties and franchises, and subject to the same duties and restrictions as the Susquehanna corporation.

The construction which has been given by us to the Susquehanna charter is necessarily a solution of all questions pertaining to the charter of the Chenango Bridge Company. The legislature, therefore, contracted with this company, if they would build and maintain a safe and suitable bridge across the Chenango River, at Chenango Point, for the accommodation of the public, they should have, in consideration for it, a perpetual charter, the right to take certain specified tolls, and that it should not be lawful for any person or persons to erect any bridge, or establish any ferry, within a distance of two miles, on the Chenango River, either above or below their bridge.

Has the Legislature of 1855 broken the contract, which the Legislatures of 1805 and 1808 made with the plaintiffs?

The foregoing discussion affords an easy answer to this question. The legislature has the power to license ferries and bridges, and so to regulate them, that no rival ferries or bridges can be established within certain fixed distances. No individual without a license can build a bridge or establish a ferry for general travel, for "it is a well-settled principle of common law that no man may set up a ferry for all passengers, without prescription time out of mind, or a charter from the king. He may make a ferry for his own use, or the use of his family, but not for the common use of all the king's subjects passing that way, because it doth in consequence tend to a common charge, and is become a thing of public interest and use; and every ferry ought to be under a public regulation." As there was no necessity of laying a restraint on unauthorized persons, it is clear that such a restraint was not within the meaning of the legislature. The restraint was on the legislature itself. The plain reading of the provision, "that it shall not be lawful for any person or persons to erect a bridge within a distance of two miles," is, that the legislature will not make it lawful by licensing any person, or association of persons, to do it. And the obligation includes a free bridge as well as a toll bridge, for the security would be worthless to the corporation if the right by implication was reserved, to authorize the erection of a bridge which should be free to the public. The Binghamton Bridge Company was chartered to construct a bridge for general road travel, like the Chenango Bridge, and near to it, and within the prohibited distance. This was a plain violation of the contract which the legislature made with the Chenango Bridge Company, and as such a contract is within the protection of the Constitution of the United States, it follows that the charter of the Binghamton Bridge Company is null and void. Decree of the Court of Appeals of New York reversed. . . .

The Chief Justice, and Justices Field and Grier dissented, the latter delivering an opinion, as follows: —

I feel unable to concur in the opinion of the majority of my brethren, which has just been read. The general principles of law, as connected with the question involved in the case, are, no doubt, correctly stated, as to the strict construction of statutes as against corporations claiming rights so injurious to the public. My objection is, that they have not been properly applied to the case before us.

The power of one legislature to bind themselves and their posterity, and all future legislatures, from authorizing a bridge absolutely required for public use, might well be denied by the courts of New York;[1] and

[1] In his dissenting opinion in the case of *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 641 (1837), Story, J., said. "It has been further argued, that even if the charter of the Charles River Bridge does imply such a contract on the part of the legislature as is contended for, it is void for want of authority in the legislature to make it; because it is a surrender of the right of eminent domain, intrusted to the legislature and its successors for the benefit of the public, which it is not at liberty to alienate. If the argument means no more than that the legislature, being intrusted with the power to grant franchises, cannot, by contract, agree to surrender or part with this power, generally, it would be unnecessary to consider the argument; for no one supposes that the legislature can rightfully surrender its legislative power If the argument means no more than that the legislature, having the right by the Constitution to take private property (among which property are franchises) for public purposes, cannot divest itself of such a right by contract, there would be as little reason to contest it. Neither of these cases is like that before the court. But the argument (if I do not misunderstand it) goes further, and denies the right of the legislature to make a contract granting the exclusive right to build a bridge between Charlestown and Boston, and thereby taking from itself the right to grant another bridge between Charlestown and Boston, at its pleasure; although the contract does not exclude the legislature from taking it for public use upon making actual compensation; because it trenches upon the sovereign right of eminent domain. . . .

"But let us see what the argument is in relation to sovereignty in general. It admits, that the sovereign power has, among its prerogatives, the right to make grants, to build bridges, to erect ferries, to lay out highways; and to create franchises for public and private purposes. If it has a right to make such grants, it follows that the grantees have a right to take, and to hold these franchises. It would be a solecism to declare that the sovereign power could grant, and yet no one could have a right to take. If it may grant such franchises, it may define and limit the nature and extent of such franchises; for, as the power is general, the limitations must depend upon the good pleasure and discretion of the sovereign power in making the particular grant. If it may prescribe the limits, it may contract that these limits shall not be invaded by itself or by others.

"It follows, from this view of the subject, that if the sovereign power grants any franchise, it is good and irrevocable within the limits granted, whatever they may be; or else, in every case, the grant will be held only during pleasure; and the identical franchise may be granted to any other person, or may be revoked at the will of the sovereign. This latter doctrine is not pretended; and, indeed, is unmaintainable in our systems of free government. If, on the other hand, the argument be sound, that the sovereign power cannot grant a franchise to be exclusive within certain limits, and cannot contract not to grant the same, or any like franchise, within the same limits, to the prejudice of the first grant, because it would abridge the sovereign power in the exercise of its right to grant franchises; the argument applies equally to all grants of franchises, whether they are broad or narrow: for, *pro tanto*, they do abridge the exercise of the sovereign power to grant the same franchise within the same limits

as a construction of their own constitution, we would have no right to sit in error upon their judgment. But assuming a power for one legis-

Thus, for example, if the sovereign power should expressly grant an exclusive right to build a bridge over navigable waters, between the towns of A and B, and should expressly contract with the grantees, that no other bridge should be built between the same towns; the grant would, upon the principles of the argument, be equally void in regard to the franchise within the planks of the bridge, as it would be in regard to the franchise outside of the planks of the bridge; for, in each case, it would, *pro tanto*, abridge or surrender the right of the sovereign to grant a new bridge within the local limits. I am aware that the argument is not pressed to this extent; but it seems to me a necessary consequence flowing from it. The grant of the franchise of a bridge, twenty feet wide, to be exclusive within those limits, is certainly, if obligatory, an abridgment or surrender of the sovereign power to grant another bridge within the same limits; if we mean to say that every grant that diminishes the things upon which that power can rightfully act, is such an abridgment. Yet the argument admits, that within the limits and planks of the bridge itself, the grant is exclusive; and cannot be recalled. There is no doubt, that there is a necessary exception in every such grant, that if it is wanted for public use, it may be taken by the sovereign power for such use, upon making compensation. Such a taking is not a violation of the contract; but it is strictly an exception resulting from the nature and attributes of sovereignty; implied from the very terms, or at least acting upon the subject-matter of the grant, *suo jure*.

"But the Legislature of Massachusetts is, as I have already said, in no just sense the sovereign of the State. The sovereignty belongs to the people of the State in their original character as an independent community; and the legislature possesses those attributes of sovereignty, and those only, which have been delegated to it by the people of the State, under its Constitution.

"There is no doubt, that among the powers so delegated to the legislature, is the power to grant the franchises of bridges and ferries, and others of a like nature. The power to grant is not limited by any restrictive terms in the Constitution; and it is of course general and unlimited as to the terms, the manner, and the extent of granting franchises. These are matters resting in its sound discretion; and having the right to grant, its grantees have a right to hold, according to the terms of their grant, and to the extent of the exclusive privileges conferred thereby. This is the necessary result of the general authority, upon the principles already stated. . . .

"Another answer to the argument has been, in fact, already given. It is, that by the grant of a particular franchise the legislature does not surrender its power to grant franchises, but merely parts with its power to grant the same franchise; for it cannot grant that which it has already parted with. Its power remains the same; but the thing on which it can alone operate, is disposed of. It may, indeed, take it again for public uses, paying a compensation. But it cannot resume it, or grant it to another person, under any other circumstances, or for any other purposes.

"In truth, however, the argument itself proceeds upon a ground which the court cannot act upon or sustain. The argument is, that if the State Legislature makes a grant of a franchise exclusive, and contracts that it shall remain exclusive within certain local limits; it is an excess of power, and void as an abridgment or surrender of the rights of sovereignty, under the State Constitution. But this is a point over which this court has no jurisdiction. We have no right to inquire in this case, whether a State law is repugnant to its own Constitution; but only whether it is repugnant to the Constitution of the United States. If the contract has been made, we are to say whether its obligation has been impaired; and not to ascertain whether the legislature could rightfully make it. Such was the doctrine of this court in the case of *Jackson* v. *Lamphire*, already cited; 3 Peters' R. 280–289. But the conclusive answer is, that the State judges have already settled that point, and held the present grant a contract; to be valid to the extent of the exclusive limits of the grant, whatever they are." — Ed.

lature to restrain the power of future legislatures, those who assert that it has been exercised should prove their assertion beyond a doubt. Such intention must be clearly expressed in the letter of the statute, and not left to be discovered by astute construction and inferences. Although an Act of incorporation may be called a contract, the rules of construction applied to it are admitted to be the reverse of those applied to other contracts. Yet the opinion of the court, while admitting the rule of construction, proceeds on a contrary hypothesis, and with great ingenuity, and astute reasoning, has given a construction most favorable to the monopolist, and injurious to the people.

The judgment given by the majority of my brethren regards the general language of the Act of incorporation as first bringing to the Susquehanna Company a provision that "it shall not be lawful for any person or persons to erect any bridge," etc., across the east and west branches of the Delaware: as then bringing this specific clause into the charter of the Chenango Company, and applying it to the Chenango River (a river with but a single stream); making it, moreover, apply to that stream for two miles, indeed, above the bridge, but for three-quarters of a mile only below it, the river's entire extent in that direction, and finding the complement of the "two miles," in a mile and a quarter of the river Susquehanna, into which the Chenango falls and is lost. While withal, by like construction only, the original limitation of thirty years disappears, and the charter becomes perpetual.

This mode of interpreting a legislative grant appears to me irrational, and beyond the most liberal construction that has been given to that class of enactments. Indeed, the fact that it required so ingenious and labored an argument by my learned brother to vindicate such a construction of the Act seems to me, of itself, conclusive evidence that the construction should not be given to it.[1]

[1] Compare *Richm., &c. R. R. Co.* v. *Louis. R. R. Co.*, 13 How. 71 (1851); *Pisc. Bridge* v. *N. H. Bridge*, 7 N. H. 35, 60 (1834).

In *Wheel. & Belm. Bridge Co.* v. *Wheel. Br. Co.*, 138 U. S. 287, 292 (1891), FIELD, J., for the court, said: "The contention of the defendant is, that by the acquisition of the ferry and its privileges, and the authority to construct its bridge, it has the exclusive right to transport passengers, animals and vehicles over the Ohio River at all points within half a mile of the bridge. The ferry which it purchased — the one connecting the main land with Wheeling Island — was licensed at an early day, and no exclusive privileges, such as are claimed now, were then attached to the franchise. The subsequent general law of Virginia, passed in 1840, prohibiting the courts of the different counties from licensing a ferry within half a mile in a direct line from an established ferry, had in it nothing of the nature of a contract. It was a gratuitous proceeding on the part of the legislature, by which a certain benefit was conferred upon existing ferries, but not accompanied by any conditions that made the act take the character of a contract. It was a matter of ordinary legislation, subject to be repealed at any time when, in the judgment of the legislature, the public interest should require the repeal. The mere purchase by the defendant of existing rights and privileges added nothing to them. It would be absurd to suppose that the transfer from vendor to vendee gave them any additional force or validity. Here the prohibition of the Act of 1840, was only upon the county courts, and that in no way affected the legislative power of the State. *Fanning* v. *Gregoire*, 16 How. 524. Nor did the charter of the defendant con-

FERTILIZING COMPANY *v.* HYDE PARK.

SUPREME COURT OF THE UNITED STATES. 1878.

[97 *U. S.* 659.]

ERROR to the Supreme Court of the State of Illinois.

The Northwestern Fertilizing Company, a corporation created by an Act of the Legislature of Illinois, approved March 8, 1867, filed its bill in equity to restrain the village of Hyde Park, in Cook County, Illinois, from enforcing the provisions of an ordinance of that village, which the company claims impairs the obligation of its charter. The bill also prayed for general relief. The Supreme Court of that State affirmed the decree of the Circuit Court of Cook County dismissing the bill; whereupon the company sued out this writ of error. The charter of the company and the ordinance complained of are, with the facts which gave rise to the suit, set forth in the opinion of the court.

The case was argued by *Mr. Leonard Swett*, for the plaintiff in error; *Mr. Charles Hitchcock*, *contra*.

MR. JUSTICE SWAYNE delivered the opinion of the court. . . .

The plaintiff in error was incorporated by an Act of the Legislature, approved March 8, 1867. The Act declared that the corporation should "have continued succession and existence for the term of fifty years.' The fourth and fifth sections are as follows: "SECT. 4. Said corporation is hereby authorized and empowered to establish and maintain chemical and other works at the place designated herein, for the purpose of manufacturing and converting dead animals and other animal matter into an agricultural fertilizer, and into other chemical products, by means of chemical, mechanical, and other processes. SECT. 5. Said chemical works shall be established in Cook County, Illinois, at any point south of the dividing line between townships 37 and 38. Said corporation may establish and maintain depots in the city of Chicago, in said county, for the purpose of receiving and carrying off, from and out of the said city, any and all offal, dead animals, and other animal matter, which they may buy or own, or which may be delivered to them by the city authorities and other persons."

tain any inhibition upon the State to authorize the establishment of another bridge within the distance claimed whenever the public interest should require it. An alleged surrender or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions. As was said substantially in the case of *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 548, whenever it is alleged that a State has surrendered or suspended its power of improvement and public accommodation on an important line of travel, along which a great number of persons must daily pass, the community has a right to insist that its surrender or suspension shall not be admitted, in a case in which the deliberate purpose of the State to make such surrender or suspension does not appear; referring to several adjudications of this court in support of the doctrine." — ED.

The company organized pursuant to the charter. Its capital stock is $250,000, all of which has been paid up and invested in its business. It owns ground and has its receiving depot about three miles from Chicago. The cost of both exceeded $15,000. Thither the offal arising from the slaughtering in the city was conveyed daily. The chemical works of the company are in Cook County, south of the dividing line of townships 37 and 38, as required by the charter. When put there, the country around was swampy and nearly uninhabited, giving little promise of further improvement. They are within the present limits of the village of Hyde Park. The offal procured by the company was transported from Chicago to its works through the village by the Pittsburg, Fort Wayne, and Chicago Railroad. There was no other railroad by which it could be done. The court below, in its opinion, said: "An examination of the evidence in this case clearly shows that this factory was an unendurable nuisance to the inhabitants for many miles around its location; that the stench was intolerable, producing nausea, discomfort, if not sickness, to the people; that it depreciated the value of property, and was a source of immense annoyance. It is, perhaps, as great a nuisance as could be found or even created; not affecting as many persons as if located in or nearer to the city, but as intense in its noisome effects as could be produced. And the transportation of this putrid animal matter through the streets of the village, as we infer from the evidence, was offensive in a high degree both to sight and smell."

This characterization is fully sustained by the testimony.

In March, 1869, the charter of the village was revised by the legislature, and the largest powers of police and local government were conferred. The trustees were expressly authorized to "define or abate nuisances which are, or may be, injurious to the public health," — to compel the owner of any grocery-cellar, tallow-chandler shop, soap factory, tannery, or other unwholesome place, to cleanse or abate such place, as might be necessary, and to regulate, prohibit, or license breweries, tanneries, packing-houses, butcher-shops, stock-yards, or establishments for steaming and rendering lard, tallow-offal, or other substances, and all establishments and places where any nauseous, offensive, or unwholesome business was carried on. The sixteenth section contains a proviso that the powers given should not be exercised against the Northwestern Fertilizing Company until after two years from the passage of the Act. This limitation was evidently a compromise by conflicting parties.

On the 5th of March, 1867, a prior Act, giving substantially the same powers to the village, was approved and became a law. This Act provided that nothing contained in it should be construed to authorize the officers of the village to interfere with parties engaged in transporting any animal matter from Chicago, or from manufacturing it into a fertilizer or other chemical product. The works here in question were in existence and in operation where they now are before the proprietors were incorporated.

After the last revision of the charter the municipality passed an ordinance whereby, among other things, it was declared that no person should transport any offal or other offensive or unwholesome matter through the village, and that any person employed upon any train or team conveying such matter should be liable to a fine of not less than five nor more than fifty dollars for each offence; and that no person should maintain or carry on any offensive or unwholesome business or establishment within the limits of the village, nor within one mile of those limits. Any person violating either of these provisions was subjected to a penalty of not less than fifty nor more than two hundred dollars for each offence, and to a like fine for each day the establishment or business should be continued after the first conviction.

After the adoption of this ordinance and the expiration of two years from the passage of the Act of 1869, notice was given to the company, that, if it continued to transport offal through the village as before, the ordinance would be enforced. This having no effect, thereafter, on the 8th of January, 1873, the village authorities caused the engineer and other employés of the railway company, who were engaged in carrying the offal through the village, to be arrested and tried for violating the ordinance. They were convicted, and fined each fifty dollars. This bill was thereupon filed by the company. It prays that further prosecutions may be enjoined, and for general relief. The Supreme Court of the State, upon appeal, dismissed the bill, and the company sued out this writ of error.

The plaintiff in error claims that it is protected by its charter from the enforcement against it of the ordinances complained of, and that its charter is a contract within the meaning of the contract clause of the Constitution of the United States. Whether this is so, is the question to be considered.

The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court. It may be well to cite a few cases by way of illustration. In *Rector, &c. of Christ Church* v. *The County of Philadelphia*, 24 How. 301, in *Tucker* v. *Ferguson*, 22 Wall. 527, and in *West Wisconsin Railroad Company* v. *Board of Supervisors*, 93 U. S. 595, property had been expressly exempted for a time from taxation. Taxes were imposed contrary to the terms of the exemption in each case. The corporations objected. This court held that the promised forbearance was only a bounty or gratuity, and that there was no contract. In *The Providence Bank* v. *Billings & Pittman*, 4 Pet. 515, the bank had been incorporated with the powers usually given to such institutions. The charter was silent as to taxation. The legislature imposed taxes. "The power to tax involves the power to

destroy." *McCulloch* v. *Maryland*, 4 Wheat. 316. The bank resisted, and brought the case here for final determination. This court held that there was no immunity, and that the bank was liable for the taxes as an individual would have been. There is the same silence in the charter here in question as to taxation and as to liability for nuisances. Can exemption be claimed as to one more than the other? Is not the case just cited conclusive as to both?

Continued succession is given to corporations to prevent embarrassment arising from the death of their members. One striking difference between the artificial and a natural person is, that the latter can do any thing not forbidden by law, while the former can do only what is so permitted. Its powers and immunities depend primarily upon the law of its creation. Beyond that it is subject, like individuals, to the will of the law-making power.

If the intent of the legislature touching the point under consideration be sought in the charter and its history, it will be found to be in accordance with the view we have expressed as matter of law. Three days before the charter of the plaintiff in error became a law, the legislature declared that the power of the village as to nuisances should not extend to those engaged in the business to which the charter relates. The subject must have been fully present to the legislative mind when the company's charter was passed. If it were intended the exemption should be inviolable, why was it not put in the company's charter as well as in that of the village? The silence of the former, under the circumstances, is a pregnant fact. In one case it was doubtless known to all concerned that the restriction would be irrepealable, while in the other, that it could be revoked at any time. In the revised village charter of 1869, the exemption was limited to two years from the passage of the Act. This was equivalent to a declaration that after the lapse of the two years the full power of the village might be applied to the extent found necessary. Corporations in such cases are usually prolific of promises, and the legislature was willing to await the event for the time named.

That a nuisance of a flagrant character existed, as found by the court below, is not controverted. We cannot doubt that the police power of the State was applicable and adequate to give an effectual remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions. The adjudged cases showing its exercise where corporate franchises were involved are numerous. . . . [Here follows a statement of *Coates* v. *Mayor*, 7 Cowen, 585, where a city ordinance forbidding interments in a graveyard held by a corporation, under a royal grant giving the land for this purpose, was sustained; and also of *Beer Co.* v. *Mass*, 97 U. S. 25; s. c. *supra*, p. 757.]

Perhaps the most striking application of the police power is in the destruction of buildings to prevent the spread of a conflagration. This right existed by the common law, and the owner was entitled to no compensation. 2 Kent, Com. 339, and notes 1 and *a* and *b*. In some of the States it is regulated by statute. *Russel* v. *The Mayor of New York*, 2 Den. (N. Y.) 461; *American Print Works* v. *Lawrence*, 23 N. J. L. 590.

In the case before us it does not appear that the factory could not be removed to some other place south of the designated line, where it could be operated, and where offal could be conveyed to it from the city by some other railroad, both without rightful objection. The company had the choice of any point within the designated limits. In that respect there is no restriction.

The charter was a sufficient license until revoked; but we cannot regard it as a contract guaranteeing, in the locality originally selected, exemption for fifty years from the exercise of the police power of the State, however serious the nuisance might become in the future, by reason of the growth of population around it. The owners had no such exemption before they were incorporated, and we think the charter did not give it to them.

There is a class of nuisances designated "legalized." These are cases which rest for their sanction upon the intent of the law under which they are created, the paramount power of the legislature, the principle of "the greatest good of the greatest number," and the importance of the public benefit and convenience involved in their continuance. The topic is fully discussed in Wood on Nuisances, c. 23, p. 781. See also 4 Waite, Actions and Defences, 728. This case is not within that category. We need not, therefore, consider the subject in this opinion. *Decree affirmed.*

Mr. Justice Field did not sit in this case, nor take any part in its decision; Mr. Justice Miller concurred in the judgment; Mr. Justice Strong dissented.

Mr. Justice Miller. I concur in the judgment of the court, but cannot agree to the principal argument by which it is supported in the opinion. As the question turns upon the existence of a contract and its nature, and not upon the power of the legislature to pass laws affecting the health and comfort of the community, a reference to them and to the power to repeal and modify them, where no contract is in question, is irrelevant. It is said that such contract as may be found in the present case was made subject to the police power of the legislature over the class of subjects to which it relates. The extent to which this is true depends upon the specific character of the contract and not upon the general doctrine. This court has repeatedly decided that a State may by contract bargain away her right of taxation. I have not concurred in that view, but it is the settled law of this court. If a State may make a contract on that subject which it cannot abrogate or repeal, it may, with far more reason, make a contract for a limited time for the removal of a continuing nuisance from a populous city.

The nuisance in the case before us was the very subject-matter of the contract. The consideration of the contract was that the company might and should do certain things which affected the health and comfort of the community; and the State can no more impair the obligation of that contract than it can resume the right of taxation which it has on valid consideration agreed not to exercise, because in either case the wisdom of its legislation has become doubtful. If the good of the entire community requires the destruction of the company's rights under this contract, let the entire community pay therefor, by condemning the same for public use.

But I agree that contracts like this must be clearly established, and the powers of the legislature can only be limited by the express terms of the contract, or by what is necessarily implied. In the case before us, the company has two correlative rights in regard to the offal at the slaughter-houses in Chicago. One is to have within the limit of that city depots for receiving it, and the other is to carry it to a place in Cook County south of the dividing line between townships 37 and 38. The city or the State legislature is not forbidden by the contract to locate such depots within the city, where the health of the city requires; in other words, the company has not the choice of location within the city. So, in regard to the chemical works. The company, by its contract, is entitled to have them in Cook County south of the line mentioned; but the precise locality within that large space is a fair subject of regulation by the police power of the State, or of any town to which it has been delegated. If within the limits of Hyde Park, that town may pass such laws concerning its health and comfort as may require the company to seek another location south of the designated line, without impairing the terms of the contract.

It is said that the only railroad by which the company can carry offal passes through Hyde Park, and that the ordinance is fatal to the use of the road. But the State did not contract that the company might carry by railroad, still less by that road. In short, in my opinion, there is within the limits of the original designation of boundary ample space where the company may exercise the power granted by the contract, without violating the ordinances of Hyde Park, and they, as a police regulation of health and comfort, are therefore valid, as not infringing that contract.

For this reason alone, I think the decree should be affirmed.[1]

[1] [The dissenting opinion of STRONG, J., is as follows:] I cannot concur in the judgment directed by the court in this case. That the charter granted by the legislature, March 8, 1867, and accepted by the company, is a contract protected by the Constitution of the United States, cannot be denied, in the face of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, and the long line of decisions that have followed in its wake and reasserted its doctrines. And if the company holds its rights under and by force of the contract, those rights cannot be taken away or impaired, either directly or indirectly, by any subsequent legislation. This I believe to be incontrovertible, though the opinion just delivered may seem to express a doubt of it. . . .

In order to have a clear apprehension of the rights and privileges which this charter

was intended to secure to the company, and of the purposes which the legislature that granted it had in view, it is both admissible and important to take notice of the circumstances that existed at the time of its grant, so far as they are shown by the record. . . .

When accepted, it was, therefore, a contract by which the State authorized the company to establish works and carry on a business which, without the authority, would be a nuisance to a few persons, in order to relieve a very large community from a greater nuisance. It was, therefore, a grant of a right to maintain a local nuisance.

In the exercise of the rights thus granted, the company established their works at a place in Cook County, south of the dividing line between townships 37 and 38, in what is now the village of Hyde Park, but quite remote from the thickly inhabited part of the village. The point at which they are located is within the limits designated by the legislature. The selection of the place within those limits was confided by the charter to the company, and when the selection was made and the works were erected, the charter conferred the right to maintain them and carry on the business where they were located. I concede that the company could not exercise their discretion wantonly or in negligent disregard of the rights of others. But there is nothing in the case tending to show such disregard or wantonness. There is nothing to show, and it is not claimed, that the works are not at a place where they were authorized to be erected. On the contrary, there is everything to show that the neighborhood where they were located was swampy and nearly uninhabited, giving, as I have said, little promise of further improvement.

The company also, at large expense, erected receiving depots, as authorized by the charter, for the purpose of receiving and carrying from the city matter consisting of dead animals and offal, and engaged in having it transported upon the only railroad upon which it could be transported to the chemical works located within the limits of the municipal division known as Hyde Park Village. That by the charter they were authorized to transport it thither, I regard as beyond any reasonable doubt. I admit to the fullest extent the rule that all charters of private corporations are to be construed most strongly against the corporations. Nothing is granted that is not expressly or clearly implied. But this rule is quite consistent with another, equally settled, that charters are to receive a reasonable interpretation in view of the purposes for which they were made. An express grant of power must include whatever is indispensably necessary to its enjoyment. No man can reasonably deny that a grant of power to establish works at a certain place to convert animal matter into an agricultural fertilizer, coupled with power to establish depots for receiving and carrying it from the city, does authorize its transportation to the converting works. It is not denied in the present case. One of the rights, then, which the company obtained by their charter was to carry the offal, dead animals, and other animal matter into and through the village of Hyde Park to the works authorized for its conversion.

To recapitulate: The company obtained by their contract with the State, among others, three rights: One, a right to establish and maintain at a place in Cook County, south of the dividing line between townships 37 and 38, works for converting animal matter. The works have been established there at a cost of more than $200,000; second, they obtained the right to establish receiving depots for receiving and carrying such matter from Chicago; and, third, they obtained the right to carry such matter from their receiving depots to their converting works in Hyde Park. I do not understand any of these propositions to be questioned, either by the defendants in error or by the majority of this court.

The only serious question, therefore, is whether by any law of the State this contract has been impaired, and the rights assured by it have been taken away. . . . It is, in my judgment, a palpable violation of the constitutional provision that no State shall pass a law impairing the obligation of a contract.

It has been suggested that the charter did not precisely designate the place where the rendering works might be established, and to which the city offal might be carried; and hence it is argued that, notwithstanding the contract, it is within the power of the legislature to order the removal of the works to another locality, and that this

may be done mediately by a municipal corporation empowered by the State. The inference I emphatically deny. It is true the charter empowered the company to select a location within certain geographical limits, and did not itself define the exact point; but when under this power a location was made by the company, and hundreds of thousands of dollars were expended upon it, it was beyond the power of the other contracting party to change it. The location was lawful when made, and, if lawful then, it cannot be made unlawful afterwards. If it could be, it would be in the power of the legislature to change it a second, a third, a fiftieth time, and fix it at last at a place where none of the rights of the company could be enjoyed. No one has ever doubted that when a railroad company has been authorized, as is often the case, to construct a railroad beginning at some point within a township or a county, and has constructed its road from some point in that township or county, its right to maintain it from that terminus is indefeasible. That which was left uncertain has become certain. So, if a warrant be granted for a tract of land in a specified district without describing it, when the warrantee has selected a tract, the contract is closed, and his right to that tract is absolute. It must be, therefore, that the location of the company's works at the places where they were located, recognized as a proper location in the Act of the Legislature of 1869, is one which cannot be changed without the consent of both parties to the contract, or without compensation made.

But it is said the ordinance complained of is only an exercise of the police power of the State, and that the charter must be assumed to have been granted and accepted subject to that police power I admit that the police power of a State extends generally to the prevention and removal of things injurious to the comfort of the public. I admit also that the works of the company may have been and probably were offensive, and were a nuisance, unless their character was changed by the law. So, also, carrying offal, or animal matter, into or through the village may have been and probably was more or less offensive. But the question now is, were the works or the transportation things illegal? In view of the contract contained in the charter, was it a legitimate exercise of the State's police power to declare them illegal, abate them, and inflict penalties for doing what the State had declared that the company might do? I am confident it was not. Had the charter been a mere license, instead of a contract, the case would be different. But the legislature may legalize acts which, without such legislation, would be obnoxious to criminal law. It may legalize that which, without such action, would be a nuisance. It may do this either by law or by contract. It may limit the extent to which its police power shall be exerted. And it often does. The charter of a railroad company is a familiar illustration. Crossing highways and running locomotives, were they not authorized by law, would be nuisances. Who will contend that, when a charter has been granted for building a railway and running locomotives thereon, the company or its agents can be punished criminally for maintaining a nuisance? Why not? Because there is no nuisance in the eye of the law, and the State has contracted away a portion of its police power. So, also, an illustration may be found in the case of gas companies. If a legislature charter a gas company, and locate its works at a designated place, authorizing the manufacture of gas there, it would be marvellous indeed if the agents of the company could be indicted for a nuisance, or if the legislature could without compensation deny the exercise of the powers granted, because manufacturing gas is offensive The police power of a State is no more sacred than its taxing power. We have held again and again that a State may by contract with one of its corporations bind itself not to tax the property of that corporation. If so, why may it not bind itself not to exercise its police power over certain employments? It would be a monstrous stretch of credulity to conclude that the Legislature of Illinois did not intend such a relinquishment of police power when it granted the charter to the plaintiff in error. Its members must be assumed to have had common knowledge. They knew the offensiveness of animal offal. The plain object of the charter was to relieve the citizens of Chicago from it. The legislature knew that the transportation of the offal to a point south of the designated line, and its deposit there, would inevitably be offensive to the much less numerous inhabitants of the vicinity. With this knowledge they authorized what the plaintiff

in error has been doing. They invited the investment of $250,000 to enable it to be done, and they entered into a contract that the company should have a right do it for fifty years. To say now, as the judgment in this case does, there was a tacit reservation, that under the pretence of exercising the police power of the State the rights of the company may all be taken away, and their investments destroyed without compensation, is, in my opinion, not only unjust, but unwarranted by any judicial decision heretofore made. While saying this, I freely admit that the police power of the State may remain to regulate the conduct of the company's business, provided the regulation does not extend to the destruction of the chartered rights. It may prescribe that the offal shall be transported to the appellants' works in closed cars or wagons. It may impose reasonable regulations upon the disposition of the offal when received at the rendering works, but under the cover of regulation it cannot destroy.

Nothing, I admit, is more indefinite than the extent or limits of what is called police power. I will not undertake to define them. Certainly it has limits. I refer to what Judge Cooley has said in reference to the exercise of the power over private corporations. Cooley, Const. Lim. 577. He says, "The exercise of the police power in these cases must be this: the regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter, and they must not, under the pretence of regulations, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise." This I understand to be entirely correct. In support of it he refers to numerous decisions, which I will not cite, but to which I also refer. There are many others fully sustaining the text as I have quoted it.

There is no authority to the contrary. The cases relied upon to uphold the exercise of the power which the defendants in error assert are all clearly distinguishable. They are not cases where the police power was exerted for the destruction of a chartered right distinctly granted by a contract.

The only decision referred to which has been made by this court is *Beer Company* v. *Massachusetts*,[1] 97 U. S. 25. In my judgment, it furnishes no support for the present ruling. The case was this: In 1828, the legislature granted a charter to the Boston Beer Company, by which they were made a corporation, "for the purpose of manufacturing malt liquors in all their varieties," and made the corporation subject to all the duties and requirements of an Act passed on the 3d of March, 1809, entitled "An Act defining the general powers and duties of manufacturing companies," and the several Acts in addition thereto. The general Manufacturing Act of 1809 contained a provision that the Legislature might from time to time, upon due notice to any corporation, make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly to repeal any act or part thereof establishing any corporation, as should be deemed expedient. In 1829, the Act of 1809 was repealed, with the following qualification, however: "But this repeal shall not affect the existing rights of any person or the existing or future liabilities of any corporation, or any members of any corporation now established, until such corporation shall have adopted this Act and complied with the provisions herein contained." The Legislature of the State, in 1869, passed an Act restricting the sale within the Commonwealth of any malt liquors, and prohibiting it except in certain specified cases.

The Supreme Judicial Court of the State adjudged: first, that the Act of 1869 did not impair the obligation of the contract contained in the charter of the beer company, so far as it related to the sale of malt liquors, but was binding upon the company to the same extent as on individuals. The sale was not expressly authorized, nor authorized by necessary implication. And, secondly, the court held that the Act was in the nature of a police regulation in regard to the sale of a certain article of property, and is applicable to the sale of such property by individuals and corporations, even when the charter of the corporation cannot be altered or repealed by the legislature.

We affirmed the decision of the State court. But there was nothing in the charter

[1] For this case see *supra*, p. 757. — ED.

In *Stone* v. *Mississippi*, 101 U. S. 814 (1879), on error to the Supreme Court of Mississippi, in sustaining provisions of the Constitution of Mississippi of 1869 prohibiting lotteries, and also a statute of 1870 enforcing these provisions, as against a corporation chartered in 1867 with authority to carry on the business of a lottery for twenty-five years, the court (Waite, C. J.) said: "There can be no dispute but that under this form of words the Legislature of the State chartered a lottery company, having all the powers incident to such a corporation, for twenty-five years, and that in consideration thereof the company paid into the State treasury $5,000 for the use of a university, and agreed to pay, and until the commencement of this suit did pay, an annual tax of $1,000 and 'one-half of one per cent on the amount of receipts derived from the sale of certificates or tickets.' If the legislature that granted this charter had the power to bind the people of the State and all succeeding legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object, although there was an evident purpose to conceal the vice of the transaction by the phrases that were used. Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the State and the people of the State in that way. . . .

"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 dis-

that authorized, either expressly or by necessary intendment, the company to sell their product within the Commonwealth. It was not a contract to authorize what was a nuisance when it was granted, or what might thereafter become one. It was not a contract respecting anything that was illegal when the contract was made. The contract under consideration in the present case was. It was made with reference to the exercise of the State's police power, and in restraint of it. It is obvious, therefore, the beer company's case has no applicability to the one we have now in hand.

I have said enough to indicate the reasons for my dissent. To me they appear very grave. In my judgment, the decision of the court denies the power of a State legislature to legalize, during a limited period, that which without its action would be a nuisance. It enables a subsequent legislature to take away, without compensation, rights which a former one has accorded, in the most positive terms, and for which a valuable consideration has been paid. And, in its application to the present case, it renders it impossible to remove from Chicago the vast bodies of animal offal there accumulated; for if the ordinance of Hyde Park can stand, every other municipality around the city can enforce similar ordinances. — Ed.

cretion is allowed, and the discretion cannot be parted with any more than the power itself. *Beer Company* v. *Massachusetts*, 97 U. S. 25.

"In *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, it was argued that the contract clause of the Constitution, if given the effect contended for in respect to corporate franchises, 'would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for the purpose of internal government, and which, to subserve those purposes, ought to vary with varying circumstances' (p. 628); but Mr. Chief Justice Marshall, when he announced the opinion of the court, was careful to say (p. 629), 'that the framers of the Constitution did not intend to restrain States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed.' The present case, we think, comes within this limitation. We have held, not, however, without strong opposition at times, that this clause protected a corporation in its charter exemptions from taxation. While taxation is in general necessary for the support of government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.

"But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.' They may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality.

"The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be

no difficulty.[1] They are not, in the legal acceptation of the term, *mala in se*, but, as we have just seen, may properly be made *mala prohibita*. They are a species of gambling, and wrong in their influences. 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 accumulations 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.

"On the whole, we find no error in the record.

"*Judgment affirmed.*" [2]

NOTE.

At this point, the case of *Butchers' Union Slaughter House, etc. Co.* v. *Cresc. City, etc. Sl. Ho. Co.*, 111 U. S. 746 (1883), (s. c. *supra*, p. 537) should be examined.[3]

In *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650 (1885), the plaintiff, claiming for fifty years from April 1, 1875, the sole and exclusive right of manufacturing and distributing gas in the city of New Orleans, by means of pipes laid in the streets, sought an injunc-

[1] As late as the early part of this century a different opinion of lotteries seems to have prevailed in this country. Harvard College built some of its dormitories by the aid of lotteries, allowed by the Legislature of Massachusetts down to 1806. This was "one of the approved methods of the period for raising money." See 2 Quincy's Hist. Harv. Coll. 162, 273, 292. It is interesting to reflect upon the probable course of decision in the Supreme Court of the United States if, at the time when *Fletcher* v. *Peck* was decided, in 1810, or *Dartmouth College* v. *Woodward*, in 1819, instead of those cases, it had been a case like *Stone* v. *Miss.* which presented itself for judgment. — Ed.

[2] Compare *Moore* v. *Indianapolis*, 120 Ind. 483 (1889). — Ed.

[3] In *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556 (1894), s. c. *supra*, pp. 687, 689, and *Minn. & St. Louis Ry.* v. *Emmons*, 149 U. S. 364, 367 (1892), the language of the court denies the power of restraining by contract the freedom of legislative action, in regulating railroads, in matters affecting the public safety, *e. g.*, as to grade crossings and fencing their track. Compare *Thorpe* v. *Rutl. & B. R. R. Co.*, *supra*, 706, 707; *Backus* v. *Lebanon*, 11 N. H. 19; *Lock Haven Br. Co.* v. *Clinton County*, 157 Pa. 379, 388 (1890). — Ed.

tion against the defendants, who had been organized under a general law in 1881 for carrying on the same business, and were proceeding to act under authority of an ordinance of the city. On demurrer, in the Circuit Court of the United States for the Eastern District of Louisiana, the plaintiff's bill was dismissed, on the ground that the consolidation of several corporations, under which it claimed, was without legal authority. On appeal, the Supreme Court reversed this decree. After disposing of the point upon which the court below had proceeded, HARLAN, J., for the court, said: —

"This brings us to the consideration of questions more difficult. It is contended that the right granted to the Crescent City Gas-Light Company, of manufacturing and distributing illuminating gas, and now enjoyed by the consolidated company, was abrogated, to the extent that it was made exclusive, by that article of the Constitution of Louisiana of 1879, which, while preserving rights, claims, and contracts then existing, provided that 'the monopoly features in the charter of any corporation now existing in this State, save such as may be contained in the charter of railroad companies, are hereby abolished;' and that such article is not in violation of the provision of the Constitution of the United States which forbids a State to pass a law impairing the obligation of contracts.

"These propositions have received the careful consideration which their importance demands.

"It is true, as suggested in argument, that the manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character. Under proper management, the business contributes very materially to the public convenience, while, in the absence of efficient supervision, it may disturb the comfort and endanger the health and property of the community. It also holds important relations to the public through the facilities furnished, by the lighting of streets with gas, for the detection and prevention of crime. An English historian, contrasting the London of his day with the London of the time when its streets, supplied only with oil lamps, were scenes of nightly robberies, says that 'the adventurers in gas-lights did more for the prevention of crime than the government had done since the days of Alfred.' Knight, vol. 7, ch. 21; Macaulay, ch. 3. . . .

"It will therefore be assumed, in the further consideration of this case, that the charter of the Crescent City Gas-Light Company, — to whose rights and franchises the present plaintiff has succeeded, — so far as it created a corporation with authority to manufacture gas and to distribute the same by means of pipes, mains, and conduits, laid in the streets and other public ways of New Orleans, constituted, to use the language of this court in the case of the *Delaware Railroad Tax*, 18 Wall. 206, 'a contract between the State and its corporators, and within the provision of the Constitution prohibiting legislation impairing the obligation of contracts,' and therefore 'equally protected from legisla-

tive interference, whether the public be interested in the exercise of its franchise, or the charter be granted for the sole benefit of its corporators.' See also *Greenwood* v. *Freight Co.*, 105 U. S. 13, 20; *New Jersey* v. *Yard*, 95 U. S. 104, 113.

"But it is earnestly insisted that, as the supplying of New Orleans and its inhabitants with gas has relation to the public comfort, and, in some sense, to the public health and the public safety, and, for that reason, is an object to which the police power extends, it was not competent for one legislature to limit or restrict the power of a subsequent legislature in respect to those subjects. It is, consequently, claimed that the State may at pleasure recall the grant of exclusive privileges to the plaintiff; and that no agreement by her, upon whatever consideration, in reference to a matter connected in any degree with the public comfort, the public health, or the public safety, will constitute a contract the obligation of which is protected against impairment by the National Constitution. And this position is supposed by counsel to be justified by recent adjudications of this court in which the nature and scope of the police power have been considered. . . . [Here follows a reference to the *Slaughter House Cases*, 16 Wall. 36; *Stone* v. *Mississippi*, 101 U. S. 814; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Barbier* v. *Connolly*, 113 U. S. 27; *Henderson* v. *Mayor*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; *R. R. Co.* v. *Husen*, 95 U. S. 465; *Bridge Prop'rs* v. *The Hoboken Co.*, 1 Wall. 116; *The Binghamton Bridge*, 3 Wall. 51; *West Riv. Bridge Co.* v. *Dix*, 6 Harr. 507, and to several cases in Louisiana.]

"Numerous other cases could be cited as establishing the doctrine that the State may by contract restrict the exercise of some of its most important powers. We particularly refer to those in which it is held that an exemption from taxation, for a valuable consideration at the time advanced, or for services to be thereafter performed, constitutes a contract within the meaning of the Constitution. *Asylum* v. *New Orleans*, 105 U. S. 362, 368; *Home of the Friendless*, 8 Wall. 430; *New Jersey* v. *Wilson*, 7 Cranch, 164, 166; *State Bank of Ohio* v. *Knoop*, 16 How. 363, 376; *Gordon* v. *Appeal Tax Court*, 3 How. 133; *Wilmington Railroad* v. *Reid*, 13 Wall. 264, 266; *Humphrey* v. *Pegues*, 16 Wall. 244, 248-9; *Farrington* v. *Tennessee*, 95 U. S. 679, 689.

"If the State can, by contract, restrict the exercise of her power to construct and maintain highways, bridges, and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation, by granting exemption from taxation to particular individuals and corporations, it is difficult to perceive upon what ground we can deny her authority, — when not forbidden by her own organic law, — in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public

safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the State might undertake to perform either herself or by subordinate municipal agencies.

"The former adjudications of this court, upon which counsel mainly rely, do not declare any different doctrine, or justify the conclusion for which the defendant contends.

"In *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 32, . . . the prohibitory enactment of which the Beer Company complained was held to be a mere police regulation which the State could establish even had there been no reservation of authority to amend or repeal its charter.

"The case of *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 663, is much relied on by counsel. But a careful examination will show that it does not militate against the views here expressed. . . . The decision was that the State, under her power to protect the public health, could abate the nuisance created by the company's business notwithstanding its works had been established within the general locality designated in its charter, and, consequently, the legislature could, at its discretion, amend the charter of Hyde Park and remove the restriction upon its authority to abate nuisances, or invest it with power to regulate or prohibit business necessarily injurious to the public health.

"The same principles underlie the decision in *Stone* v. *Mississippi*, 101 U. S. 814, in which it was held that any one accepting a grant of a lottery 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,' the only right acquired by the grantee being 'a suspension of certain governmental rights in his favor, subject to withdrawal at will.' . . .

"We are referred to *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, as authority for the proposition that the State is incapable of making a contract protected by the National Constitution, in reference to any matter within the reach of her police power in its broadest sense. But no such principle is there established. . . . So far from the court saying that the State could not make a valid contract in reference to any matter whatever within the reach of the police power, according to its largest definition, its language was: 'While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by contract, limit the exercise of those powers to the prejudice of the general welfare. They are the public health and the public morals. The preservation of these is so necessary to the best interests of social organization, that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime.' . . .

"The principle upon which the decisions in *Beer Co.* v. *Massachusetts*, *Fertilizing Co.* v. *Hyde Park*, *Stone* v. *Mississippi*, and *Butchers' Union Co.* v. *Crescent City Live-Stock Landing Co.*, 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. . . .

"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 the 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. . . .

"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, ubi supra; Richmond, &c. 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."

In *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387 (1892), on an appeal in equity, decrees of the Circuit Court of the United States for the Northern District of Illinois in favor of the State were affirmed. The object of the litigation was to determine the rights, respectively, of the State, Chicago, and the railroad company in land, submerged or reclaimed, in front of the water line of the city on Lake Michigan.

Field, J., for the court, said: "The object of the suit is to obtain a judicial determination of the title of certain lands on the east or lake front of the city of Chicago, situated between the Chicago River and Sixteenth Street, which have been reclaimed from the waters of the lake, and are occupied by the tracks, depots, warehouses, piers, and other structures used by the railroad company in its business; and also of the title claimed by the railroad company to the submerged lands, constituting the bed of the lake, lying east of its tracks, within the corporate limits of the city, for the distance of a mile, and between the south line of the south pier near Chicago River extended eastwardly, and a line extended, in the same direction, from the south line of lot 21 near the company's round-house and machine shops. The determination of the title of the company will involve a consideration of its rights to construct, for its own business, as well as for public convenience, wharves, piers, and docks in the harbor. . . . The claim is founded upon the third section of the Act of the Legislature of the State passed on the 16th of April, 1869. . . . On the 15th of April, 1873, the Legislature of Illinois repealed the Act. The questions presented relate to the validity of the section cited of the Act and the effect of the repeal upon its operation. . . .

"As to the grant of the submerged lands, the Act declares that all the right and title of the State in and to the submerged lands, constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the company for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastwardly from the south line of lot 21, south of and near to the round-house and machine shops of the company 'are granted in fee to the railroad company, its successors and assigns.' The grant is accompanied with a

proviso that the fee of the lands shall be held by the company in perpetuity, and that it shall not have the power to grant, sell, or convey the fee thereof. It also declares that nothing therein shall authorize obstructions to the harbor or impair the public right of navigation, or be construed to exempt the company from any Act regulating the rates of wharfage and dockage to be charged in the harbor.

"This clause is treated by the counsel of the company as an absolute conveyance to it of title to the submerged lands, giving it as full and complete power to use and dispose of the same, except in the technical transfer of the fee, in any manner it may choose, as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the State. Treating it as such a conveyance, its validity must be determined by the consideration whether the legislature was competent to make a grant of the kind.

"The Act, if valid and operative to the extent claimed, placed under the control of the railroad company nearly the whole of the submerged lands of the harbor, subject only to the limitations that it should not authorize obstructions to the harbor or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged. With these limitations, the Act put it in the power of the company to delay indefinitely the improvement of the harbor, or to construct as many docks, piers, and wharves and other works as it might choose, and at such positions in the harbor as might suit its purposes, and permit any kind of business to be conducted thereon, and to lease them out on its own terms, for indefinite periods. The inhibition against the technical transfer of the fee of any portion of the submerged lands was of little consequence when it could make a lease for any period and renew it at its pleasure. And the inhibitions against authorizing obstructions to the harbor and impairing the public right of navigation placed no impediments upon the action of the railroad company which did not previously exist. A corporation created for one purpose, the construction and operation of a railroad between designated points, is, by the Act, converted into a corporation to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally. . . .

"The question, therefore, to be considered is whether the legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the State.

"That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide-water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title

different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. . . .

"The area of the submerged lands proposed to be ceded by the Act in question to the railroad company embraces something more than a thousand acres, being, as stated by counsel, more than three times the area of the outer harbor, and not only including all of that harbor but embracing adjoining submerged lands which will, in all probability, be hereafter included in the harbor. It is as large as that embraced by all the merchandise docks along the Thames at London; is much larger than that included in the famous docks and basins at Liverpool; is twice that of the port of Marseilles, and nearly if not quite equal to the pier area along the water front of the city of New York. And the arrivals and clearings of vessels at the port exceed in number those of New York, and are equal to those of New York and Boston combined. Chicago has nearly twenty-five per cent of the lake carrying trade as compared with the arrivals and clearings of all the leading ports of our great inland seas. In the year ending June 30, 1886, the joint arrivals and clearances of vessels at that port amounted to twenty-

two thousand and ninety-six, with a tonnage of over seven millions; and in 1890 the tonnage of the vessels reached nearly nine millions. As stated by counsel, since the passage of the Lake Front Act, in 1869, the population of the city has increased nearly a million souls, and the increase of commerce has kept pace with it. It is hardly conceivable that the legislature can divest the State of the control and management of this harbor and vest it absolutely in a private corporation. Surely an Act of the Legislature transferring the title to its submerged lands and the power claimed by the railroad company, to a foreign State or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held. So would a similar transfer to a corporation of another State. It would not be listened to that the control and management of the harbor of that great city, — a subject of concern to the whole people of the State, — should thus be placed elsewhere than in the State itself. All the objections which can be urged to such attempted transfer may be urged to a transfer to a private corporation like the railroad company in this case.

"Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay; but, be that as it may, the power to resume the trust whenever the State judges best is, we think, incontrovertible. The position advanced by the railroad company in support of its claim to the ownership of the submerged lands and the right to the erection of wharves, piers, and docks at its pleasure, or for its business in the harbor of Chicago, would place every harbor in the country at the mercy of a majority of the legislature of the State in which the harbor is situated.

"We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the State, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining. . . .

"In *Newton* v. *Commissioners*, 100 U. S. 548, it appeared that by an Act passed by the Legislature of Ohio, in 1846, it was provided that upon the fulfilment of certain conditions by the proprietors or citizens of the town of Canfield, the county seat should be permanently established in that town. Those conditions having been complied with, the county seat was established therein accordingly. In 1874, the legisla-

ture passed an Act for the removal of the county seat to another town. Certain citizens of Canfield thereupon filed their bill, setting forth the Act of 1846, and claiming that the proceedings constituted an executed contract, and prayed for an injunction against the contemplated removal. But the court refused the injunction, holding that there could be no contract and no irrepealable law upon governmental subjects, observing that legislative Acts concerning public interests are necessarily public laws; that every succeeding legislature possesses the same jurisdiction and power as its predecessor; that the latter have the same power of repeal and modification which the former had of enactment, neither more nor less; that all occupy in this respect a footing of perfect equality; that this is necessarily so in the nature of things; that it is vital to the public welfare that each one should be able, at all times, to do whatever the varying circumstances and present exigencies attending the subject may require; and that a different result would be fraught with evil.

"As counsel observe, if this is true doctrine as to the location of a county seat, it is apparent that it must apply with greater force to the control of the soils and beds of navigable waters in the great public harbors held by the people in trust for their common use and of common right as an incident to their sovereignty. The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the State in and over the submerged lands in Lake Michigan, by the Act of April 16, 1869, was inoperative to affect, modify, or in any respect to control the sovereignty and dominion of the State over the lands, or its ownership thereof, and that any such attempted operation of the Act was annulled by the repealing Act of April 15, 1873, which to that extent was valid and effective. There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it."[1]

[SHIRAS, J., gave a dissenting opinion, in which GRAY and BROWN, JJ., concurred. The CHIEF JUSTICE, having been of counsel in the court below, and MR. JUSTICE BLATCHFORD, being a stock-holder in the Illinois Central Railroad Company, did not take any part in the consideration or decision of these cases.]

[1] Compare *Martin* v. *Waddell*, 16 Pet. 367; *Saunders* v. *N. Y. C., &c. R. R. Co.*, 144 N. Y. 75 (1894); *Core* v. *The State*, 39 N. E. Rep. 400 (1895); *Stockton* v. *Balt. & N. Y. R. R. Co.*, 32 Fed. Rep. 9, 20. — ED.

CHAPTER X.

THE REGULATION OF COMMERCE, — FOREIGN, INTERSTATE, AND WITH THE INDIAN TRIBES.[1]

From 5 Marshall's "Life of Washington" (Philadelphia, 1807), c. 2, pp. 65 *et seq.* [At the time this book was published (1804–1807), Marshall was Chief Justice of the United States. Washington had died in December, 1799, and Marshall, after being Minister to France and Secretary of State, had been commissioned Chief Justice in January, 1801.] "Scarcely had the war of the Revolution terminated, when the United States and Great Britain reciprocally charged each other with having violated the treaty of peace. . . . But the cause of most extensive disquiet was the rigorous commercial system pursued by Great Britain. While colonists, the Americans had carried on a free and gainful trade with the British West Indies, from which they had drawn considerable supplies of specie. As citizens of an independent State, those ports were closed against them, and, in other parts of the empire also, the Navigation-Act was in many points strictly enforced with respect to them.

"To explore new channels, into which the trade of a nation may be transferred, will, in any state of things, require time; and, in that which existed, was opposed by obstacles which almost discouraged the attempt. On every side they encountered rigorous and unlooked-for restrictions. In the rich trade of the neighboring colonies they were not permitted to participate, and in the ports of Europe they encountered regulations which were extremely embarrassing. From the Mediterranean they were excluded by the Barbary powers, whose hostility they had no force to subdue, and whose friendship they had no money to purchase. And the characteristic enterprise of their merchants, which in better times has displayed their flag in every part of the world, was then in a great measure restrained from exerting itself by the scantiness of their means. Thus circumstanced, the idea of compelling Great Britain to relax somewhat of the rigor of her system, by opposing it with regulations equally restrictive, seems to have been generally taken up; but to render success in such a conflict possible, it was necessary that the whole power of regulating commerce should reside in a single legislature. That thirteen independent sovereignties, jealous of each other, could be induced to concur, for a length of time, in measures capable of producing the desired effect, few were so sanguine as to hope. With many, therefore, the desire of counteracting a system which appeared to them so injurious, triumphed over their attachment to State authority, and the converts to the opinion, that Congress ought to be empowered to pass a navigation-act, or to regulate trade generally, were daily multiplied. So early as the 30th of April, 1784, resolutions were entered into, recommending it to the several States 'to vest the United States in Congress assembled, for the term of fifteen years, with power to prohibit any goods, wares, or merchandise, from being imported into, or exported from, any of the States, in vessels belonging

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[1] Valuable monographs on this subject may be found in F. C. Hartshorne's "Railroads and the Commerce Clause" (1893); W. D. Lewis's "Federal Power over Commerce" (1892), (both published in Philadelphia, at the University of Pennsylvania Press); Professor Blewett Lee's "Limitations on the Right of the States to enact Quarantine Laws," 2 Harv. Law Rev. 267, 293 (1888); and Mr. L. M. Greeley's "Test of a Regulation of Foreign and Interstate Commerce," 1 Harv. Law Rev. 159 (1887). — Ed.

to, or navigated by, the subjects of any power with whom these United States shall not have formed treaties of commerce.' And also, of prohibiting the subjects of any foreign State, kingdom, or empire, unless authorized by treaty, from importing into the United States any goods, wares, or merchandise, which are not the produce or manufacture of the dominions of the sovereign whose subjects they are. Meanwhile, the United States were unremitting in their endeavors to form commercial treaties in Europe. Three commissioners had been appointed for that purpose; and at length, as the trade with England was peculiarly important, and the growing misunderstandings between the two countries threatened serious consequences, should their adjustment be much longer delayed, it was determined to appoint a minister plenipotentiary to represent the United States at the court of Great Britain; and, in February, 1785, Mr. John Adams was elected to this interesting embassy. His endeavors to give stability to the commercial relations between the two countries, by a compact which might be mutually advantageous to them, were not successful. Some overtures were made on his part, but the cabinet of London declined the negotiation. The government of the United States, it was said, was unable to secure the observance of any general commercial regulations; and it was deemed unwise to enter into stipulations, which could not be of reciprocal obligation. . . .

"One of the consequences resulting from this unprosperous state of things was, a general discontent with the course of trade. It had commenced with the native merchants of the North, who found themselves incapable of contending in their own ports with certain foreigners, and was soon communicated to others. The gazettes of Boston contained some very animated and angry addresses, which produced resolutions for the government of the citizens of that town, applications to their State legislature, a petition to Congress, and a circular letter to the merchants of the several seaports throughout the United States. After detailing the disadvantages under which the trade and navigation of America labored, in consequence of the free admission of the ships and commodities of Great Britain into their ports, while their navigation in return was discouraged, and their exports either prohibited from entering British ports, or loaded with the most rigorous exactions; after stating the ruin which must result from the continuance of such a system, and their confidence that the necessary powers to the Federal government would be soon, if not already, delegated, the petition to Congress thus concludes: 'Impressed with these ideas, your petitioners beg leave to request of the very august body which they have now the honor to address, that the numerous impositions of the British on the trade and exports of these States may be forthwith contravened by similar expedients on our part; else, may it please your excellency and honors, the commerce of this country, and, of consequence, its wealth, and perhaps the Union itself, may become victims to the artifice of a nation, whose arms have been in vain exerted to accomplish the ruin of America.'

"The merchants of the city of Philadelphia presented a memorial to the legislature of that State, in which, after lamenting it as a fundamental defect in the Constitution, that full and entire power over the commerce of the United States had not been originally vested in Congress, 'as no concern common to many could be conducted to a good end but by an unity of counsels;' they say: 'Hence it is that the intercourses of the States are liable to be perplexed and injured by various and discordant regulations, instead of that harmony of measures on which the particular as well as general interests depend; productive of mutual disgusts, and alienation amongst the several members of the empire. But the more certain inconveniences foreseen and more experimentally felt, flow from the unequal footing this circumstance puts us on with other nations, and by which we stand in a very singular and disadvantageous situation; for, while the whole of our trade is laid open to these nations, they are at liberty to limit us to such branches of theirs as interest or policy may dictate; unrestrained by any apprehensions, as long as the power remains severally with the States, of being met and opposed by any consistent and effectual restrictions on our part.'

"This memorial prayed that the legislature would endeavor to procure from Congress a recommendation to the several States, to vest in that body the necessary powers over the commerce of the United States. It was immediately taken into con-

sideration, and resolutions were passed conforming to its prayer. Similar applications were made by other commercial towns.

"From these proceedings, and from the general representations made by the American merchants, General Washington had augured the most happy effects. 'The information,' said he, in a letter to an intimate friend in Great Britain, 'which you have given of the disposition of a certain court, coincides precisely with the sentiments I had formed of it, from my own observations on many late occurrences. With respect to ourselves, I wish I could add that as much wisdom had pervaded our counsels, as reason and common policy most evidently dictated. But the truth is, the people must *feel* before they will *see;* consequently, they are brought slowly into measures of public utility. Past experience, or the admonition of a few, have but little weight. But evils of this nature work their own cure, though the remedy comes slower than comports with the wishes of those who foresee, or think they foresee, the danger.

"'With respect to the commercial system which Great Britain is pursuing with this country, the ministers, in this as in other matters, are defeating their end, by facilitating the grant of those powers to Congress, which will produce a counteraction of their plans, and with which, but for those plans, half a century would not have invested that body. The restrictions on our trade, and the additional duties which are imposed on many of our staple commodities, have put all the commercial people of this country in motion. They now see the indispensable necessity of a general controlling power, and are addressing their respective assemblies to grant it to Congress. Before this, every State thought itself competent to regulate its own trade; and we were verifying the observations of Lord Sheffield, who supposed we never could agree on any general plan; but those who will go a little deeper into matters than his lordship seems to have done, will perceive that in any measure where the general interest is touched, however wide apart the politics of individual States may be, yet, as soon as it is discovered, they will unite to effect a common good.' . . .

"While the advocates for union exerted themselves to impress its necessity on the public mind, measures were taking, in Virginia, which, though they had originated in different views, terminated in a proposition for a general convention, to revise the state of the Union. To form a compact relative to the navigation of the rivers Potomac and Pocomoke, and of part of the Bay of Chesapeake, by the citizens of Virginia and Maryland, commissioners were appointed by the legislatures of those States respectively, who assembled at Alexandria, in March, 1785. While at Mount Vernon on a visit, they agreed to propose to their respective governments the appointment of other commissioners, with power to make conjoint arrangements, to which the assent of Congress was to be solicited, for maintaining a naval force in the Chesapeake. The commissioners were also to be empowered to establish a tariff of duties on imports, to which the laws of both States should conform. When these propositions received the assent of the Legislature of Virginia, an additional resolution was passed, directing that which respected the duties on imports to be communicated to all the States in the Union, who were invited to send deputies to the meeting.

"On the 21st of January, 1786, a few days after the passing of these resolutions, another was adopted, appointing certain commissioners, 'who were to meet such as might be appointed by the other States in the Union, at a time and place to be agreed on, to take into consideration the trade of the United States, to examine the relative situation and trade of the said States, to consider how far an uniform system in their commercial relations may be necessary to their common interest, and their permanent harmony; and to report to the several States, such an act, relative to this great object, as, when unanimously ratified by them, will enable the United States, in Congress assembled, effectually to provide for the same.'

"In the circular letter, transmitting these resolutions to the respective States, Annapolis, in Maryland, was proposed as the place, and the ensuing September as the time of meeting. Before the period at which these commissioners were to assemble had arrived, the idea was carried, by those who saw and deplored the complicated calamities which flowed from the inefficacy of the general government, much further than was avowed by the resolution of Virginia. . . .

"The convention at Annapolis was attended by commissioners from only five

States. Having appointed Mr. Dickinson their chairman, they proceeded to discuss the objects for which they had been convened. It was soon perceived that powers much more ample than had been confided to them would be requisite to enable them to effect the beneficial purpose which they contemplated.

"For this reason, as well as in consideration of the small number of States which were represented, the convention determined to rise without coming to any specific resolutions on the particular subject which had been referred to them. Previous to their adjournment, however, they agreed on a report to be made to their respective States, in which was represented the necessity of extending the revision of the Federal system to all its defects, and in which they recommended that deputies for that purpose be appointed, by the several legislatures, to meet in convention in the city of Philadelphia, on the second day of the ensuing May." See also *supra*, pp. 209–210. — Ed.

UNITED STATES *v.* BRIGANTINE "WILLIAM."

District Court of the United States for Massachusetts. 1808.

[2 *Hall's Am. Law Journal*, 255.]

Davis, Dist. J. This libel is founded on the Act of Congress, passed 22d December, 1807, entitled, "An Act laying an embargo on all ships and vessels in the ports and harbors of the United States," and on the first supplementary Act, passed January 9th, 1808.

The libel alleges, that sundry enumerated goods, wares, and merchandise, on the 17th day of March last, on the high seas, were put from said brigantine on board another vessel called the "Nancy;" and also that other goods, wares, and merchandise, on the 11th day of May last, at Lynn, in said district, were put from said brigantine on board another vessel called the "Mary," with intent that said goods, wares, and merchandise should be transported to some foreign port or place, contrary to the Acts aforesaid, by which it is alleged that said brigantine is forfeited.

It has been contended, by the counsel for the claimants, 1st. That the facts, appearing in evidence, do not present a case, within the true intent and meaning of the Acts aforesaid. 2d. That the Acts, on which a forfeiture is claimed, are unconstitutional.

After argument on these heads, it is suggested by the counsel for the claimants, that the case may receive material elucidations from the facts that will appear, on the trial of the brigantine "Nancy;" and they pray for a postponement of a decision on this libel, until a hearing shall be had relative to that vessel. As that case is necessarily continued, and as that of the "Sukey," also pending at this term, appears to have connection with the transactions in the case of the "William," I shall not make up a judgment relative to the facts on this libel, until those of the "Nancy" and "Sukey" shall have been tried, or until the further evidence suggested shall have been heard. But it appears to be necessary to declare an opinion on the constitutional question, which has

been so fully discussed, especially as the objection, if available, equally applies to many other cases before the court. Under these circumstances, I have considered it expedient, and indeed an incumbent duty, to give an opinion on this great and interesting question; though an entire decision on the case, in which it was presented and argued, is, for the reasons suggested, postponed.

In considering the several Acts relative to the embargo as one system, it may be convenient to exhibit an analysis of their contents.

The general, or primary, provisions are contained in the first Act, passed December 22, 1807; which lays "An embargo on all ships and vessels in the ports and places within the limits and jurisdiction of the United States, cleared or not cleared, bound to any foreign port or place;" and in the fourth section of the third additional Act, passed March 12th, 1808, which prohibits the exportation from the United States in any manner whatever, either by land or water, of any goods, wares, or merchandise of foreign or domestic growth or manufacture. To the same head belongs the prohibition of the exportation of specie, by any foreign ship or vessel, by section 5th of the first supplementary Act. . . . The first Act is without limitation, and the several supplementary Acts are to exist during the continuance of the first.

A separate Act passed April 22d, 1808, authorizes the President of the United States to suspend the operation of the Act laying an embargo, and the several supplementary Acts, "in the event of such peace, or suspension of hostilities, between the belligerent powers of Europe, or of any changes in their measures, affecting neutral commerce, as may render that of the United States safe, in the judgment of the President" — with a proviso, that such suspension shall not extend beyond twenty days after the next meeting of Congress.

My views of the constitutional question, which has been raised in this case, will be confined to the Acts relative to navigation, and to exportation by sea. On those only do the cases before the court depend; and it is obviously incumbent on a judge to confine himself to the actual case presented for trial, and its inseparable incidents, and to avoid pronouncing premature decisions on extraneous questions.

The prohibition of exportation by land can, properly, come into view only as it may tend to explain those provisions, on which I am called to decide, and to indicate their character. . . .

Before a court can determine whether a given Act of Congress, bearing relation to a power with which it is vested, be a legitimate exercise of that power, or transcend it, the degree of legislative discretion, admissible in the case, must first be determined. Legal discretion is limited. It is thus defined by Lord Coke, *Discretio est discernere, per legem, quid sit justum.* Political discretion has a wider range. It embraces, combines, and considers all circumstances, events, and projects, foreign or domestic, that can affect the national interests. Legal discretion has not the means of ascertaining the grounds on which political discretion may have proceeded. It seems admitted

that necessity might justify the Acts in question. But how shall legal discussion determine that political discretion, surveying the vast concerns committed to its trust, and the movements of conflicting Nations, has not perceived such necessity to exist? Considerations of this nature have induced a doubt of the competency or constitutional authority of the court to decide an Act invalid, in a case of this description. On the precise extent, however, of the power of the court, I do not give a definite opinion; my view of the main question submitted by the counsel, in this case, rendered such a decision unnecessary. I now proceed to the examination of that question. It will be perceived that some of the considerations, suggested under the last head, have an application to the remaining inquiry, and it is acknowledged that they had an influence in forming my determination.

It is contended, that Congress is not invested with powers, by the Constitution to enact laws, so general and so unlimited, relative to commercial intercourse with foreign nations, as those now under consideration.

It is well understood, that the depressed state of American commerce, and complete experience of the inefficacy of State regulations to apply a remedy were among the great procuring causes of the Federal Constitution. It was manifest that other objects, of equal importance, were exclusively proper for national jurisdiction; and that under national management and control alone could they be advantageously and efficaciously conducted. The Constitution specifies those objects. A national sovereignty is created. Not an unlimited sovereignty, but a sovereignty as to the objects surrendered and specified, limited only by the qualifications and restrictions expressed in the Constitution. Commerce is one of those objects. The care, protection, management, and control of this great national concern is, in my opinion, vested by the Constitution in the Congress of the United States; and their power is sovereign, relative to commercial intercourse, qualified by the limitations and restrictions expressed in that instrument, and by the treaty-making power of the President and Senate.

"Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Such is the declaration in the Constitution. Stress has been laid in the argument on the word regulate, as implying in itself a limitation. Power to regulate, it is said, cannot be understood to give a power to annihilate. To this it may be replied, that the Acts under consideration, though of very ample extent, do not operate as a prohibition of all foreign commerce. It will be admitted that partial prohibitions are authorized by the expression; and how shall the degree or extent of the prohibition be adjusted, but by the discretion of the national government, to whom the subject appears to be committed? Besides, if we insist on the exact and critical meaning of the word regulate, we must, to be consistent, be equally critical with the substantial term commerce.

The term does not necessarily include shipping or navigation; much less does it include the fisheries. Yet it never has been contended that they are not the proper objects of national regulation; and several Acts of Congress have been made respecting them. It may be replied, that these are incidents to commerce, and intimately connected with it; and that Congress, in legislating respecting them, act under the authority given them by the Constitution to make all laws necessary and proper for carrying into execution the enumerated powers. Let this be admitted; and are they not at liberty, also, to consider the present prohibitory system as necessary and proper to an eventual beneficial regulation? I say nothing of the policy of the expedient. It is not within my province. But on the abstract question of constitutional power, I see nothing to prohibit or restrain the measure.

Further; the power to regulate commerce is not to be confined to the adoption of measures exclusively beneficial to commerce itself, or tending to its advancement; but in our national system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest. The mode of its management is a consideration of great delicacy and importance; but the national right or power under the Constitution to adapt regulations of commerce to other purposes than the mere advancement of commerce, appears to me unquestionable.

Great Britain is styled, eminently, a commercial nation; but commerce is, in fact, a subordinate branch of her national policy, compared with other objects. In ancient times, indeed, shipping and navigation were made subordinate to commerce, as then contemplated. The mart or staple of their principal productions, wool, leather, and lead, was confined to certain great towns in the island, where foreigners might resort to purchase; and Englishmen were restrained from exporting those commodities, under heavy penalties. It was conceived that trade thus conducted would be more advantageous to the country, than if transacted by the English on the Continent. On this idea was made the statute of the staple; 27 Edw. 3 (vid. Reeves' Hist. of English Law, 2. 393). This may appear a strange regulation. It was evidently founded on erroneous views, and Selden, the learned commentator on Fortescue, remarks, "that all acts or attempts which have been derogatory to trade have ever been noted to be discouraged and short lived" in that nation. It is well known how the views of their statesmen and their commercial laws have changed since that statute was enacted. The navigation system has long stood prominent. The interests of commerce are often made subservient to those of shipping and navigation. Maritime and naval strength is the great object of national solicitude; the grand and ultimate objects are the defence and security of the country.

The situation of the United States, in ordinary times, might render legislative interferences relative to commerce less necessary; but the capacity and power of managing and directing it for the advance-

ment of great national purposes seems an important ingredient of sovereignty.

It was perceived that, under the power of regulating commerce, Congress would be authorized to abridge it in favor of the great principles of humanity and justice. Hence the introduction of a clause in the Constitution so framed as to interdict a prohibition of the slave trade until 1808. Massachusetts and New York proposed a stipulation that should prevent the erection of commercial companies with exclusive advantages. Virginia and North Carolina suggested an amendment that "no navigation law, or law regulating commerce, should be passed without the consent of two thirds of the members present in both houses." These proposed amendments were not adopted, but they manifest the public conceptions, at the time, of the extent of the powers of Congress relative to commerce.

It has been said in the argument that the large commercial States, such as New York and Massachusetts, would never have consented to the grant of power relative to commerce, if supposed capable of the extent now claimed. On this point, it is believed, there was no misunderstanding. The necessity of a competent national government was manifest. Its essential characteristics were considered and well understood; and all intelligent men perceived that a power to advance and protect the national interests necessarily involved a power that might be abused. The "Federalist," which was particularly addressed to the people of the State of New York, frankly avows the genuine operation of the powers proposed to be vested in the general government: "If the circumstances of our country are such as to demand a compound instead of a simple, a confederate instead of a sole government, the essential point which will remain to be adjusted will be to discriminate the objects, as far as it can be done, which shall appertain to the different provinces, or departments of power, allowing to each the most ample authority for fulfilling those which may be committed to its charge. Shall the Union be constituted the guardian of the common safety? Are fleets, and armies, and revenues necessary for this purpose? The government of the Union must be empowered to pass all laws, and to make all regulations which have relation to them. The same must be the case in respect to commerce, and to every other matter to which its jurisdiction is permitted to extend."

If it be admitted that national regulations relative to commerce may apply it as an instrument, and are not necessarily confined to its direct aid and advancement, the sphere of legislative discretion is, of course, more widely extended; and in time of war or of great impending peril it must take a still more expanded range.

Congress has power to declare war. It of course has power to provide for war; and the time, the manner, and the measure in the application of constitutional means seem to be left to its wisdom and discretion. Foreign intercourse becomes in such times a subject of peculiar interest, and its regulation forms an obvious and essential

branch of the Federal administration. In the year 1798, when aggressions from France became insupportable, a non-intercourse law relative to that nation and her dependencies was enacted; partial hostilities for a time prevailed; but no war was declared. I have never understood that the power of Congress to adopt that course of proceeding was questioned.

It seems to have been admitted in the argument that State necessity might justify a limited embargo, or suspension of all foreign commerce; but if Congress have the power, for purposes of safety, of preparation or counteraction, to suspend commercial intercourse with foreign nations, where do we find them limited as to the duration more than as to the manner and extent of the measure? Must we understand the nation as saying to their government, "We look to you for protection and security against all foreign aggressions. For this purpose, we give you the control of commerce; but you shall always limit the time during which this instrument is to be used. This shield of defence you may on emergent occasions employ; but you shall always announce to us and to the world the moment when it shall drop from your hands."

It is apparent that cases may occur in which the indefinite character of a law, as to its termination, may be essential to its efficacious operation.

In this connection I would notice the internal indications exhibited by the Acts themselves relative to their duration. In addition to the authority given to the President to suspend the Acts upon the contingency of certain events, we have evidence, from the very nature of their provisions, that they cannot be designed to be perpetual. An entire prohibition of exportation, unaccompanied with any restriction on importations, could never be intended for a permanent system; though the laws in a technical view may be denominated perpetual, containing no specification of the time when they shall expire.

In illustration of their argument, gentlemen have supposed a strong case; a prohibition of the future cultivation of corn in the United States. It would not be admitted, I presume, that an Act so extravagant would be constitutional, though not perpetual, but confined to a single season. And why? Because it would be most manifestly without the limits of the Federal jurisdiction, and relative to an object or concern not committed to its management. If an embargo, or suspension of commerce of any description, be within the powers of Congress, the terms and modifications of the measure must also be within their discretion. If the measure be referred to State necessity, the body that is authorized to determine on the existence of such necessity must also be competent so to modify the means as to adapt them to the exigency.

It is said that such a law is in contravention of unalienable rights; and we have had quotations from elementary writers, and from the bills of rights of the State constitutions in support of this position. The doctrines and declarations of those respectable writers, and in

those venerable instruments, are not to be slighted; but we are to leave the wide field of general reasonings and abstract principles, and are to consider the construction and operation of an express compact, a government of convention.

The general position is incontestable, that all that is not surrendered by the Constitution is retained. The amendment which expresses this is for greater security; but such would have been the true construction without the amendment. Still it remains to be determined, and it is often a question of some difficulty, what is given? By the second article of the Confederation, Congress were prohibited the exercise of any power not expressly delegated. A similar qualification was suggested, in one of the amendments proposed by the State of New Hampshire, to the new Constitution. The phraseology indeed was strengthened; and Congress were to be prohibited from the exercise of powers not expressly and particularly delegated.

Such expressions were not adopted. If they had been, as an intelligent writer justly observes, "Congress would be continually exposed, as their predecessors under the Confederation were, to the alternative of construing the term expressly with so much rigor as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction." It is wisely left as it is; and the true sense and meaning of the instrument is to be determined by just construction, guided and governed by good sense and honest intentions.

Under the Confederation, Congress could have no agency relative to foreign commerce but through the medium of treaties; and, by the ninth article, it was stipulated that no treaty of commerce should be made whereby the legislative power of the respective States should be restrained from imposing such imposts and duties on foreigners as their own people were subjected to, "or from prohibiting the exportation of any species of goods or commodities whatsoever." Here we find an express reservation to the State legislatures of the power to pass prohibitory commercial laws, and, as respects exportations, without any limitations. Some of them exercised this power. In Massachusetts it was carried to considerable extent, with marked determination, but to no sensible good effect. One of the prohibitory acts of that State, passed in 1786, was for the express "encouragement of the agriculture and manufactures in our own country."

The other, which was a counteracting law, had no definite limitation, but was to continue in force until Congress should be vested with competent powers, and should have passed an ordinance for the regulation of the commerce of the States. Unless Congress, by the Constitution, possess the power in question, it still exists in the State legislatures — but this has never been claimed or pretended since the adoption of the Federal Constitution; and the exercise of such a power by the States would be manifestly inconsistent with the power vested by the people in Congress, "to regulate commerce." Hence I infer that the power

reserved to the States by the Articles of Confederation is surrendered to Congress by the Constitution; unless we suppose that, by some strange process, it has been merged or extinguished, and now exists nowhere.

The propriety of this power, on the present construction, may be further evinced by contemplating the operation of specific limitations or restrictions which it might be proposed to apply. Will it be said that the amendment proposed by Virginia and North Carolina would be an improvement in the instrument of government? Such a provision might prevent the adoption of exceptionable regulations; but it would be equally operative in defeating those that would be salutary; and would disable the majority of the nation from deciding on the best means of advancing its prosperity. To avoid such a system as is now in operation, shall the people expressly provide, as a limitation to the power of regulating commerce, that it shall not extend to a total prohibition, or but for a limited time? Nothing would be gained by such restrictions. A prohibition might still be so nearly total, or extend to such a length of time, without violation of the restriction, as to be equivalent, in practical effect, to the present arrangement. Or will it be said that the judiciary should then be called upon to decide the law void, though not repugnant to the terms of the restriction, and to consider exceptions from the prohibition, as in the common case of a fraudulent deed, to be merely colorable? Loose and general restrictions would be ineffective, or, at best, merely directory. If particular and precise, they would evince an indiscreet attempt to anticipate the immense extent and variety of national exigencies, and would not be suitable appendages to a power which, in its exercise, must depend on contingencies, and from its nature and object must be general. A particular mischief or inconvenience, contemplated in framing such limitations, might be avoided; but they would also injuriously fetter the national councils, and prevent the application of adequate provisions for the public safety and happiness, according to the ever varying emergencies of national affairs. Let us not insist on a security which the nature of human concerns will not permit. More effectual guards against abuse, more complete security for civil and political liberty and for private right, are not perhaps afforded to any nation than to the people of the United States. These views of the national powers are not new. I have only given a more distinct exhibition of habitual impressions coeval, in my mind, with the Constitution. Upon these considerations, I am bound to overrule the objections to the Acts in question, which I shall proceed to apply to the cases before the court, believing them to be constitutional laws.

I lament the privations, the interruption of profitable pursuits and manly enterprise, to which it has been thought necessary to subject the citizens of this great community. I respect the merchant and his employment. The disconcerted mariner demands our sympathy. The sound of the axe and of the hammer would be grateful music. Ocean,

in itself a dreary waste, by the swelling sail and floating streamer becomes an exhilarating object; and it is painful to perceive by force of any contingencies the American stars and stripes vanishing from the scene. Commerce indeed merits all the eulogy which we have heard so eloquently pronounced at the bar. . . . Let us not entertain the gloomy apprehension that advantages so precious are altogether abandoned, that pursuits so interesting and beneficial are not to be resumed. Let us rather cherish a hope that commercial activity and intercourse, with all their wholesome energies, will be revived; and that our merchants and our mariners will again be permitted to pursue their wonted employments, consistently with the national safety, honor, and independence!

LIVINGSTON AND FULTON *v.* VAN INGEN ET AL.

NEW YORK COURT OF ERRORS. 1812.

[9 *Johns.* 507.][1]

THE appellants filed a bill in equity asking an injunction restraining the defendants from using a vessel called the "Hope," a steamboat, in navigating the waters of New York, without the leave of the appellants. They claimed under statutes of New York the exclusive right of navigating New York waters by "boats which might be urged or impelled through the water by the force of fire or steam." The respondents denied the validity of these statutes, under the Constitution of the United States. The appellants' application was denied; and, thereupon, this appeal was taken.

Hoffman (*Colden* and *Riggs*, on the same side), for the appellants; *Wells* and *Henry* (*Van Vechten*, on the same side), for the respondents.

KENT, CH. J. The great point in this cause is, whether the several Acts of the Legislature which have been passed in favor of the appellants, are to be regarded as constitutional and binding.

This house, sitting in its judicial capacity as a court, has nothing to do with the policy or expediency of these laws. The only question here is, whether the legislature had authority to pass them. If we can satisfy ourselves upon this point, or, rather, unless we are fully persuaded that they are void, we are bound to obey them, and give them the requisite effect.

In the first place, the presumption must be admitted to be extremely strong in favor of their validity. There is no very obvious constitutional objection, or it would not so repeatedly have escaped the notice of the several branches of the government, when these Acts were under

[1] The statement of facts is shortened. — ED.

consideration. There are, in the whole, five different statutes, passed in the years 1798, 1803, 1807, 1808, and 1811, all relating to one subject, and all granting or confirming to the appellants, or one of them, the exclusive privilege of using steamboats upon the navigable waters of this State. The last Act was passed after the right of the appellants was drawn into question, and made known to the legislature, and that Act was, therefore, equivalent to a declaratory opinion of high authority, that the former laws were valid and constitutional. The Act in the year 1798 was peculiarly calculated to awaken attention, as it was the first Act that was passed upon the subject, after the adoption of the Federal Constitution, and it would naturally lead to a consideration of the power of the State to make such a grant. That Act was, therefore, a legislative exposition given to the powers of the State governments, and there were circumstances existing at the time, which gave that exposition singular weight and importance. It was a new and original grant to one of the appellants, encouraging him, by the pledge of an exclusive privilege for twenty years, to engage, according to the language of the preamble to the statute, in the "uncertainty and hazard of a very expensive experiment." The legislature must have been clearly satisfied of their competency to make this pledge, or they acted with deception and injustice towards the individual on whose account it was made. There were members in that legislature, as well as in all the other departments of the government, who had been deeply concerned in the study of the Constitution of the United States, and who were masters of all the critical discussions which had attended the interesting progress of its adoption. Several of them had been members of the State convention, and this was particularly the case with the exalted character, who at that time was chief magistrate of this State (Mr. Jay), and who was distinguished, as well in the Council of Revision, as elsewhere, for the scrupulous care and profound attention with which he examined every question of a constitutional nature.

After such a series of statutes, for the last fourteen years, and passed under such circumstances, it ought not to be any light or trivial difficulty that should induce us to set them aside. Unless the court should be able to vindicate itself by the soundest and most demonstrable argument, a decree prostrating all these laws would weaken, as I should apprehend, the authority and sanction of law in general, and impair, in some degree, the public confidence, either in the intelligence or integrity of the government. . . . [Here follows, among other things, the passage found *supra*, pp. 266–268, which should be examined.]

I now proceed to apply these general rules to those parts of the Constitution which are supposed to have an influence on the present question.

The provision that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, has nothing to do with this case. It means only that citizens of other States shall have equal rights with our own citizens, and not that they shall have

different or greater rights. Their persons and property must, in all respects, be equally subject to our law. This is a very clear proposition, and the provision itself was taken from the articles of the confederation. The two paragraphs of the Constitution by which it is contended that the original power in the State governments to make the grant has been withdrawn, and vested exclusively in the Union, are, 1. The power to regulate commerce with foreign nations, and among the several States; and, 2. The power to secure to authors and inventors the exclusive right to their writings and discoveries.

1. As to the power to regulate commerce.

This power is not, in express terms, exclusive, and the only prohibition upon the States is, that they shall not enter into any treaty or compact with each other, or with a foreign power, nor lay any duty on tonnage, or on imports or exports, except what may be necessary for executing their inspection laws. Upon the principles above laid down, the States are under no other constitutional restriction, and are, consequently, left in possession of a vast field of commercial regulation; all the internal commerce of the State by land and water remains entirely, and I may say exclusively, within the scope of its original sovereignty. The Congressional power relates to external not to internal commerce, and it is confined to the regulation of that commerce. To what extent these regulations may be carried, it is not our present duty to inquire. The limits of this power seem not to be susceptible of precise definition. It may be difficult to draw an exact line between those regulations which relate to external and those which relate to internal commerce, for every regulation of the one will, directly or indirectly, affect the other. To avoid doubts, embarrassment and contention on this complicated question, the general rule of interpretation which has been mentioned, is extremely salutary. It removes all difficulty, by its simplicity and certainty. The States are under no other restrictions than those expressly specified in the constitution, and such regulations as the national government may, by treaty, and by laws, from time to time, prescribe. Subject to these restrictions, I contend, that the States are at liberty to make their own commercial regulations. There can be no other safe or practicable rule of conduct, and this, as I have already shown, is the true constitutional rule arising from the nature of our Federal system. This does away all color for the suggestion that the steamboat grant is illegal and void under this clause in the Constitution. It comes not within any prohibition upon the States, and it interferes with no existing regulation. Whenever the case shall arise of an exercise of power by Congress which shall be directly repugnant and destructive to the use and enjoyment of the appellants' grant, it would fall under the cognizance of the Federal courts, and they would, of course, take care that the laws of the Union are duly supported. I must confess, however, that I can hardly conceive of such a case, because I do not, at present, perceive any power which Congress can lawfully carry to that extent. But when there is no existing regulation

which interferes with the grant, nor any pretence of a constitutional interdict, it would be most extraordinary for us to adjudge it void, on the mere contingency of a collision with some future exercise of Congressional power. Such a doctrine is a monstrous heresy. It would go, in a great degree, to annihilate the legislative power of the States. May not the legislature declare that no bank paper shall circulate, or be given or received in payment, but what originates from some incorporated bank of our own, or that none shall circulate under the nominal value of one dollar? But suppose Congress should institute a national bank, with authority to issue and circulate throughout the Union, bank notes, as well below as above that nominal value: This would so far control the State law, but it would remain valid and binding, except as to the paper of the national bank. The State law would be absolute, until the appearance of the national bank, and then it would have a qualified effect, and be good *pro tanto*. So, again, the legislature may declare that it shall be unlawful to vend lottery tickets, unless they be tickets of lotteries authorized by a law of this State, and who will question the validity of the provision? But suppose Congress should deem it expedient to establish a national lottery, and should authorize persons in each State to vend the tickets, this would so far control the State prohibition, and leave it in full force as to all other lotteries. The possibility that a national bank, or a national lottery, might be instituted, would be a very strange reason for holding the State laws to be absolutely null and void. It strikes me to be an equally inadmissible proposition, that the State is divested of a capacity to grant an exclusive privilege of navigating a steamboat, within its own waters, merely because we can imagine that Congress, in the plenary exercise of its power to regulate commerce, may make some regulation inconsistent with the exercise of this privilege. When such a case arises, it will provide for itself; and there is, fortunately, a paramount power in the Supreme Court of the United States to guard against the mischiefs of collision.

The grant to the appellants may, then, be considered as taken subject to such future commercial regulations as Congress may lawfully prescribe. Congress, indeed, has not any direct jurisdiction over our interior commerce or waters. Hudson River is the property of the people of this State, and the legislature have the same jurisdiction over it that they have over the land, or over any of our public highways, or over the waters of any of our rivers or lakes. They may, in their sound discretion, regulate and control, enlarge or abridge the use of its waters, and they are in the habitual exercise of that sovereign right. If the Constitution had given to Congress exclusive jurisdiction over our navigable waters, then the argument of the respondents would have applied; but the people never did, nor ever intended, to grant such a power; and Congress has concurrent jurisdiction over the navigable waters no further than may be incidental and requisite to the due regulation of commerce between the States, and with foreign nations.

What has been the uniform, practical construction of this power? Let us examine the code of our statute laws. Our turnpike roads, our toll-bridges, the exclusive grant to run stage-wagons, our laws relating to paupers from other States, our Sunday laws, our rights of ferriage over navigable rivers and lakes, our auction licenses, our licenses to retail spirituous liquors, the laws to restrain hawkers and pedlers; what are all these provisions but regulations of internal commerce, affecting as well the intercourse between the citizens of this and other States, as between our own citizens? So we also exercise, to a considerable degree, a concurrent power with Congress in the regulation of external commerce. What are our inspection laws relative to the staple commodities of this State, which prohibit the exportation, except upon certain conditions, of flour, of salt provisions, of certain articles of lumber, and of pot and pearl ashes, but regulations of external commerce? Our health and quarantine laws, and the laws prohibiting the importation of slaves are striking examples of the same kind. So the Act relative to the poor, which requires all masters of vessels coming from abroad to report and give security to the mayor of New York, that the passengers, being aliens, shall not become chargeable as paupers, and in case of default, making even the ship or vessel from which the alien shall be landed liable to seizure, is another and very important regulation affecting foreign commerce.

Are we prepared to say, in the face of all these regulations, which form such a mass of evidence of the uniform construction of our powers, that a special privilege for the exclusive navigation by a steamboat upon our waters, is void, because it may, by possibility, and in the course of events, interfere with the power granted to Congress to regulate commerce? Nothing, in my opinion, would be more preposterous and extravagant. Which of our existing regulations may not equally interfere with the power of Congress? It is said that a steamboat may become the vehicle of foreign commerce; and, it is asked, can then the entry of them into this State, or the use of them within it, be prohibited? I answer yes, equally as we may prohibit the entry or use of slaves, or of pernicious animals, or an obscene book, or infectious goods, or any thing else that the legislature shall deem noxious or inconvenient. Our quarantine laws amount to an occlusion of the port of New York from a portion of foreign commerce, for several months in the year; and the mayor is even authorized under those laws to stop all commercial intercourse with the ports of any neighboring State. No doubt these powers may be abused, or exercised in bad faith, or with such jealousy and hostility towards our neighbors, as to call for some explicit and paramount regulation of Congress on the subject of foreign commerce, and of commerce between the States. Such cases may easily be supposed, but it is not logical to reason from the abuse against the lawful existence of a power; and until such Congressional regulations appear, the legislative will of this State, exercised on a subject within its original jurisdiction, and not expressly prohibited to it by

the Constitution of the United States, must be taken to be of valid and irresistible authority.

If the grant is not inconsistent with the power of Congress to regulate commerce, there is as little pretence to hold it repugnant to the power to grant patents. . . .

[SPENCER, J., and LEWIS and TOWNSEND, SENATORS, being related to some of the parties, declined giving any opinions. The other judges and senators concurred with the Chief Justice. Separate opinions of YATES, J., and THOMPSON, J. are reported, but are now omitted. The order below was reversed and an injunction awarded.]

GIBBONS *v.* OGDEN.

SUPREME COURT OF THE UNITED STATES. 1824.

[9 *Wheat.* 1; s. c. 6 *Curtis's Decisions*, 1.] [1]

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

[1] The statement of facts is taken from Curtis's Decisions. — ED.

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.

Webster and *Wirt* (Attorney-General), for the plaintiff. *Oakley* and *Emmett*, for the defendant.

[At the first stage of this case, *Ogden v. Gibbons*, 4 Johns. Ch. 150 (1819), KENT, Chancellor, in refusing to dissolve a preliminary injunction, said: "The Act of Congress (passed 18th of February, 1793, ch. 8) referred to in the answer, provides for the enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries. Without being enrolled and licensed, they are not entitled to the privileges of American vessels, but must pay the same fees and tonnage as foreign vessels, and if they have on board articles of foreign growth or manufacture, or distilled spirits, they are liable to forfeiture. I do not perceive that this Act confers any right incompatible with an exclusive right in Livingston and Fulton to navigate steamboats upon the waters of this State; the right of the legislature to pass the laws mentioned in the pleadings is not attempted to be made a question of in this place, and upon this occasion. That right has been settled (as far as the courts of this State can settle it) by the decision of the Court of Errors in *Livingston* v. *Van Ingen*, 9 Johnson, 507; and if those laws are to be deemed, in the first instance, and *per se*, valid and constitutional, and as conferring valid legal rights, a coasting license cannot surely have any effect in controlling their operation. The Act of Congress referred to never meant to determine the right of property, or the use or enjoyment of it, under the laws of the States. Any person, in the assumed character of owner, may obtain the enrolment and license required; but it will still remain for the laws and courts of the several States to determine the right and title of such assumed owner, or of some other person, to navigate the vessel. The license only gives to the vessel an American character, while the right of the individual procuring the license to use the vessel, as against another individual setting up a distinct and exclusive right, remains precisely as it did before. It is neither enlarged nor diminished by means of the license; the act of the collector does not decide the right of property. He has no jurisdiction over such a question. Nor do I think it would alter the case, in respect to the force and effect of the laws before us, if the license of the collector was evidence of property. However unquestionable the right and title to a specific chattel may be, and from whatever source that title may be derived, the use and employment of it must, as a general rule, be subject to the laws and regulations of the State. If an indi-

vidual be, for instance, in possession of any duly patented vehicle, or machine, or vessel, or medicine, or book, must not such property be held, used, and enjoyed, subject to the general laws of the land, — such as laws establishing turnpike roads and toll bridges, or the exclusive right to a ferry, or laws for preventing and removing nuisances? Must it not be subject to all other regulations touching the use and employment of property which the legislature of the State may deem just and expedient? It appears to me that these questions must be answered in the affirmative. The only limitation upon such a general discretion and power of control is the occurrence of the case when the exercise of it would impede or defeat the operation of some lawful measure, or be absolutely repugnant to some constitutional law of the Union. When laws become repugnant to each other, the supreme or paramount law must and will prevail. There can be no doubt of the fitness and necessity of this result in every mind that entertains a just sense of its duty and loyalty. Suppose there was a provision in the Act of Congress that all vessels duly licensed should be at liberty to navigate, for the purpose of trade and commerce, over all the navigable bays, harbors, rivers, and lakes within the several States, any law of the States, creating particular privileges as to any particular class of vessels, to the contrary notwithstanding, the only question that could arise in such a case would be, whether the law was constitutional. If that was to be granted or decided in favor of the validity of the law, it would certainly, in all courts and places, overrule and set aside the State grant. But at present we have no such case, and there is no ground to infer any such supremacy or intention from the Act regulating the coasting trade. There is no collision between the Act of Congress and the Acts of this State creating the steamboat monopoly. The one requires all vessels to be licensed to entitle them to the privileges of American vessels, and the others confer on particular individuals the exclusive right to navigate steamboats, without, however, interfering with, or questioning the requisitions of the license. The license is admitted to be as essential to these boats as to any others. The only question is, who is entitled to take and enjoy the license? The suggestion that the laws of the two governments are repugnant to each other upon this point appears to be new and without any foundation. The Acts granting exclusive privileges to Livingston and Fulton were all passed subsequent to the Act of Congress; and it must have struck every one at the time to have been perfectly idle to pass such laws conferring such privileges, if a coasting license, which was to be obtained as a matter of course, and with as much facility as the flag of the United States could be procured and hoisted, was sufficient to interpose and annihilate the force and authority of those laws. If the State laws were not absolutely null and void from the beginning, they require a greater power than a simple coasting license to disarm them. We must be permitted to require, at least, the presence and clear manifestation of some constitutional law, or some judicial decision of the supreme power of the Union, acting upon

those laws in direct collision and conflict, before we can retire from the support and defence of them. We must be satisfied that

> "'Neptunus muros, magnoque emota tridenti
> Fundamenta quatit.'"

On an appeal to the New York Court of Errors, in *Gibbons* v. *Ogden*, 17 Johns. 488 (1820), PLATT, J., for a unanimous court, said: "As to the first general question [whether the State had power to grant the exclusive privilege], I consider it as no longer open for discussion here. It would be trifling with the rights of individuals, and highly derogatory to the character of the court, if it were now to depart from its former deliberate decision on the very same point.

"As to the second ground relied on by the appellant, to wit, the coasting license, I am unable to discern how that can vary the merits of the question, as presented in the case of *Livingston* v. *Van Ingen*.

"The Act of Congress for enrolling and licensing coasting ships, or vessels, etc., enacts that 'no ships or vessels, except such as shall be so enrolled and licensed, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries.' (Sect. 1.) And the same Act also declares, that every ship or vessel engaged in the coasting trade, etc., and not being so enrolled and licensed, 'shall pay the same fees and tonnage in every port of the United States at which she may arrive, as ships or vessels not belonging to a citizen or citizens of the United States; and if she have on board any articles of foreign growth or manufacture, or distilled spirits other than sea-stores, the ship or vessel, with her tackle and lading, shall be forfeited.' (Sect. 6.)

"From these provisions and an examination of the various regulations of that statute, and from all the laws of the United States on that subject, it appears that the only design of the Federal Government in regard to the enrolling and licensing of vessels was to establish a criterion of national character, with a view to enforce the laws which impose discriminating duties on American vessels and those of foreign countries.

"The term 'license' seems not to be used in the sense imputed to it by the counsel for the appellant; that is, a permit to trade, or as giving a right of transit. Because it is perfectly clear that such a vessel coasting from one State to another would have exactly the same right to trade and the same right of transit, whether she had the coasting license or not. She does not, therefore, derive her right from the license, the only effect of which is to determine her national character, and the rate of duties which she is to pay.

"Whatever may be the abstract right of Congress to pass laws for regulating trade which might come in collision and conflict with the exclusive privilege granted by this State, it is sufficient now, for the protection of the respondent, that the statute of the United States relied on by the appellant is not of that character.

"Whether Congress have the power to authorize the coasting trade to be carried on, in vessels propelled by steam, so as to give a paramount right, in opposition to the special license given by this State, is a question not yet presented to us. No such Act of Congress yet exists, and it will be time enough to discuss that question when it arises.

"I am decidedly of opinion, therefore, that the coasting license affords no aid or support to the title of the appellant to run a steamboat on our waters in opposition to the laws of this State.

"The real merits of this case fall precisely within the decision of this court in the case of *Livingston, etc.* v. *Van Ingen.* As a Senator, I was a party to that decision, and concurred in it for the reasons which were then assigned by the learned judges who delivered the opinion of the court. Those reasons are before the public, and I have not the vanity to believe that I could add anything to their force or perspicuity. I therefore deem it my only remaining duty to say that, in my judgment, the decree of his Honor the Chancellor in this case ought to be affirmed."

At the final stage of the case in the Supreme Court of the United States,] 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. . . . [Here follows the passage given *supra*, p. 269.]

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 sig-

nifications. 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 univer-

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

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

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

nate 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. . . .
[Here follows a passage given *supra*, near the bottom of p. 270.]

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

But it has been urged with great earnestness that, although the power of Congress to regulate commerce with foreign nations, and among the several States, be coextensive with the subject itself, and have no other limits than are prescribed in the Constitution, yet the States may severally exercise the same power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty before the formation of the Constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the Tenth Amendment; that an affirmative grant of power is not exclusive, unless in its

own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

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

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

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the States; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the States are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not in its nature incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defence and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained

until Congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation. The sole question is, can a State regulate commerce with foreign nations and among the States while Congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the 10th section as supporting their opinion. . . . [Here follows a consideration of the clauses prohibiting the States from laying duties on imports or exports, or "any duty of tonnage."]

These restrictions, then, are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

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

That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the 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 a general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

No direct general power over these objects is granted to Congress, and consequently they remain subject to State legislation. If the legislative power of the Union can reach them it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious that the government of the Union, in the exercise of its express powers; — that, for example, of regulating commerce with foreign nations and among the States, — may use means that may also be employed by a State in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another in the same State, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police. So if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects,

shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

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

The Acts of Congress, passed in 1796 and 1799 (1 Stats. at Large, 474, 619), empowering and directing the officers of the general government to conform to, and assist in, the execution of the quarantine and health laws of a State, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true that they do proceed upon that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a State may rightfully regulate commerce with foreign nations, or among the States; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the Acts of Congress, and are considered as flowing from the acknowledged power of a State to provide for the health of its citizens. But as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might interfere with, and be affected by, the laws of the United States made for the regulation of commerce, Congress, in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the States bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object by making provisions in aid of those of the States. But in making these provisions the opinion is unequivocally manifested that Congress may control the State laws, so far as it may be necessary to control them, for the regulation of commerce.

The Act passed in 1803 (3 Stats. at Large, p. 529), prohibiting the importation of slaves into any State which shall itself prohibit their

importation, implies, it is said, an admission that the States possessed the power to exclude or admit them; from which it is inferred that they possess the same power with respect to other articles.

If this inference were correct; if this power was exercised, not under any particular clause in the Constitution, but in virtue of a general right over the subject of commerce, to exist as long as the Constitution itself, — it might now be exercised. Any State might now import African slaves into its own territory. But it is obvious that the power of the States over this subject, previous to the year 1808, constitutes an exception to the power of Congress to regulate commerce, and the exception is expressed in such words as to manifest clearly the intention to continue the pre-existing right of the States to admit or exclude for a limited period. The words are, "the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808." The whole object of the exception is, to preserve the power to those States which might be disposed to exercise it; and its language seems to the court to convey this idea unequivocally. The possession of this particular power, then, during the time limited in the Constitution, cannot be admitted to prove the possession of any other similar power.

It has been said that the Act of August 7, 1789 (1 Stats. at Large, 54), acknowledges a concurrent power in the States to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with Congress to regulate commerce with foreign nations and amongst the States. But this inference is not, we think, justified by the fact. Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every State. The Act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by Congress. But the Act, it may be said, is prospective also, and the adoption of laws to be made in future presupposes the right in the maker to legislate on the subject.

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

the court to imply a right in the States so to apply it of their own authority. But the adoption of the State system being temporary, being only "until further legislative provision shall be made by Congress," shows conclusively an opinion that Congress could control the whole subject, and might adopt the system of the States, or provide one of its own.

A State, it is said, or even a private citizen, may construct lighthouses. But gentlemen must be aware that if this proves a power in a State to regulate commerce, it proves that the same power is in the citizen. States, or individuals who own lands, may, if not forbidden by law, erect on those lands what buildings they please; but this power is entirely distinct from that of regulating commerce, and may, we presume, be restrained if exercised so as to produce a public mischief.

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

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

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

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

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

power to regulate it. In the exercise of this power, Congress has passed "An Act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this Act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise.

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

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

The first section declares that vessels enrolled by virtue of a previous law, and certain other vessels, enrolled as described in that Act, and having a license in force, as is by the Act required, "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade."

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

The fourth section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade;" and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, "license is hereby granted for the said steamboat 'Bellona' to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

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

The word "license" means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license. Would the validity or effect of such an instrument be questioned by the respondent if executed by persons claiming regularly under the laws of New York?

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

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

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

The answer given to this argument, that the American character is conferred by the enrolment and not by the license, is, we think, founded too clearly in the words of the law to require the support of any additional observations. The enrolment of vessels designed for the coasting trade corresponds precisely with the registration of vessels designed for the foreign trade, and requires every circumstance which can constitute the American character. The license can be granted only to vessels already enrolled, if they be of the burden of twenty tons and upwards, and requires no circumstance essential to the American character. The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do; that is, to give permission to a vessel already proved by her enrolment to be American, to carry on the coasting trade.

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

If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive, argument to prove that the construction is correct; and if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that government, which has been thought best fitted for the purpose generally. The provisions of the law respecting native seamen and respecting ownership, are as applicable to vessels carrying men as to vessels carrying manufactures; and no reason is perceived why the power over the subject should not be placed in the same hands. The argument urged at the bar rests on the foundation that the power of Congress does not extend to navigation as a branch of commerce, and can only be applied to that subject incidentally and occasionally. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the Constitution, or by reason, for discriminating between the power of Congress over vessels employed in navigating the same seas. We can perceive no such distinction.

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

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

apply to them. The Duty Act, sections 23 and 46 (1 Stats. at Large, 644, 661), contains provisions respecting passengers, and shows that vessels which transport them have the same rights, and must perform the same duties, with other vessels. They are governed by the general laws of navigation.

In the progress of things, this seems to have grown into a particular employment, and to have attracted the particular attention of government. Congress was no longer satisfied with comprehending vessels engaged specially in this business within those provisions which were intended for vessels generally; and on the 2d of March, 1819, passed "An Act regulating passenger ships and vessels" (3 Stats at Large, 488). This wise and humane law provides for the safety and comfort of passengers, and for the communication of everything concerning them which may interest the government, to the department of State, but makes no provision concerning the entry of the vessel, or her conduct in the waters of the United States. This, we think, shows conclusively the sense of Congress (if, indeed, any evidence to that point could be required), that the pre-existing regulations comprehended passenger ships among others; and in prescribing the same duties, the legislature must have considered them as possessing the same rights.

If, then, it were even true that the "Bellona" and the "Stoudinger" were employed exclusively in the conveyance of passengers between New York and New Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these vessels can be drawn into question in the case before the court. The laws of New York, which grant the exclusive privilege set up by the respondent, take no notice of the employment of vessels, and relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind. If by the former, the waters of New York are closed against them, though their cargoes be dutiable goods, which the laws of the United States permit them to enter and deliver in New York. If by the latter, those waters are free to them, though they should carry passengers only. In conformity with the law, is the bill of the plaintiff in the State court. The bill does not complain that the "Bellona" and the "Stoudinger" carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege, specially, that those vessels were employed in the transportation of passengers, but says, generally, that they were employed "in the transportation of passengers, or otherwise." The answer avers only that they were employed in the coasting trade, and insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed vessels, not from carrying passengers, but from being

moved through the waters of New York by steam for any purpose whatever.

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

In considering this question, the first idea which presents itself is, that the laws of Congress for the regulation of commerce do not look to the principle by which vessels are moved. That subject is left entirely to individual discretion; and in that vast and complex system of legislative enactment concerning it, which embraces everything that the legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single Act (2 Stats. at Large, 694), granting a particular privilege to steamboats. With this exception, every Act, either prescribing duties or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance.

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

But all inquiry into this subject seems to the court to be put completely at rest by the Act already mentioned, entitled, "An Act for the enrolling and licensing of steamboats."

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

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

the use of either to any vessel having a license under the Act of Congress, comes, we think, in direct collision with that Act.

As this decides the cause, it is unnecessary to enter in an examination of that part of the Constitution which empowers Congress to promote the progress of science and the useful arts.[1] . . .

[1] JOHNSON, J., gave a concurring opinion, which rested wholly on the doctrine that the power of Congress is exclusive. In the course of it he said: "The history of the times will, therefore, sustain the opinion that the grant of power over commerce, if intended to be commensurate with the evils existing, and the purpose of remedying those evils, could only be commensurate with the power of the States over the subject. . . .

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

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

"It is impossible, with the views which I entertain of the principle on which the commercial privileges of the people of the United States among themselves rest, to concur in the view which this court takes of the effect of the coasting license in this cause. I do not regard it as the foundation of the right set up in behalf of the appellant. If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints. And I cannot overcome the conviction that if the licensing Act was repealed to-morrow, the rights of the appellant to a reversal of the decision complained of would be as strong as it is under this license. . . . I consider the license, therefore, as nothing more than what it purports to be, according to the 1st section of this Act, conferring on the licensed vessel certain privileges in that trade not conferred on other vessels; but the abstract right of commercial intercourse, stripped of those privileges, is common to all. . . .

"It is no objection to the existence of distinct, substantive powers that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship, that may be the subject of commercial regulation, may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated are no more intended as regulations on commerce than the laws which permit their importation are intended to inoculate the community with disease. Their different purposes mark the distinction between the powers brought into action;

and while frankly exercised they can produce no serious collision. As to laws affecting ferries, turnpike roads, and other subjects of the same class, so far from meriting the epithet of commercial regulations, they are, in fact, commercial facilities, for which, by the consent of mankind, a compensation is paid, upon the same principle that the whole commercial world submit to pay light money to the Danes. Inspection laws are of a more equivocal nature, and it is obvious that the Constitution has viewed that subject with much solicitude. But so far from sustaining an inference in favor of the power of the States over commerce, I cannot but think that the guarded provisions of the 10th section on this subject furnish a strong argument against that inference. It was obvious that inspection laws must combine municipal with commercial regulations; and while the power over the subject is yielded to the States, for obvious reasons, an absolute control is given over State legislation on the subject, as far as that legislation may be exercised, so as to affect the commerce of the country. The inferences to be correctly drawn from this whole article appear to me to be altogether in favor of the exclusive grants to Congress of power over commerce, and the reverse of that which the appellee contends for. . . .

"It would be in vain to deny the possibility of a clashing and collision between the measures of the two governments. The line cannot be drawn with sufficient distinctness between the municipal powers of the one and the commercial powers of the other. In some points they meet and blend so as scarcely to admit of separation. Hitherto the only remedy has been applied which the case admits of, — that of a frank and candid co-operation for the general good. Witness the laws of Congress requiring its officers to respect the inspection laws of the States, and to aid in enforcing their health laws; that which surrenders to the States the superintendence of pilotage, and the many laws passed to permit a tonnage duty to be levied for the use of their ports. Other instances could be cited abundantly to prove that collision must be sought to be produced; and when it does arise, the question must be decided how far the powers of Congress are adequate to put it down. Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct. A resort to the same means, therefore, is no argument to prove the identity of their respective powers."

In *North River Steamb. Co.* v. *Livingston*, 1 Hopk. Ch. 149 (1824), it appeared that, "After the decision of the cause of *Gibbons* v. *Ogden*, in the Supreme Court of the United States, the defendant in this cause equipped a steamboat called the 'Olive Branch,' which he caused to be duly enrolled and licensed under the laws of the United States for that purpose, and with which he proceeded from the city of New York to Albany, touching at Jersey, as hereafter mentioned.

"The complainants now filed their bill in this court, grounded upon the several Acts of the State legislature for securing to certain persons the exclusive right of navigating the waters of this State with steamboats; and praying for an injunction against the defendant to restrain him from navigating those waters with the 'Olive Branch.' . . .

"The Chancellor [Sanford]. The provisions concerning the coasting trade have effect in this State, as in all other States of the Union; and considered as regulations confining the navigation employed in the coasting trade to citizens of the United States, and subjecting that navigation to restrictions for the security of the revenue, there is no conflict between them and the grant to Livingston and Fulton. Steam vessels are as fully subject to these provisions as vessels of any other description; and all steam vessels in this State, whether navigated under the State grant or in opposition to it, are equally subject to their operation. The steam vessels navigated under the grant to Livingston and Fulton have always conformed, as they were bound to conform, to all these restrictions.

"It is only when this law is considered as granting a right of commerce that any collision between it and the right granted by this State can be found.

"That terms so indefinite as the words coasting trade should have been used for the purpose of establishing rights of commerce, between different parts of the nation, is not probable. That this should have been done without any known motive, when a

full freedom of intercourse, both by land and water, existed among all the States, is a supposition still more improbable. To expound these terms of this law, thus made, as a grant of rights, when its provisions have a direct application to other objects, and when all those provisions have full effect, as restrictive regulations, would be a construction widely distant from the apparent intention of the legislature. To construe a license for the coasting trade, as an express grant of an absolute right to navigate from one place to another, in all cases, is to extract a right by inference, from regulations and restrictions which do not declare any such right, and is to give to a right so inferred the same force and precision, which the most clear and affirmative terms expressly granting such a right could bestow. Still more without reason is such a right inferred from the license, when registered vessels have the rights of the coasting trade, and yet have no license.

"If, however, the law concerning the coasting trade is considered a regulation of commerce among the States, it can operate only upon that commerce, and cannot invade the internal commerce of a State. Navigation is subject to the powers concerning commerce, only because it is an instrument of commerce; and where the Congress cannot regulate a commerce, it cannot regulate the navigation which is merely instrumental in the prosecution of that commerce. So far, then, as this law may rest upon the power to regulate commerce among the States, it cannot touch navigation employed in an internal commerce, which does not concern other States.

"The grant to Livingston and Fulton is no longer exclusive in respect to other States. As every licensed vessel arriving from another State may now enter our waters or may depart from them to another State, the grant has ceased to operate upon other States, and upon commerce among the States. Navigation between this State and others by steam vessels having licenses being entirely free, every interest which other States can have in this question is satisfied.

"What collision remains? The grant to Livingston and Fulton now operates only upon this State, and excludes all, excepting those who hold the grant, from a particular employment within the State, when that employment does not affect the commerce of other States. If the grant, now reduced to this limit, affects the commerce or interests of other States, many other laws of the State, not yet impeached, are far more seriously in collision with commerce among the States. Sales by auction are confined to a few persons appointed by the State; an important revenue is derived from this species of commerce; and this regulation has an indirect effect upon other States having commerce with or through this State. The tolls imposed on our canals and roads are charges upon transportation falling in a considerable degree upon citizens of other States. The health laws of the State are a real and great impediment to commerce. Laws like these, which may operate remotely and minutely upon other States, cannot be subverted by the power of the Congress to regulate commerce among the States. A vessel moved by steam may be accelerated or retarded in its course by the winds; and the employment of such a vessel in navigation between two points in the same State, may remotely have some slight effect upon commerce with other States; but influences so accidental and insignificant can neither deprive the vessel of its essential character of a machine moved by steam, nor give to its employment the character of being engaged in commerce among the States.

"But when this law is considered as emanating from the taxing power of the Congress, the distinction between commerce among the States and the internal commerce of a State ceases to perplex the inquiry. To a great extent, this law clearly results from the taxing power; and if the security of the revenue is the main object of the Act, all its particular provisions may be justly considered as resulting from the same source, and as auxiliary to that great object. Thus understood, this Act regulates navigation in some particulars in order to secure the revenue; it regulates that navigation whether it is employed in the internal commerce of a State or in commerce among the States; and it regulates commerce in these particulars only in the manner in which laws for the collection of revenue from commerce operate upon commerce, the subject taxed.

"If this law can be considered in any respect an exercise of the power of the Congress to regulate commerce among the States, it certainly must be understood as

regulating the internal commerce of a State in no other manner than to subject the vessels employed in it to restrictions, in pursuance of the power to lay and collect taxes. These restrictions are not grants of right; and they are not regulations of commerce in any sense, excepting that in which all laws for the collection of taxes charged upon commerce may be termed commercial regulations. They are regulations of commerce only as regulations for the due collection of taxes on agriculture or manufactures would be regulations of agriculture or manufactures. A law proceeding from the taxing power of the Union may operate upon vessels employed in commerce merely internal, as it may operate upon everything within the scope of that power. But the taxing power, clear and absolute as it is, has its due course and effect, without annulling State laws. Every exposition of the Constitution, from the days of the Convention to this time, has truly taught that the taxes of the Union and laws for their collection do not extinguish State laws, but operate concurrently with them.

"When this law is thus understood, it usurps no power of a State over its internal commerce, and it operates to subject all vessels employed in a coasting trade wholly within a State to certain restrictions. These restrictions and the power of the State over its internal affairs are perfectly compatible with each other. The restrictions of this law and a law of the State may both operate upon vessels employed in a coasting trade confined to the State; and neither law excludes or interferes with the operation of the other.

"The provisions concerning the coasting trade between ports in the same State are, then, restrictive regulations, and not grants of rights. The vessels employed in such voyages are subject to the legislation of the State; and the grant made to Livingston and Fulton does not dispense with or defeat any restriction imposed on the coasting trade carried on between ports in this State.

"Navigation between this State and any other, by steam vessels licensed for the coasting trade, having been adjudged a right; and navigation by steam vessels merely from one place to another within this State being still subject to the State grant; both these rights must have effect, so far as they are compatible with each other. When these rights really interfere, the right granted by the State must yield, and the right to navigate between any port in the State and another State must prevail.

"A steam vessel having a license, and entering this State from another, may proceed to any port in this State; and such a vessel may depart from any port in this State and proceed to another State. In either case, the vessel may touch at any intermediate place within the State. These rights are either expressly adjudged by the Supreme Court, or follow as direct consequences from the principles of its decision.

"The navigation which remains subject to the State grant is that which takes place between any two points in this State, where the voyage is not a continuation of a passage to or from another State. Such a voyage is equally subject to the right granted by the State, whether it is between two places in the same revenue district, or between places in different revenue districts within the State. This right is not affected by the limits of revenue districts, or the obligations of masters of vessels in respect to manifests, oaths, reports, and permits, in different cases. All those regulations of the coasting trade have their due effect; but they do not vary the right to navigate from place to place. This question has no concern with ports of entry or ports of delivery; it having no connection with foreign commerce, or with the entry or delivery of foreign merchandise upon its arrival in the United States.

"Thus, the points at which a voyage commences and terminates, seem to me to determine whether the voyage is protected by the license, or is subject to the State grant; and I do not perceive that these rights can be reconciled in practice by any other discrimination. A steam vessel having a license, and proceeding from a port in this State, may indeed, by touching at a port in an adjoining State, continue the voyage to any other port in this State; and it is urged that such a navigation between two ports in the State would be an evasion of the State grant. But the intention with which a vessel may be navigated to another State cannot, I think, repel or destroy the right which the same vessel now has to proceed from another State to any port in this State. The right to navigate to or from another State is now an established and absolute

right, notwithstanding the State grant; and this absolute right may, I conceive, be exercised for the purpose of continuing a voyage made from or to another State to any other port in this State."

In s. c. 3 Cowen, 713 (1825), it appeared that the plaintiffs amended their bill, alleging that since the voyage on which the former application was founded the "Olive Branch" was engaged in navigation between Albany and New York without proceeding to any other State, and asked for an injunction against such direct voyages, and also against plying between Troy and New York circuitously by stopping in New Jersey for the purpose of evading the State grant. The CHANCELLOR [SANFORD] refused the last-named injunction, but granted the other, restraining the defendant from navigating between New York and Troy when there was no voyage to or from another State. On an appeal from that part of the decree refusing an injunction, the Court of Errors (22 to 9) sustained that part of the decree, but upon reasons which seemed to deny the validity of the other part of it, not appealed from.

See comments upon these cases and upon the general subject, by Chancellor Kent, in 1 Kent's Com. *431–*439. He had retired from the bench in 1823, and published the volume above named in 1826. At p. *438, he says that the court in *North Riv. St. Co.* v. *Livingston* "held that the coasting trade meant, amongst other things, commercial intercourse carried on between different districts in the same State and between different places in the same district, on the seacoast or on a navigable river; and that a voyage from New York to Albany was as much a coasting voyage, as from Boston to New Bedford."

The subject is closely connected with that of the scope of maritime jurisdiction, and the earlier cases omitted to make certain discriminations. Judge Story, indeed, in *De Lovio* v. *Boit*, 2 Gallison, 398 (1815), on a plea to the jurisdiction, in a libel on a policy of marine insurance, had declared in the First Circuit what long afterwards, in 1870, became the doctrine of the Supreme Court (*Ins. Co.* v. *Dunham*, 11 Wall. 1), that the admiralty and maritime jurisdiction of the Federal courts comprehends all maritime contracts, torts, and injuries, including all contracts, wherever made or executed or in whatever form, "which relate to the navigation, business or commerce of the sea." And, in point of locality, this jurisdiction was ultimately carried (after contrary decisions, *e. g. U. S.* v. *Coombs*, 12 Pet. 72, 76, 78) "to all navigable waters of the United States, or bordering on the same, whether landlocked or open, salt or fresh, tide or no tide" (BRADLEY, J., in *Ins. Co.* v. *Dunham*, 11 Wall. 1, 25). "Navigable waters of the United States" is a statutory expression, and is held to include such waterways as form by themselves, or in connection with others, a continuous highway over which commerce may be carried on between our own States or with foreign countries in the customary modes of carrying on commerce by water. *The Montello*, 11 Wall. 411, 415.

"Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants." — CLIFFORD, J., in *The Belfast*, 7 Wall. 624, 640 (1868).

"The scope of the maritime law, and that of commercial regulation, are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it, Congress has regulated the registry, enrolment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime. And with regard to the question now under consideration, namely, the rights of material-men in reference to supplies and repairs furnished to a vessel in her home port, there does not seem to be any great

reason to doubt that Congress might adopt a uniform rule for the whole country, though, of course, this will be a matter for consideration, should the question ever be directly presented for adjudication." — BRADLEY, J., for the court, in *The Lottawanna*, 21 Wall. 558, 577 (1874).

"The power of the United States over navigation springs from the commercial power, which is limited to commerce among the States and with foreign nations; and it was contended that, as the stream cannot rise higher than its source, contracts for the transportation of goods or passengers by river from one port in a State to another were no more subject to the admiralty jurisdiction of the Federal courts than if the carriage took place by land. Reasoning from these premises, it followed that vessels trading between ports of the same State on a river exclusively within her boundaries could not be regulated by Congress, or libelled in the admiralty for the breach of a contract of assignment or the damages occasioned by a collision.

"Agreeably to the view taken in *Allen* v. *Newberry*, 21 Howard, 244, contracts for the transportation of goods from one port in a State to another on waters above the ebb and flow of the tide are not maritime or within the jurisdiction of the admiralty; and such also was held to be the rule with regard to supplies furnished for such a voyage. In *Maguire* v. *Card*, 21 Howard, 248, the supplies which gave rise to the controversy were furnished to a steamer trading between ports and places on the Sacramento River, which has its entire course in California. The court held that the contract, like that in *Allen* v. *Newberry*, concerned the internal trade of the State, and must be governed by the same principles. There was no good reason for extending the jurisdiction of the admiralty over such contracts. From the case of *Gibbons* v. *Ogden* down, it had been conceded that, according to the true interpretation of the commercial power, it does not extend to the purely internal traffic of a State, which is necessarily left to the local legislature. To subject it therefore to the jurisdiction of the admiralty would extend the judicial power of the United States beyond the legislative, and require the Federal courts to enforce the municipal laws, or laws of the States, as to matters which concern them and are beyond the scope of the general government.

"The decisions now incline to a broader rule, more in harmony with the objects which the government of the United States was intended to promote. The grant of judicial power includes 'all cases of admiralty and maritime jurisdiction;' and since vessels were equally subject to the authority of the admiralty as it was administered in England and on this side of the Atlantic, whether the voyage was between ports of the same or to a foreign country, the rule should — now that navigability is made the test instead of the ebb and flow of the tide — be extended to navigable lakes and rivers. It is the character of the traffic as internal, interstate, or foreign, and not whether it takes place over a road or river, by boat or railway, which must be considered in applying the commercial power; but admiralty jurisdiction has a wider scope, and may be exercised over all boats using the navigable waters of the United States. Vessels use the same waters, whether they are engaged in foreign or domestic trade; and as disorder and litigation would result if they were governed by different rules, Congress may make, and the admiralty enforce, such regulations as are requisite to give certainty to title, maintain order, and prevent the collisions which may be as disastrous on a river as at sea. The craft which is plying to-day between places in the same State may to-morrow extend her voyage to another, or proceed to sea; and it is therefore essential that she, in common with all others which are or may be engaged in coasting or foreign trade, shall be governed by the same rules.

"It is on such grounds that Congress may enact that sales and mortgages of vessels shall be invalid as against *bona fide* purchasers, unless they are duly registered at the custom-house; prescribe the number and character of the boats which each must carry, and the lights which they must show; and require the machinery and boilers of steamers to be inspected by an officer of the government and certified by him. And the statute may be enforced in the admiralty whether the voyage is between ports of the same or of a different State." — 2 Hare, *Am. Const. Law*, 1007–1009.

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Corfield v. *Coryell*, 4 Wash. C. C. 371 (1825), is stated *ante*, p. 453. It was argued at the October Term, 1824; the opinion was given at the April Term, 1825. In dealing with the first objection in that case the court (WASHINGTON, J.) said: "The first question then is, whether this Act, or either section of it, is repugnant to the power granted to Congress to regulate commerce? Commerce with foreign nations, and among the several States, can mean nothing more than intercourse with those nations, and among those States, for purposes of trade, be the object of the trade what it may; and this intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several States, or by a passage overland through the States, where such passage becomes necessary to the commercial intercourse between the States. It is this intercourse which Congress is invested with the power of regulating, and with which no State has a right to interfere. But this power, which comprehends the use of and passage over the navigable waters of the several States, does by no means impair the right of the State governments to legislate upon all subjects of internal police within their territorial limits, which is not forbidden by the Constitution of the United States, even although such legislation may indirectly and remotely affect commerce, provided it do not interfere with the regulations of Congress upon the same subject. Such are inspection, quarantine, and health laws; laws regulating the internal commerce of the State; laws establishing and regulating turnpike roads, ferries, canals, and the like.

"In the case of *Gibbons* v. *Ogden*, 9 Wheat. 1, which we consider as full authority for the principles above stated, it is said, 'that no direct power over these objects is granted to Congress, and consequently they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be when the power is expressly given for a specified purpose, or is clearly incident to some power which is expressly given.'

"But if the power which Congress possesses to regulate commerce does not interfere with that of the State to regulate its internal trade, although the latter may remotely affect external commerce, except where the laws of the State may conflict with those of the general government; much less can that power impair the right of the State governments to legislate, in such manner as in their wisdom may seem best, over the public property of the State, and to regulate the use of the same, where such regulations do not interfere with the free navigation of the waters of the State, for purposes of commercial intercourse, nor with the trade within the State, which the laws of the United States permit to be carried on.

"The grant to Congress to regulate commerce on the navigable waters belonging to the several States, renders those waters the public property of the United States, for all the purposes of navigation and commercial intercourse; subject only to Congressional regulation. But this grant contains no cession, either express or implied, of territory, or

of public or private property. The *jus privatum* which a State has in the soil covered by its waters, is totally distinct from the *jus publicum* with which it is clothed. The former, such as fisheries of all descriptions, remains common to all the citizens of the State to which it belongs, to be used by them according to their necessities, or according to the laws which regulate their use. 'Over these,' says Vattel, b. 1, c. 20, sect. 235, 246, 'sovereignty gives a right to the nation to make laws regulating the manner in which the common goods are to be used.' 'He may make such regulations respecting hunting and fishing, as to seasons, as he may think proper, prohibiting the use of certain nets and other destructive methods.' — Vattel, b. 1, c. 20, sect. 248. The *jus publicum* consists in the right of all persons to use the navigable waters of the State for commerce, trade, and intercourse; subject, by the Constitution of the United States, to the exclusive regulation of Congress.

"If then the fisheries and oyster beds within the territorial limits of a State are the common property of the citizens of that State, and were not ceded to the United States by the power granted to Congress to regulate commerce, it is difficult to perceive how a law of the State regulating the use of this common property, under such penalties and forfeitures as the State legislature may think proper to prescribe, can be said to interfere with the power so granted. The Act under consideration forbids the taking of oysters by any persons, whether citizens or not, at unseasonable times, and with destructive instruments; and for breaches of the law, prescribes penalties in some cases, and forfeitures in others. But the free use of the waters of the State for purposes of navigation and commercial intercourse, is interdicted to no person; nor is the slightest restraint imposed upon any to buy and sell, or in any manner to trade within the limits of the State.

"It was insisted by the plaintiff's counsel, that, as oysters constituted an article of trade, a law which abridges the right of the citizens of other States to take them, except in particular vessels, amounts to a regulation of the external commerce of the State. But it is a manifest mistake to denominate that a commercial regulation which merely regulates the common property of the citizens of the State, by forbidding it to be taken at improper seasons, or with destructive instruments. The law does not inhibit the buying and selling of oysters after they are lawfully gathered, and have become articles of trade; but it forbids the removal of them from the beds in which they grow (in which situation they cannot be considered articles of trade), unless under the regulations which the law prescribes. What are the State inspection laws, but internal restraints upon the buying and selling of certain articles of trade? And yet the Chief Justice, speaking of those laws, 9 Wheat. 203, observes, that 'their object 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.' Is this not precisely the nature of those laws which prescribe the seasons when, and the manner in which, the taking of oysters is permitted? Paving stones, sand, and many other things are as clearly articles of trade as oysters; but can it be contended, that the laws of a State, which treat as tort feasors those who shall take them away without the permission of the owner of them, are commercial regulations?

"We deem it superfluous to pursue this subject further, and close it by stating our opinion to be, that no part of the Act under consideration amounts to a regulation of commerce, within the meaning of the eighth section of the first article of the Constitution."

BROWN ET AL. *v.* THE STATE OF MARYLAND.

SUPREME COURT OF THE UNITED STATES. 1827.

[12 *Wheat.* 419.][1]

Meredith and *The Attorney-General* [Wirt], for the plaintiffs in error; *Taney* and *Johnson*, for the State.

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 second 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, &c., 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.

[1] The statement of facts is omitted. — ED.

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 exe-

cuted 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 subject, 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 upon 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 impost, 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 over land 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 pedler. 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 pedler. In the first case, the tax intercepts the import, as an import, in its way to became 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 farther 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 require 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 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?

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. Rep. 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 State 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 farther, 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. Rep. 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.

Mr. Justice Thompson dissented. . . .

It appears to me that no other sound and practical rule can be adopted, than to consider the external commerce as ending with the importation of the foreign article; and the importation is complete, as soon as the goods are introduced into the country, according to the provisions of the revenue laws, with the intention of being sold here for consumption, or for the purpose of internal and domestic trade, and the duties paid or secured. And this is the light in which this question has been considered by this and other Courts of the United States, 5 Cranch, 368; 9 Cranch, 104; 1 Mason, 499. This, it will be perceived, does not embrace foreign merchandise intended for exportation, and not for consumption; nor articles intended for commerce between the States; but such as are intended for domestic trade within the State: and it is to such articles only that the law of Maryland extends. I cannot, therefore, think that this law at all interferes with the power of Congress to regulate commerce; nor does it, according to my understanding of the Constitution, violate that provision, 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. . . .

It certainly cannot be maintained that the States have no authority to tax imported merchandise. But the same principle of discrimination between the wholesale and retail dealer, as to a license to sell, would seem to me, if well founded, to extend to taxes of every description. And it would present a singular incongruity to exempt a wholesale merchant from all taxes upon his stock of goods, and subject to taxation the like stock of his neighbor who was selling by retail. . . .

This law seems to have been treated as if it imposed a tax or duty upon the importer, or the importation. It certainly admits of no such construction. It is a charge upon the wholesale dealer, whoever he may be, and to operate upon the sale, and not upon the importation. It requires the purchase of a privilege to sell, and must stand on the same footing as a purchase of a privilege to sell in any other manner, as by retail, at auction, or as hawkers and pedlers, or in whatever way State policy may require. Whether such regulations are wise and politic, is not a question for this court. If the broad principle contended for on the part of the plaintiffs in error, that the payment of the foreign

duty is a purchase of the privilege of selling, be well founded, no limit can be set by the States to the exercise of this privilege. The first sale may be made in defiance of all State regulation; and all State laws regulating sales of foreign goods at auction, and imposing a duty thereupon, are unconstitutional, so far, at all events, as the sale may be by bale, package, hogshead, barrel or tierce, &c. And, indeed, if the right to sell follows as an incident to the importation, it will take away all State control over infectious and noxious goods, whilst unsold, in the hands of the importer. The principle, when carried out to its full extent, would inevitably lead to such consequences.

It has been urged with great earnestness upon the court, that if the States are permitted to lay such charges and taxes upon imports, they may be so multiplied and increased as entirely to stop all importations. If this argument presents any serious objection to the law in question, the answer to it, in my judgment has already been given: that the limitation, as contended for, of State power, will not effect the objects proposed. Whether this additional burden is imposed upon the wholesale or retail dealer, it will equally affect the importation; and nothing short of a total exemption from all taxation and charges of every description, will take from the States the power of legislating so as in some way may indirectly affect the importation.

WILLSON ET AL. *v.* THE BLACKBIRD CREEK MARSH COMPANY.

SUPREME COURT OF THE UNITED STATES. 1829.

[2 *Pet.* 245.]

THIS was a writ of error to the High Court of Errors and Appeals of the State of Delaware.

The Black Bird Creek Marsh Company were incorporated by an Act of the General Assembly of Delaware, passed in February, 1822; and the owners and possessors of the marsh, cripple, and low grounds in Appoquinimink hundred, in New Castle County, and State of Delaware, lying on both sides of Black Bird Creek, below Mathews's Landing, and extending to the river Delaware, were authorized and empowered to make and construct a good and sufficient dam across said creek, at such place as the managers or a majority of them shall find to be most suitable for the purpose; and also, to bank the said marsh, cripple, and low ground, etc.

After the passing of this Act, the company proceeded to erect and place in the creek a dam, by which the navigation of the creek was obstructed; also embanking the creek, and carrying into execution all the purposes of their incorporation.

The defendants being the owners, etc., of a sloop called "The Sally," of $95\frac{8}{95}$ths tons, regularly licensed and enrolled according to the navigation laws of the United States, broke and injured the dam so erected by the company; and thereupon an action of trespass, *vi et armis*, was instituted against them in the Supreme Court of the State of Delaware, in which damages were claimed amounting to $20,000. To the declaration filed in the Supreme Court, the defendants filed three pleas; the first only of which being noticed by the court in their decision, the second and third are omitted.

This plea was in the following terms: —

1. That the place where the supposed trespass is alleged to have been committed, was, and still is, part and parcel of said Black Bird Creek, a public and common navigable creek, in the nature of a highway, in which the tides have always flowed and re-flowed; in which there was, and of right ought to have been, a certain common and public way, in the nature of a 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, etc. as they lawfully might for the cause aforesaid: and because the said gum piles, etc., bank and dam, in the said declaration mentioned, etc., 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, etc., 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, etc. as in the said declaration mentioned, doing no unnecessary damage to the said Black Bird Creek Marsh Company; which is the same supposed trespass, etc.

The plaintiffs, in the Supreme Court of the State, demurred generally to all the pleas; and the court sustained the demurrers, and gave judgment in their favor. This judgment was affirmed in the Court of Appeals, and the record remanded, for the purpose of having the damages assessed by a jury. Final judgment having been entered on the verdict of the jury, it was again carried to the Court of Appeals, where it was affirmed, and was now brought before this court, by the defendants in that court, for its review.

The case was argued for the plaintiffs in error by *Mr. Coxe;* and by *Mr. Wirt, Attorney-General*, for the defendants.

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

The defendants in error deny the jurisdiction of this court, because, they say, the record does not show that the constitutionality of the Act of the legislature, under which the plaintiff claimed to support his action, was drawn into question.

Undoubtedly the plea might have stated in terms that the Act, so far as it authorized a dam across the creek, was repugnant to the Constitution of the United States; and it might have been safer, it might have avoided any question respecting jurisdiction, so to frame it. But we think it impossible to doubt that the constitutionality of the Act was the question, and the only question, which could have been discussed in the State court. That question must have been discussed and decided.

The plaintiffs sustain their right to build a dam across the creek by the Act of Assembly. Their declaration is founded upon that Act. The injury of which they complain is to a right given by it. They do not claim for themselves any right independent of it. They rely entirely upon the Act of Assembly.

The plea does not controvert the existence of the Act, but denies its capacity to authorize the construction of a dam across a navigable stream, in which the tide ebbs and flows; and in which there was, and of right ought to have been, a certain common and public way in the nature of a highway. This plea draws nothing into question but the validity of the Act; and the judgment of the court must have been in favor of its validity. Its consistency with, or repugnancy to the Constitution of the United States, necessarily arises upon these pleadings, and must have been determined. This court has repeatedly decided in favor of its jurisdiction in such a case. *Martin* v. *Hunter's Lessee*, 1 Wheat. 355; *Miller* v. *Nicholls*, 4 Wheat. 311, and *Williams* v. *Norris*, 12 Wheat. 117; are expressly in point. They establish, as far as precedents can establish anything, that it is not necessary to state in terms on the record, that the Constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the 25th section of the Judicial Act, if the record shows that the Constitution or a law or a treaty of the United States must have been misconstrued, or the decision could not be made. Or, as in this case, that the constitutionality of a State law was questioned, and the decision has been in favor of the party claiming under such law.

The jurisdiction of the court being established, the more doubtful question is to be considered, whether the Act incorporating the Black Bird 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 Black Bird 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.[1]

THE MAYOR, ETC. OF THE CITY OF NEW YORK *v.* MILN.

SUPREME COURT OF THE UNITED STATES. 1837.

[11 *Pet.* 102.][2]

THE case was argued at a former term of this court, and the justices of the court being divided in opinion, a reargument was directed.

[1] See the comments on this case of McLEAN, J., in *The Passenger Cases*, 7 Howard, 283, 398 (1848). — ED.

[2] This case and another (*Briscoe* v. *Bank of Ky.*) were postponed in 1834 (8 Pet. 118). They had been argued, and thereupon MARSHALL, C. J., said: "The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court. In the present cases four judges do not concur in opinion as to the constitutional questions which have been argued. The court, therefore, direct these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present." De-

It was again argued by *Mr. Blount* and *Mr. Ogden,* for the plaintiffs; and by *Mr. White* and *Mr. Jones*, for the defendant.

BARBOUR, J., delivered the opinion of the court.

This case comes before this court upon a certificate of division of the Circuit Court of the United States for the Southern District of New York.

It was an action of debt brought in that court by the plaintiff, to recover of the defendant, as consignee of the ship called the "Emily," the amount of certain penalties imposed by a statute of New York, passed February 11th, 1824, entitled "An Act concerning passengers in vessels coming to the port of New York."

The statute, amongst other things, enacts that every master or commander of any ship, or other vessel, arriving at the port of New York, from any country out of the United States, or from any other of the United States than the State of New York, shall, within twenty-four hours after the arrival of such ship or vessel in the said port, make a report in writing, on oath or affirmation, to the mayor of the city of New York, or, in case of his sickness, or absence, to the recorder of the said city, of the name, place of birth, and last legal settlement, age, and occupation, of every person who shall have been brought as a passenger in such ship or vessel, on her last voyage from any country out of the United States into the port of New York, or any of the United States, and from any of the United States other than the State of New York, to the city of New York, and of all passengers who shall have landed, or been suffered or permitted to land, from such ship, or vessel, at any place, during such her last voyage, or have been put on board, or suffered, or permitted to go on board of any other ship or vessel, with the intention of proceeding to the said city, under the penalty on such master or commander, and the owner or owners, consignee or consignees, of such ship or vessel, severally and respectively of seventy-five dollars for every person neglected to be reported as aforesaid, and for every person whose name, place of birth, and last legal settlement, age, and occupation, or either or any of such particulars, shall be falsely reported as aforesaid, to be sued for and recovered as therein provided.

The declaration alleges that the defendant was consignee of the ship "Emily," of which a certain William Thompson was master; and that in the month of August, 1829, said Thompson, being master of such ship, did arrive with the same in the port of New York, from a country out of the United States, and that one hundred passengers were brought in said ship on her then last voyage, from a country out of the United States, into the port of New York; and that the said master did not make the report required by the statute, as before recited.

lays occurred. In 1835 MARSHALL, C. J., died, DUVALL, J., resigned, and WAYNE, J., succeeded MR. JUSTICE JOHNSON, who had died in 1834. TANEY, C. J., was commissioned in 1836, and BARBOUR, J., succeeded MR. JUSTICE DUVALL in the same year. — ED.

The defendant demurred to the declaration. The plaintiff joined in the demurrer, and the following point, on a division of the court, was thereupon certified to this court, viz.: — "That the Act of the Legislature of New York, mentioned in the plaintiff's declaration, assumes to regulate trade and commerce between the port of New York and foreign ports, and is unconstitutional and void.". . .

We shall not enter into any examination of the question whether the power to regulate commerce be or be not exclusive of the States, because the opinion which we have formed renders it unnecessary: in other words, we are of opinion that the Act is not a regulation of commerce, but of police; and that being thus considered, it was passed in the exercise of a power which rightfully belonged to the States.

That the State of New York possessed power to pass this law before the adoption of the Constitution of the United States, might probably be taken as a truism, without the necessity of proof. . . .

The power then of New York to pass this law having undeniably existed at the formation of the Constitution, the simple inquiry is, whether by that instrument it was taken from the States and granted to Congress; for if it were not, it yet remains with them.

If, as we think, it be a regulation, not of commerce, but police, then it is not taken from the States. To decide this, let us examine its purpose, the end to be attained, and the means of its attainment.

It is apparent, from the whole scope of the law, that the object of the legislature was to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries or from any other of the States; and for that purpose a report was required of the names, places of birth, etc., of all passengers, that the necessary steps might be taken by the city authorities to prevent them from becoming chargeable as paupers.

Now, we hold that both the end and the means here used are within the competency of the States, since a portion of their powers were surrendered to the Federal Government. Let us see what powers are left with the States. The "Federalist," in the 45th number, speaking of this subject, says: The powers reserved to the several States will extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

And this court, in the case of *Gibbons* v. *Ogden*, 9 Wheat. 203, which will hereafter be more particularly noticed in speaking of the inspection laws of the States, say: They form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government, all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

Now, if the Act in question be tried by reference to the delineation of power laid down in the preceding quotations, it seems to us that we are necessarily brought to the conclusion, that it falls within its limits. There is no aspect in which it can be viewed in which it transcends them. If we look at the place of its operation, we find it to be within the territory, and, therefore, within the jurisdiction of New York. If we look at the person on whom it operates, he is found within the same territory and jurisdiction. If we look at the persons for whose benefit it was passed, they are the people of New York, for whose protection and welfare the legislature of that State are authorized and in duty bound to provide.

If we turn our attention to the purpose to be attained, it is to secure that very protection, and to provide for that very welfare. If we examine the means by which these ends are proposed to be accomplished, they bear a just, natural, and appropriate relation to those ends.

But we are told that it violates the Constitution of the United States, and to prove this we have been referred to two cases in this court, — the first that of *Gibbons* v. *Ogden*, 9 Wheat. 1, and the other that of *Brown* v. *The State of Maryland*, 12 Wheat. 419. . . .

Whilst, however, neither of the points decided in the cases thus referred to is the same with that now under consideration, and whilst the general scope of the reasoning of the court in each of them applies to questions of a different nature, there is a portion of that reasoning in each which has a direct bearing upon the present subject, and which would justify measures on the part of States, not only approaching the line which separates regulations of commerce from those of police, but even those which are almost identical with the former class, if adopted in the exercise of one of their acknowledged powers. . . .

From this it appears, that whilst a State is acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by Congress acting under a different power; subject only, say the court, to this limitation, that in the event of collision, the law of the State must yield to the law of Congress. The court must be understood, of course, as meaning that the law of Congress is passed upon a subject within the sphere of its power.

Even then, if the section of the Act in question could be considered as partaking of the nature of a commercial regulation, the principle here laid down would save it from condemnation, if no such collision exist. It has been contended at the bar that there is that collision; and in proof of it we have been referred to the revenue Act of 1799, and to the Act of 1819, relating to passengers. The whole amount of the provision in relation to this subject, in the first of these Acts, is to require in the manifest of a cargo of goods a statement of the names of the passengers, with their baggage, specifying the number and description of packages belonging to each respectively: now it is apparent,

as well from the language of this provision as from the context, that the purpose was to prevent goods being imported without paying the duties required by law, under the pretext of being the baggage of passengers.

The Act of 1819 contains regulations obviously designed for the comfort of the passengers themselves; for this purpose it prohibits the bringing more than a certain number proportioned to the tonnage of the vessel, and prescribes the kind and quality of provisions, or sea stores, and their quantity, in a certain proportion to the number of the passengers.

Another section requires the master to report to the collector a list of all passengers, designating the age, sex, occupation, the country to which they belong, etc., which list is required to be delivered to the Secretary of State, and which he is directed to lay before Congress.

The object of this clause, in all probability, was to enable the government of the United States to form an accurate estimate of the increase of population by emigration; but whatsoever may have been its purpose, it is obvious that these laws only affect, through the power over navigation, the passengers whilst on their voyage, and until they shall have landed. After that, and when they have ceased to have any connection with the ship, and when, therefore, they have ceased to be passengers, we are satisfied that Acts of Congress, applying to them as such, and only professing to legislate in relation to them as such, have then performed their office, and can, with no propriety of language, be said to come into conflict with the law of a State, whose operation only begins when that of the laws of Congress ends, whose operation is not even on the same subject, because, although the person on whom it operates is the same, yet having ceased to be a passenger, he no longer stands in the only relation in which the laws of Congress either professed or intended to act upon him.

There is, then, no collision between the law in question and the Acts of Congress just commented on; and, therefore, if the State law were to be considered as partaking of the nature of a commercial regulation, it would stand the test of the most rigid scrutiny if tried by the standard laid down in the reasoning of the court, quoted from the case of Gibbons against Ogden.

But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty, of a State to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or

restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive.

We are aware that it is at all times difficult to define any subject with proper precision and accuracy; if this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering.

If we were to attempt it, we should say that every law came within this description which concerned the welfare of the whole people of a State, or any individual within it; whether it related to their rights or their duties; whether it respected them as men or as citizens of the State; whether in their public or private relations; whether it related to the rights of persons or of property, of the whole people of a State or of any individual within it; and whose operation was within the territorial limits of the State, and upon the persons and things within its jurisdiction. But we will endeavor to illustrate our meaning rather by exemplification than by definition. No one will deny that a State has a right to punish any individual found within its jurisdiction, who shall have committed an offence within its jurisdiction against its criminal laws. We speak not here of foreign ambassadors, as to whom the doctrines of public law apply. We suppose it to be equally clear, that a State has as much right to guard, by anticipation, against the commission of an offence against its laws, as to inflict punishment upon the offender after it shall have been committed. The right to punish or to prevent crime does in no degree depend upon the citizenship of the party who is obnoxious to the law. The alien who shall just have set his foot upon the soil of the State is just as subject to the operation of the law as one who is a native citizen. In this very case, if either the master, or one of the crew of the "Emily," or one of the passengers who were landed, had, the next hour after they came on shore, committed an offence, or indicated a disposition to do so, he would have been subject to the criminal law of New York, either by punishment for the offence committed or by prevention from its commission where good ground for apprehension was shown, by being required to enter into a recognizance with surety, either to keep the peace, or be of good behavior, as the case might be; and if he failed to give it, by liability to be imprisoned in the discretion of the competent authority. Let us follow this up to its possible results. If every officer and every seaman belonging to the "Emily" had participated in the crime, they would all have been liable to arrest and punishment, although thereby the vessel would have been left without either commander or crew. Now, why is this? For no other reason than this: simply that, being within the territory and jurisdiction of New York, they were liable to the laws of that State, and amongst others, to its criminal laws; and this, too, not only for treason, murder, and other crimes of that degree of atrocity, but for the most petty offence which can be imagined.

It would have availed neither officer, seamen, or passenger, to have alleged either of these several relations in the recent voyage across the Atlantic. The short but decisive answer would have been, that we know you now only as offenders against the criminal laws of New York, and being now within her jurisdiction, you are now liable to the cognizance of those laws. Surely the officers and seamen of the vessel have not only as much, but more, concern with navigation than a passenger; and yet, in the case here put, any and every one of them would be held liable. There would be the same liability, and for the same reasons, on the part of the officers, seamen, and passengers to the civil process of New York, in a suit for the most trivial sum; and if, according to the laws of that State, the party might be arrested and held to bail, in the event of his failing to give it, he might be imprisoned until discharged by law. Here, then, are the officers and seamen, the very agents of navigation, liable to be arrested and imprisoned under civil process, and to arrest and punishment under the criminal law.

But the instrument of navigation, that is, the vessel, when within the jurisdiction of the State, is also liable by its laws to execution. If the State have a right to vindicate its criminal justice against the officers, seamen, and passengers who are within its jurisdiction, and also, in the administration of its civil justice, to cause process of execution to be served on the body of the very agents of navigation, and also on the instrument of navigation, under which it may be sold, because they are within its jurisdiction and subject to its laws, the same reasons precisely equally subject the master, in the case before the court, to liability for failure to comply with the requisitions of the section of the statute sued upon. Each of these laws depends upon the same principle for its support; and that is, that it was passed by the State of New York, by virtue of her power to enact such laws for her internal police as it deemed best; which laws operate upon the persons and things within her territorial limits, and therefore within her jurisdiction.

Now, in relation to the section in the Act immediately before us, that is obviously passed with a view to prevent her citizens from being oppressed by the support of multitudes of poor persons, who come from foreign countries without possessing the means of supporting themselves. There can be no mode in which the power to regulate internal police could be more appropriately exercised. New York, from her particular situation, is, perhaps more than any other city in the Union, exposed to the evil of thousands of foreign emigrants arriving there, and the consequent danger of her citizens being subjected to a heavy charge in the maintenance of those who are poor. It is the duty of the State to protect its citizens from this evil; they have endeavored to do so by passing, amongst other things, the section of the law in question. We should, upon principle, say that it had a right to do so.

Let us compare this power with a mass of power said by this court, in Gibbons against Ogden, not to be surrendered to the general govern-

ment. They are inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, etc. To which it may be added that this court, in Brown against The State of Maryland, admits the power of a State to direct the removal of gunpowder, as a branch of the police power, which unquestionably remains, and ought to remain, with the States. It is easy to show, that if these powers, as is admitted, remain with the States, they are stronger examples than the one now in question. The power to pass inspection laws involves the right to examine articles which are imported, and are, therefore, directly the subject of commerce; and if any of them are found to be unsound, or infectious, to cause them to be removed, or even destroyed. But the power to pass these inspection laws is itself a branch of the general power to regulate internal police.

Again, the power to pass quarantine laws operates on the ship which arrives, the goods which it brings, and all persons in it, whether the officers and crew, or the passengers; now the officers and crew are the agents of navigation; the ship is an instrument of it, and the cargo on board is the subject of commerce; and yet it is not only admitted, that this power remains with the States, but the laws of the United States expressly sanction the quarantines, and other restraints which shall be required and established by the health laws of any State; and declare that they shall be duly observed by the collectors and all other revenue officers of the United States.

We consider it unnecessary to pursue this comparison further; because we think, that if the stronger powers under the necessity of the case, by inspection laws and quarantine laws to delay the landing of a ship and cargo, which are the subjects of commerce and navigation, and to remove or even to destroy unsound and infectious articles, also the subject of commerce, can be rightfully exercised; then, that it must follow as a consequence, that powers less strong, such as the one in question, which operates upon no subject either of commerce or navigation, but which operates alone within the limits and jurisdiction of New York upon a person, at the time not even engaged in navigation, is still more clearly embraced within the general power of the States to regulate their own internal police, and to take care that no detriment come to the Commonwealth. We think it as competent and as necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported, or from a ship the crew of which may be laboring under an infectious disease.

As to any supposed conflict between this provision and certain treaties of the United States, by which reciprocity as to trade and intercourse is granted to the citizens of the governments with which those treaties were made; it is obvious to remark that the record does not show that any person in this case was a subject or citizen of a country to which treaty stipulation applies; but, moreover, those which we have

examined stipulate that the citizens and subjects of the contracting parties shall submit themselves to the laws, decrees, and usages to which native citizens and subjects are subjected.

We are therefore of opinion, and do direct it to be certified to the Circuit Court for the Southern District of New York, that so much of the section of the Act of the Legislature of New York, as applies to the breaches assigned in the declaration, does not assume to regulate commerce between the port of New York and foreign ports; and that so much of said section is constitutional.

We express no opinion on any other part of the Act of the Legislature of New York; because no question could arise in the case in relation to any part of the Act except that declared upon.[1]

THOMPSON, J., delivered a concurring opinion, in which he said: "Whether the law of New York, so far as it applies to the case now before the court, be considered as a mere police regulation, and the exercise of a power belonging exclusively to the State, or whether it be considered as legislating on a subject falling within the power to regulate commerce, but which still remains dormant, Congress not having exercised any power conflicting with the law in this respect, no constitutional objection can, in my judgment, arise against it. I have chosen to consider this question under this double aspect, because I do not find as yet laid down by this court, any certain and defined limits to the exercise of this power to regulate commerce, or what shall be considered commerce with foreign nations, and what the regulations of domestic trade and police. And when it is denied that a State law, in requiring a list of the passengers arriving in the port of New York, from a foreign country, to be reported to the police authority of the city, is unconstitutional and void, because embraced within that power; I am at a loss to say where its limits are to be found. It becomes, therefore, a very important principle to establish, that the States retain the exercise of powers, [which,] although they may in some measure partake of the character of commercial regulations, until Congress asserts the exercise of the power under the grant of the power to regulate commerce."

[1] For a remarkable explanation by WAYNE, J., of the way in which this opinion was arrived at, see *Passenger Cases*, 7 How. pp. 429–436. "In the discussion of the case, however, by the judges, the nature and exclusiveness of the power in Congress to regulate commerce was much considered. There was a divided mind among us about it. Four of the court being of the opinion that, according to the Constitution and the decisions of this court in *Gibbons* v. *Ogden* and in *Brown* v. *Maryland*, the power in Congress to regulate commerce was exclusive. Three of them thought otherwise. And to this state of the court is owing the disclaimer in the opinion, already mentioned by me, that this exclusiveness of the power to regulate commerce was not in the case a point for examination." With the statement of WAYNE, J., compare that of C. J. TANEY, in the same case, pp. 487–490.

The subject of the regulation of interstate commerce, as involving the admission or exclusion of persons, was complicated with that of slavery. During the second quarter of this century a bitter controversy went on over the right of the slave States to exclude free negroes. South Carolina passed laws, from the year 1820 on, for impris-

STORY, J., gave a dissenting opinion, in which he said: "It has been argued that the power of Congress to regulate commerce is not exclusive, but concurrent with that of the States. If this were a new question in this court, wholly untouched by doctrine or decision, I should not hesitate to go into a full examination of all the grounds upon which concurrent authority is attempted to be maintained. But in point of fact the whole argument on this very question, as presented by the learned counsel on the present occasion, was presented by the learned counsel who argued the case of *Gibbons* v. *Ogden*, 9 Wheat. R. 1, and it was then deliberately examined and deemed inadmissible by the court. Mr. Chief Justice Marshall, with his accustomed accuracy and fulness of illustration, reviewed at that time the whole grounds of the controversy; and from that time to the present the question has been considered (as far as I know) to be at rest. The power given to Congress to regulate commerce with foreign nations, and among the States, has been deemed exclusive, from the nature and objects of the power and the necessary implications growing out of its exercise. Full power to regulate a particular subject implies the whole power, and leaves no residuum; and a grant of the whole to one is incompatible with a grant to another of a part. When a State proceeds to regulate commerce with foreign nations or among the States, it is doing the very thing which Congress is authorized to do. *Gibbons* v. *Ogden*, 9 Wheat. R 198, 199. And it has been remarked, with great cogency and accuracy, that the regulation of a subject indicates and designates 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 upon which it has operated. *Gibbons* v. *Ogden*, 9 Wheat. R. 209. . . .

"In this opinion I have the consolation to know that I had the entire concurrence, upon the same grounds, of that great constitutional jurist the late Mr. Chief Justice Marshall. Having heard the former arguments, his deliberate opinion was that the Act of New York was unconstitutional, and that the present case fell directly within the principles established in the case of *Gibbons* v. *Ogden*, 9 Wheat. R. 1, and *Brown* v. *The State of Maryland*, 12 Wheat. R. 419."

owing free colored seamen arriving in Northern and foreign vessels, and for compelling the ship-masters to pay the expense of their detention. Under these enactments, that State defied the authority of the United States judiciary and the protests of other States. The controversy was carried on, not only between the States, but in Congress. An account of these things may be seen in Leg. Doc. Mass. 1845 (Senate), No. 31. At p. 39 is found a long opinion by MR. JUSTICE JOHNSON of the Supreme Court of the United States, given at the Circuit, in Charleston, in August, 1823, in the case of *Elkison* v. *Deliesseline*, in which the action of South Carolina was declared unconstitutional, in the most emphatic terms. But this sort of legislation continued, and was repeated in stronger form; and a leading citizen of Massachusetts, sent there as a State agent twenty years later, to investigate the matter, was driven away, and similar action thereafter was made criminal by Act of the Legislature. See also the Report of the House Committee on Commerce (January 20, 1843), in the documents of the 27th Congress, 3d Sess. (Rep. No. 80). — ED.

In *Groves* v. *Slaughter*, 15 Pet. 449 (1841), on error to the Circuit Court of the United States for the Eastern District of Louisiana, in an action brought in 1838 upon a promissory note, given for the price of slaves brought into Mississippi for sale, in 1835 and 1836, the defendants (the plaintiffs in error) set up that the consideration was illegal under the Constitution of Mississippi adopted in 1832. That instrument declared that "the introduction of slaves into this State as merchandise, or for sale, shall be prohibited after the 1st day of May, 1833." . . . The United States Supreme Court now affirmed a decision for the plaintiffs by the lower court, on the ground that this clause only operated as a direction to the legislature, and no statute had been passed applicable to this case. Thompson, J., for the court, closed the opinion thus: "And this view of the case makes it unnecessary to inquire whether this article in the Constitution of Mississippi is repugnant to the Constitution of the United States; and, indeed, such inquiry is not properly in the case, as the decision has been placed entirely upon the construction of the Constitution of Mississippi."

Notwithstanding this statement, McLean, J., in a concurring opinion declared that such exclusion of slaves by the States would be constitutional. With this view Taney, C. J., concurred in a separate opinion. The Reporter guardedly adds: "Mr. Justice Story, Mr. Justice Thompson, Mr. Justice Wayne, and Mr. Justice M'Kinley concurred with the majority of the court in opinion that the provision of the Constitution of the United States, which gives the regulation of commerce to Congress, did not interfere with the provision of the Constitution of the State of Mississippi, which relates to the introduction of slaves as merchandise, or for sale."

Baldwin, J., remarked that "Any reasoning or principle which would authorize any State to interfere with such transit of a slave, would equally apply to a bale of cotton, or cotton goods; and thus leave the whole commercial intercourse between the States liable to interruption or extinction by State laws, or constitutions. It is fully within the power of any State to entirely prohibit the importation of slaves of all descriptions, or of those who are diseased, convicts, or of dangerous or immoral habits or conduct; this is a regulation of police, for purposes of internal safety to the State, or the health and morals of its citizens, or to effectuate its system of policy in the abolition of slavery. But where no object of police is discernible in a State law or constitution, nor any rule of policy, other than that which gives to its own citizens a 'privilege,' which is denied to citizens of other States, it is wholly different."

The Reporter states that Catron, J., was ill and took no part in this case; that Barbour, J., died before it was decided; and that, out of the seven judges who took part, two, M'Kinley, J., and Story, J., dissented as regards the point actually decided.[1]

[1] For decisions upon this point *contra* to the opinion of the court, and giving effect to the State power of exclusion, see *Brien* v. *Williamson*, 7 How. (Miss.) 14, *Cotton* v. *Brien*, 6 Rob. (La). 115. — Ed.

LICENSE CASES.

THURLOW *v.* THE COMMONWEALTH OF MASSACHUSETTS. FLETCHER *v.* THE STATE OF RHODE ISLAND. PEIRCE ET AL. *v.* THE STATE OF NEW HAMPSHIRE.

SUPREME COURT OF THE UNITED STATES. 1847.

[5 *Howard*, 504; s. c. 16 *Curtis's Decisions*, 513.][1]

THESE three cases came up on writs of error under the 25th section of the Judiciary Act of 1789 (1 Stats. at Large, 85), and were argued together; the first by *Webster* and *Choate*, for the plaintiff, and *John Davis*, *contra*, — the second by *Ames* and *Whipple*, for the plaintiff, and *R. W. Greene*, *contra*, — the third by *John P. Hale*, for the plaintiffs, and *Burke*, *contra*. It is not deemed necessary to set out the statutes on which the indictments were founded. Their substance and effect are clearly stated by the CHIEF JUSTICE, as well as by the other judges, in their opinions, and there was no controversy concerning their construction, or meaning and effect.

No opinion of the court was pronounced. Each justice gave his own reasons for affirming the decision of the State courts.

TANEY, C. J. In the cases of *Thurlow* v. *The State of Massachusetts*, of *Fletcher* v. *The State of Rhode Island*, and of *Peirce et al.* v. *The State of New Hampshire*, the judgments of the respective State courts are severally affirmed.

The justices of this court do not, however, altogether agree in the principles upon which these cases are decided, and I therefore proceed to state the grounds upon which I concur in affirming the judgments. The first two of these cases depend upon precisely the same principles; and, although the case against the State of New Hampshire differs in some respects from the others, yet there are important principles common to all of them, and on that account it is more convenient to consider them together. Each of the cases has arisen upon State laws, passed for the purpose of discouraging the use of ardent spirits within their respective territories, by prohibiting their sale in small quantities, and without licenses previously obtained from the State authorities. And the validity of each of them has been drawn in question, upon the ground that it is repugnant to that clause of the Constitution of the United States which confers upon Congress the power to regulate commerce with foreign nations, and among the several States. . . .

The Constitution of the United States declares that that 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.

[1] The case is taken from Curtis's Decisions. — ED.

It follows that a law of Congress, regulating commerce with foreign nations, or among the several States, is the supreme law; and if the law of a State is in conflict with it, the law of Congress must prevail, and the State law cease to operate so far as it is repugnant to the law of the United States.

It is equally clear that the power of Congress over this subject does not extend further than the regulation of commerce with foreign nations and among the several States; and that beyond these limits, the States have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the general government. Every State, therefore, may regulate its own internal traffic, according to its own judgment, and upon its own views of the interest and well-being of its citizens.

I am not aware that these principles have ever been questioned. The difficulty has always arisen on their application; and that difficulty is now presented in the Rhode Island and Massachusetts cases, where the question is, how far a State may regulate or prohibit the sale of ardent spirits, the importation of which from foreign countries has been authorized by Congress. Is such a law a regulation of foreign commerce, or of the internal traffic of the State?

It is unquestionably no easy task to mark, by a certain and definite line, the division between foreign and domestic commerce, and to fix the precise point, in relation to every imported article, where the paramount power of Congress terminates, and that of the State begins. The Constitution itself does not attempt to define these limits. They cannot be determined by the laws of Congress or the States, as neither can, by its own legislation, enlarge its own powers, or restrict those of the other. And as the Constitution itself does not draw the line, the question is necessarily one for judicial decision, and depending altogether upon the words of the Constitution.

This question came directly before the court, for the first time, in the case of *Brown* v. *The State of Maryland*, 12 Wheat. 419. And the court there held that an article authorized by a law of Congress to be imported, continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale, in the original bale, package, or vessel in which it was imported; that the authority given to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported; and that no State, either by direct assessment, or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of Congress had itself imposed; but that, when the original package was broken up, for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import, or a part of foreign commerce, and became subject to the laws of the State, and might be taxed for State purposes, and the sale regulated by the State, like any other

property. This I understand to be substantially the decision in the case of *Brown* v. *The State of Maryland*, drawing the line between foreign commerce, which is subject to the regulation of Congress, and internal or domestic commerce, which belongs to the States, and over which Congress can exercise no control.

I argued the case in behalf of the State, and endeavored to maintain that the law of Maryland, which required the importer as well as other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the State, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the State more than a sound construction of the Constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind. In the nature of things, the line of division is in some degree vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and object of this provision in the Constitution. Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government. The immense amount of foreign products used and consumed in this country are imported, landed, and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the State in which they are imported. A great (perhaps the greater) part imported, in some of the cities, is not owned or brought in by citizens of the State, but by citizens of other States, or foreigners. And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely *in transitu*, and on their way to the distant cities, villages, and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported. And a tax upon them while in this condition, for State purposes, whether by direct assessment or, indirectly, by requiring a license to sell, would be hardly more justifiable in principle than a transit duty upon the merchandise when passing through a State. A tax in any shape upon imports is a tax on the consumer, by enhancing the price of the commodity. And if a State is permitted to levy it in any form, it will put it in the power of a maritime importing State to raise a revenue for the support of its own government from citizens of other States, as certainly and effectually as if the tax was laid openly and without disguise as a duty on imports.

Such a power in a State would defeat one of the principal objects of forming and adopting the Constitution. It cannot be done directly, in the shape of a duty on imports, for that is expressly prohibited. And as it cannot be done directly, it could hardly be a just and sound construction of the Constitution which would enable a State to accomplish precisely the same thing under another name, and in a different form.

Undoubtedly, a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consist of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner. But a tax of this description stands upon a very different footing from a tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State. Nor, indeed, can it even influence materially the price of the commodity to the consumer, since foreigners, as well as citizens of other States, who are not chargeable with the tax, may import goods into the same place and offer them for sale in the same market, and with whom the resident merchant necessarily enters into competition.

Adopting, therefore, the rule as laid down in *Brown* v. *The State of Maryland*, 12 W. 419, I proceed to apply it to the cases of Massachusetts and Rhode Island. The laws of Congress regulating foreign commerce authorize the importation of spirits, distilled liquors, and brandy, in casks or vessels not containing less than a certain quantity, specified in the laws upon this subject. Now, if the State laws in question came in collision with those Acts of Congress, and prevented or obstructed the importation or sale of these articles by the importer in the original cask or vessel in which they were imported, it would be the duty of this court to declare them void.

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 seem 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.

But I do not understand the law of Massachusetts or Rhode Island as interfering with the trade in ardent spirits while the article remains a part of foreign commerce, and is in the hands of the importer for sale, in the cask or vessel in which the laws of Congress authorize it to be imported. 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. Of the wisdom of this policy, it is not my province or my purpose to speak. Upon that subject, each State must decide for itself. I speak only of the restrictions which the Constitution and laws of the United States have imposed upon the States. And as the laws of Massachusetts and Rhode Island are not repugnant to the Constitution of the United States, and do not come in conflict with any law of Congress passed in pursuance of its authority to regulate commerce with foreign nations and among the several States, there is no ground upon which this court can declare them to be void.

I now come to the New Hampshire case, in which a different principle is involved, — the question, however, arising under the same clause in the Constitution, and depending on its construction.

The law of New Hampshire prohibits the sale of distilled spirits, in any quantity, without a license from the selectmen of the town in which the party resides. The plaintiffs in error, who were merchants in Dover, in New Hampshire, purchased a barrel of gin in Boston, brought it to Dover, and sold it in the cask in which it was imported, without a license from the selectmen of the town. For this sale they were indicted, convicted, and fined, under the law above mentioned.

The power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it. And, according to the doctrine in *Brown* v. *Maryland*, the article in question, at the time of the sale, was subject to the legislation of Congress.

The present case, however, differs from *Brown* v. *The State of Maryland* in this, — that the former was one arising out of commerce with foreign nations, which Congress had regulated by law; whereas the present is a case of commerce between two States, in relation to which Congress has not exercised its power. Some Acts of Congress have indeed been referred to in relation to the coasting trade. But they are evidently intended merely to prevent smuggling, and do not regulate imports or exports from one State to another. This case differs also from the cases of Massachusetts and Rhode Island; because, in these two cases, the laws of the States operated upon the articles after they had passed beyond the limits of foreign commerce, and consequently were beyond the control and power of Congress. 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. This is the question upon which the case turns; and I do not see how it can be decided upon any other ground, provided we adopt the line of division between foreign and domestic commerce as marked out by the court in *Brown* v. *The State of Maryland*. I proceed, therefore, to state my opinion upon it.

It is well known that upon this subject a difference of opinion has existed, and still exists, among the members of this court. But with every respect for the opinion of my brethren with whom I do not agree, it appears to me to be very clear, 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. Such evidently, I think, was the construction which the Constitution universally received at the time of its adoption, as appears from the legislation of Congress and of the several States; and a careful examination of the decisions of this court will show, that, so far from sanctioning the opposite doctrine, they recognize and maintain the power of the States.

The language in which the grant of power to the general government is made, certainly furnishes no warrant for a different construction, and there is no prohibition to the States. Neither can it be inferred by comparing the provision upon this subject with those that relate to other powers granted by the Constitution to the general government. On the contrary, in many instances, after the grant is made, the Constitution proceeds to prohibit the exercise of the same power by the States in express terms; in some cases absolutely, in others without the consent of Congress. And if it was intended to forbid the States from making any regulations of commerce, it is difficult to account for the omission to prohibit it, when that prohibition has been so carefully and distinctly inserted in relation to other powers, where the action of the State over the same subject was intended to be entirely excluded. But if, as I think, 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 may operate. For if the mere grant of power to the general government was in itself a prohibition to the States, there would seem to be no necessity for providing for the supremacy of the laws of Congress, as all State laws upon the subject would be *ipso facto* void, and there could, therefore, be no such thing as conflicting laws, nor any question about the supremacy of conflicting legislation. It is only where both may legislate on the subject that the question can arise.

I have said that the legislation of Congress and the States has conformed to this construction from the foundation of the government. This is sufficiently exemplified in the laws in relation to pilots and pilotage, and the health and quarantine laws.

In relation to the first, they are admitted on all hands to belong to foreign commerce, and to be subject to the regulations of Congress, under the grant of power of which we are speaking. Yet they have been continually regulated by the maritime States, as fully and entirely since the adoption of the Constitution as they were before; and there is but one law of Congress (5 Stats. at Large, 153) making any specific regulation upon the subject, and that passed as late as 1837, and intended, as it is understood, to alter only a single provision of the New York law, leaving the residue of its provisions entirely untouched. It is true, that the Act of 1789 (1 Stats. at Large, 54) provides that pilots shall continue to be regulated by the laws of the respective States then in force, or which may thereafter be passed, until Congress shall

make provision on the subject. And undoubtedly Congress had the power, by assenting to the State laws then in force, to make them its own, and thus make the previous regulations of the States the regulations of the general government. But it is equally clear, that, as to all future laws by the States, if the Constitution deprived them of the power of making any regulations on the subject, an Act of Congress could not restore it. For it will hardly be contended that an Act of Congress can alter the Constitution, and confer upon a State a power which the Constitution declares it shall not possess. And if the grant of power to the United States to make regulations of commerce is a prohibition to the States to make any regulation upon the subject, Congress could no more restore to the States the power of which it was thus deprived, than it could authorize them to coin money, or make paper money a tender in the payment of debts, or to do any other act forbidden to them by the Constitution. Every pilot law in the commercial States has, it is believed, been either modified or passed since the Act of 1789 adopted those then in force; and the provisions since made are all void, if the restriction on the power of the States now contended for should be maintained; and the regulations made, the duties imposed, the securities required, and penalties inflicted by these various State laws are mere nullities, and could not be enforced in a court of justice. It is hardly necessary to speak of the mischiefs which such a construction would produce to those who are engaged in shipping, navigation, and commerce. Up to this time their validity has never been questioned. On the contrary, they have been repeatedly recognized and upheld by the decisions of this court; and it will be difficult to show how this can be done, except upon the construction of the Constitution which I am now maintaining. So, also, in regard to health and quarantine laws. They have been continually passed by the States ever since the adoption of the Constitution, and the power to pass them recognized by Acts of Congress, and the revenue officers of the general government directed to assist in their execution. Yet all of these health and quarantine laws are necessarily, in some degree, regulations of foreign commerce in the ports and harbors of the State. They subject the ship, and cargo, and crew to the inspection of a health officer appointed by the State; they prevent the crew and cargo from landing until the inspection is made, and destroy the cargo if deemed dangerous to health. And during all this time the vessel is detained at the place selected for the quarantine ground by the State authority. The expenses of these precautionary measures are also usually, and I believe universally, charged upon the master, the owner, or the ship, and the amount regulated by the State law, and not by Congress. Now, so far as these laws interfere with shipping, navigation, or foreign commerce, or impose burdens upon either of them, they are unquestionably regulations of commerce. Yet, as I have already said, the power has been continually exercised by the States, has been continually recognized by Congress ever since the adoption of the Constitu-

tion, and constantly affirmed and supported by this court whenever the subject came before it.

The decisions of this court will, also, in my opinion, when carefully examined, be found to sanction the construction I am maintaining. It is not my purpose to refer to all of the cases in which this question has been spoken of, but only to the principal and leading ones; and, —

First, to *Gibbons* v. *Ogden*, 9 Wheat. 1, because this is the case usually referred to and relied on to prove the exclusive power of Congress and the prohibition to the States. It is true that one or two passages in that opinion, taken by themselves, and detached from the context, would seem to countenance this doctrine. And, indeed, it has always appeared to me that this controversy has mainly arisen out of that case, and that this doctrine of the exclusive power of Congress, in the sense in which it is now contended for, is comparatively a modern one, and was never seriously put forward in any case until after the decision of *Gibbons* v. *Ogden*, although it has been abundantly discussed since. . . .

The court distinctly admits, on pages 205, 206, that a State may, in the execution of its police and health laws, make regulations of commerce, but which Congress may control. It is very clear, that, so far as these regulations are merely internal, and do not operate on foreign commerce, or commerce among the States, they are altogether independent of the power of the general government and cannot be controlled by it. The power of control, therefore, which the court speaks of, presupposes that they are regulations of foreign commerce, or commerce among the States. And if a State, with a view to its police or health, may make valid regulations of commerce which yet fall within the controlling power of the general government, it follows that the State is not absolutely prohibited from making regulations of foreign commerce within its own territorial limits, provided they do not come in conflict with the laws of Congress.

It has been said, indeed, that quarantine and health laws are passed by the States, not by virtue of a power to regulate commerce, but by virtue of their police powers, and in order to guard the lives and health of their citizens. This, however, cannot be said of the pilot laws, which are yet admitted to be equally valid. But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States. And when the validity of a State law making regulations of commerce is drawn into question in a judicial

tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interest and convenience of trade.

Upon this question, the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power. Are the States absolutely prohibited by the Constitution from making any regulations of foreign commerce? If they are, then such regulations are null and void, whatever may have been the motive of the State, or whatever the real object of the law; and it requires no law of Congress to control or annul them. Yet the case of *Gibbons* v. *Ogden*, 9 Wheat. 1, unquestionably affirms that such regulations may be made by a State, subject to the controlling power of Congress. And if this may be done, it necessarily follows that the grant of power to the Federal government is not an absolute and entire prohibition to the States, but merely confers upon Congress the superior and controlling power. And to expound the particular passages hereinbefore mentioned in the manner insisted upon by those who contend for the prohibition, would be to make different parts of that opinion inconsistent with each other, — an error which I am quite sure no one will ever impute to the very eminent jurist by whom the opinion was delivered.

And that the meaning of the court in the case of *Gibbons* v. *Ogden* was such as I have insisted on, is, I think, conclusively proved by the case of *Willson et al.* v. *The Blackbird Creek Marsh Company*, 2 Pet. 251, 252. In that case, a dam authorized by a State law had been erected across a navigable creek, so as to obstruct the commerce above it. And the validity of the State law was objected to, on the ground that it was repugnant to the Constitution of the United States, being a regulation of commerce. But the court says: "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," and then proceeds to decide that the law of Delaware could not "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."

The passages I have quoted show that the validity of the State law was maintained because it was not in conflict with a law of Congress, although it was confessedly within the limits of the power granted. And it is worthy of remark, that the counsel for the plaintiff in error in that case relied upon *Gibbons* v. *Ogden*, as conclusive authority to show the unconstitutionality of the State law, no doubt placing upon the passages I have mentioned the construction given to them by those who insist upon the exclusiveness of the power. This case, therefore, was brought fully to the attention of the court. And the decision in the last case, and the grounds on which it was placed, in my judgment, show most clearly what was intended in *Gibbons* v. *Ogden*; and that in

that case, as well as in the case of *Willson et al.* v. *The Blackbird Creek Marsh Company*, the court held that a State law was not invalid merely because it made regulations of commerce, but that its invalidity depended upon its repugnancy to a law of Congress passed in pursuance of the power granted. And it is worthy, also, of remark, that the opinion in both of these cases was delivered by Chief Justice Marshall, and I consider his opinion in the latter one as an exposition of what he meant to decide in the former.

In the case of the *City of New York* v. *Miln*, 11 Pet. 130, the question as to the power of the States upon this subject was very fully discussed at the bar. But no opinion was expressed upon it by the court, because the case did not necessarily involve it, and there was great diversity of opinion on the bench. Consequently the point was left open, and has never been decided in any subsequent case in this court.

For my own part, I have always regarded the cases of *Gibbons* v. *Ogden*, 9 Wheat. 1, and *Willson et al.* v. *The Blackbird Creek Marsh Company*, 2 Pet. 245, as abundantly sufficient to sanction the construction of the Constitution which in my judgment is the true one. Their correctness has never been questioned; and I forbear, therefore, to remark on the other cases in which this subject has been mentioned and discussed.

It may be well, however, to remark, that in analogous cases, where, by the Constitution of the United States, power over a particular subject is conferred on Congress without any prohibition to the States, the same rule of construction has prevailed. Thus in the case of *Houston* v. *Moore*, 5 Wheat. 1, it was held that the grant of power to the Federal government to provide for organizing, arming, and disciplining the militia, did not preclude the States from legislating on the same subject, provided the law of the State was not repugnant to the law of Congress. And every State in the Union has continually legislated on the subject, and I am not aware that the validity of these laws has ever been disputed, unless they came in conflict with the law of Congress.

The same doctrine was held in the case of *Sturges* v. *Crowninshield*, 4 Wheat. 196, under the clause in the Constitution which gives to Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States.

And in the case of *Chirac* v. *Chirac*, 2 Wheat. 269, which arose under the grant of power to establish a uniform rule of naturalization, where the court speak of the power of Congress as exclusive, they are evidently merely sanctioning the argument of counsel stated in the preceding sentence, which placed the invalidity of the naturalization under the law of Maryland, not solely upon the grant of power in the Constitution, but insisted that the Maryland law was "virtually repealed by the Constitution of the United States, and the Act of naturalization enacted by Congress." Undoubtedly it was so repealed, and the opposing counsel in the case did not dispute it. For the law of the United States covered every part of the Union, and there could not, therefore, by possibility, be a State law which did not come in conflict

with it. And, indeed, in this case, it might well have been doubted whether the grant in the Constitution itself did not abrogate the power of the States, inasmuch as the Constitution also provided that the citizens of each State should be entitled to all the privileges and immunities of citizens in the several States; and it would seem to be hardly consistent with this provision to allow any one State, after the adoption of the Constitution, to exercise a power which, if it operated at all, must operate beyond the territory of the State, and compel other States to acknowledge as citizens those whom it might not be willing to receive.

In referring to the opinions of those who sat here before us, it is but justice to them, in expounding their language, to keep in mind the character of the case they were deciding. And this is more especially necessary in cases depending upon the construction of the Constitution of the United States, where, from the great public interests which must always be involved in such questions, this court have usually deemed it advisable to state very much at large the principles and reasoning upon which their judgment was founded, and to refer to and comment on the leading points made by the counsel on either side in the argument. And I am not aware of any instance in which the court have spoken of the grant of power to the general government as excluding all State power over the subject, unless they were deciding a case where the power had been exercised by Congress, and a State law came in conflict with it. In cases of this kind, the power of Congress undoubtedly excludes and displaces that of the State; because, wherever there is collision between them, the law of Congress is supreme. And it is in this sense only, in my judgment, that it has been spoken of as exclusive in the opinions of the court to which I have referred. The case last mentioned is a striking example; for there the language of the court, affirming in the broadest terms the exclusiveness of the power, evidently refers to the argument of counsel stated in the preceding sentence.

Upon the whole, therefore, the law of New Hampshire is, in my judgment, 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.

The judgment of the State courts ought, therefore, in my opinion, to be affirmed in each of the three cases before us. . . .[1]

[1] The court consisted at this time of nine judges. They appear to have been unanimous in the result of affirming the judgment below. As to two of the judges, WAYNE and MCKINLEY, the report gives no indication of the grounds of their opinion.

CATRON, J., held, in the New Hampshire case, that the law was not defensible as a

police regulation, but was good as a State regulation of commerce. He said: "The [New Hampshire] law and the decision apply equally to foreign and to domestic spirits, as they must do on the principles assumed in support of the law. The assumption is, that the police power was not touched by the Constitution, but left to the States as the Constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State, and Congress cannot interfere. But this must always depend on facts, subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of commerce among the States. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the State that it no longer belongs to commerce, or, in other words, is not a commercial article, then the State power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the Federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of *Gibbons* v. *Ogden*, 9 Wheat. 1; *Brown* v. *The State of Maryland*, 12 Wheat. 419; *New York* v. *Miln*, 11 Pet. 102

"What, then, is the assumption of the State court? Undoubtedly, in effect, that the State had the power to declare what should be an article of lawful commerce in the particular State; and, having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of Congress could not interfere. The exclusive State power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the State laws, and asserted as the State policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the State is attempted to be created, in a case where it did not previously exist.

"If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the States, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated.

"Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the State police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated.

"The same process of legislation and reasoning adopted by the State and its courts could bring within the police power any article of consumption that a State might wish to exclude, whether it belonged to that which was drank, or to food and clothing; and with nearly equal claims to propriety, as malt liquors, and the produce of fruits other than grapes stand on no higher grounds 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 in this connection it may be proper to say, that the three States, whose laws are now before us, had in view an entire prohibition from use of spirits and wines of every description, and that their main scope and object is to enforce exclusive temperance as a policy of State, under the belief that such a policy will best subserve the interests of society; and that to this end, more than to any other, has the sovereign power of these States been exerted; for it was admitted, on the argument, that no licenses are issued, and that exclusion exists, so far as the laws can produce the result, — at least, in some of the States, —

and that this was the policy of the law. For these reasons, I think the case cannot depend on the reserved power in the State to regulate its own police. . . .

"Congress has stood by for nearly sixty years, and seen the States regulate the commerce of the whole country, more or less, at the ports of entry and at all their borders, without objection; and for this court now to decide that the power did not exist in the States, and that all they had done in this respect was void from the beginning, would overthrow and annul entire codes of State legislation on the particular subject. We would, by our decision, expunge more State laws and city corporate regulations than Congress is likely to make in a century on the same subject, and on no better assumption than that Congress and the State legislatures had been altogether mistaken as to their respective powers, for fifty years and more. If long usage, general acquiescence, and the absence of complaint, can settle the interpretation of the clause in question, then it should be deemed as settled in conformity to the usage by the courts. . . .

"In proceeding on this moderate, and, as I think, prudent and proper construction, all further difficulty will be obviated in regard to the admission of property into the States; this the States may regulate, so they do not tax; and if the States (or any one of them) abuse the power, Congress can interfere at pleasure, and remedy the evil; nor will the States have any right to complain. And so the courts can interfere if the States assume to exercise an excess of power, or act on a subject of commerce that is regulated by Congress. As already stated, it is hardly possible for Congress to deal at all with the details of this complicated matter.

"The case before us presents a fair illustration of the difficulty; all vendors of spirits produced in New Hampshire, are compelled to be licensed before they can lawfully sell; this is not controverted, and cannot be. To hold that the State license law was void, as respects spirits coming in from other States as articles of commerce, would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require; the consequence of which would be, that the dealers in New Hampshire would sell only spirits produced in other States, and that the products of New Hampshire would find an unrestrained market in the neighboring States having similar license laws to those of New Hampshire."

As regards the Massachusetts and Rhode Island cases, CATRON, J., disposed of them by applying the principle of *Brown* v. *Maryland*, that the article had ceased to have the character of an "import."

NELSON, J., simply "concurred in the opinions delivered by the CHIEF JUSTICE and MR. JUSTICE CATRON."

WOODBURY, J., also thought that the power of Congress was not exclusive, but the ground of his opinion in this case was that these were not regulations of foreign or interstate commerce, but police regulations, not conflicting with any Act of Congress, — "regulations of the police or internal commerce of the State itself." "The idea . . . that a prohibition to sell would be tantamount to a prohibition to import, does not seem to me either logical or founded in fact. For even under a prohibition to sell, a person could import, as he often does, for his own consumption and that of his family and plantations; and also, if a merchant, extensively engaged in commerce, often does import articles with no view of selling them here, but of storing them for a higher and more suitable market." — p. 620. "The apprehension that the States, by these license systems, are likely to impair the freedom of trade between each other, is hardly verified by the experience of a half-century. Their conduct has been so liberal and just thus far on this matter, as never to have called for the legislation of Congress, which it clearly has the power to make in respect to the commerce between the States, whenever any occasion shall require its interposition to check imprudences or abuses on the part of any one of them towards the citizens of another." — p. 626.

All these laws are to be supported, MR. JUSTICE WOODBURY declared, on the ground of "the reserved rights of the States." "The power to forbid the sale of things is surely as extensive, and rests on as broad principles of public security and sound morals, as that to exclude persons. And yet who does not know that slaves have been prohibited admittance by many of our States, whether coming from their neighbors or

THE PASSENGER CASES.

SMITH *v.* TURNER. NORRIS *v.* BOSTON.

SUPREME COURT OF THE UNITED STATES. 1848.

[7 *Howard*, 283; s. c. 17 *Curtis's Decisions*, 122.][1]

THESE were writs of error, the first to the Court for the Trial of Impeachments, &c., of the State of New York, the second, to the Supreme Judicial Court of the State of Massachusetts, under the 25th section of the Judiciary Act of 1789, 1 Stats. at Large, 85. The cases will be found succinctly but clearly stated in the opinions of JUSTICE M'LEAN, on page 122, of JUSTICE CATRON, on page 167, and of JUSTICE GRIER on page 185.

The case of *Smith* v. *Turner* was argued at December term, 1845, by *Webster* and *D. B. Ogden*, for the plaintiff in error, and by *Willis Hall* and *John Van Buren*, for the defendant in error; at December term, 1847, by the same counsel upon each side; and at December term, 1848, by *John Van Buren*, for the defendant in error.

The case of *Norris* v. *The City of Boston*, was argued at December term, 1846, by *Webster* and *Choate*, for the plaintiff in error, and by *Davis*, for the defendant in error; at December term, 1847, by *Choate*,

abroad? And which of them cannot forbid their soil from being polluted by incendiaries and felons from any quarter? "— p. 629.

MCLEAN, J., supported all of the State laws as being police regulations, not regulations of commerce, and not in conflict with any law of Congress. "When in the appropriate exercise of these Federal and State powers, contingently and incidentally, their lines of action run into each other; if the State power be necessary to the preservation of the morals, the health, or safety of the community, it must be maintained. But this exigency is not to be founded on any notions of commercial policy, or sustained by a course of reasoning about that which may be supposed to affect, in some degree, the public welfare. The import must be of such a character as to produce, by its admission or use, a great physical or moral evil." — p. 592.

GRIER, J., "concurred mainly" with MCLEAN, J., and held that "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." — p. 631. He thought that the question whether Congress had an exclusive power to regulate interstate and foreign commerce was not necessarily involved. "All these things are done . . . because police laws for the preservation of health, prevention of crime, and protection of the public welfare, must of necessity have full and free operation, according to the exigency which requires their interference." — p. 632.

DANIEL, J., held all the laws to be legitimate regulations of the State's internal affairs, — the mere regulation of sales. He denied the doctrine of *Brown* v. *Maryland*, as to the right of the importer to sell what he had brought in, — herein differing, as he declared, from "the majority of the judges."

For a careful abstract of the opinions in this case, see the dissenting opinion of MR. JUSTICE GRAY, in *Leisy* v. *Hardin*, 135 U. S. 135–147; *infra*, p. 2104.

Both the CHIEF JUSTICE and MR. JUSTICE WOODBURY subsequently said (*The Passenger Cases*, 7 Howard, pp. 470 and 559), that a majority of the judges in *The License Cases*, held that the power of Congress was not exclusive. — ED.

[1] The case is taken from Curtis's Decisions. — ED.

for the plaintiff in error; and at December term, 1848, by *Webster* and *J. Prescott Hall*, for the plaintiff in error, and by *Davis* and *Ashmun*, for the defendant in error.

SMITH *v.* TURNER.

M'LEAN, J. Under the general denomination of health laws in New York, and by the 7th section of an Act relating to the marine hospital, it is provided, that "the health commissioners shall demand and be entitled to receive, and in case of neglect or refusal to pay, shall sue for and recover, in his name of office, the following sums from the master of every vessel that shall arrive in the port of New York, namely: 1. From the master of every vessel from a foreign port, for himself and each cabin passenger, $1.50; for each steerage passenger, mate, sailor, or mariner, $1. 2. From the master of each coasting vessel, for each person on board, $0.25; but no coasting vessel from the States of New Jersey, Connecticut, and Rhode Island shall pay for more than one voyage in each month, computing from the first voyage in each year."

The 8th section provides that the money so received, shall be denominated "hospital moneys." And the 9th section gives "each master paying hospital moneys, a right to demand and recover from each person the sum paid on his account." The 10th section declares any master, who shall fail to make the above payments within twenty-four hours after the arrival of his vessel in the port, shall forfeit the sum of $100. By the 11th section, the commissioners of health are required to account annually to the comptroller of the State for all moneys received by them for the use of the marine hospital; "and if such money shall, in any one year, exceed the sum necessary to defray the expenses of their trust, including their own salaries, and exclusive of such expenses as are to be borne and paid as a part of the contingent charges of the city of New York, they shall pay over such surplus to the treasurer of the Society for the Reformation of Juvenile Delinquents in the city of New York, for the use of the society."

The plaintiff in error was master of the British ship "Henry Bliss," which vessel touched at the port of New York in the month of June, 1841, and landed 290 steerage passengers. The defendant in error brought an action of debt on the statute against the plaintiff, to recover $1 for each of the above passengers. A demurrer was filed, on the ground that the statute of New York was a regulation of commerce, and in conflict with the Constitution of the United States. The Supreme Court of the State overruled the demurrer, and the Court of Errors affirmed the judgment. This brings before this court, under the 25th section of the Judiciary Act, the constitutionality of the New York statute.

I will consider the case under two general heads: 1. Is the power of Congress to regulate commerce an exclusive power? 2. Is the statute of New York a regulation of commerce? . . .

Whether I consider the nature and object of the commercial power, the class of powers with which it is placed, the decision of this court in the case of *Gibbons* v. *Ogden*, 9 Wheat. 1, reiterated in *Brown* v. *The State of Maryland*, 12 Wheat. 419, and often reasserted by MR. JUSTICE STORY, who participated in those decisions, I am brought to the conclusion that the power "to regulate commerce with foreign nations, and among the several States," by the Constitution, is exclusively vested in Congress.

I come now to inquire, under the second general proposition, Is the statute of New York a regulation of foreign commerce?

All commercial action within the limits of a State, and which does not extend to any other State or foreign country, is exclusively under State regulation. Congress have no more power to control this than a State has to regulate commerce "with foreign nations and among the several States." And yet Congress may tax the property within a State, of every description, owned by its citizens, on the basis provided in the Constitution, the same as a State may tax it. But if Congress should impose a tonnage duty on vessels which ply between ports within the same State, or require such vessels to take out a license, or impose a tax on persons transported in them, the act would be unconstitutional and void. But foreign commerce and commerce among the several States, the regulation of which, with certain constitutional exceptions, is exclusively vested in Congress, no State can regulate.

In giving the commercial power to Congress, the States did not part with that power of self-preservation which must be inherent in every organized community. They may guard against the introduction of anything which may corrupt the morals, or endanger the health or lives of their citizens. Quarantine or health laws have been passed by the States, and regulations of police for their protection and welfare. The inspection laws of a State apply chiefly to exports, and the State may lay duties and imposts on imports or exports, to pay the expense of executing those laws. But a State is limited to what shall be "absolutely necessary" for that purpose. And still further to guard against the abuse of this power, it is declared that "the net produce of all duties and imposts laid by a 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 Congress."

The cautious manner in which the exercise of this commercial power by a State is guarded, shows an extreme jealousy of it by the convention; and no doubt the hostile regulations of commerce by the States, under the confederation, had induced this jealousy. No one can read this provision, and the one which follows it in relation to tonnage duties, without being convinced that they cover, and were intended to cover, the entire subject of foreign commerce. A criticism on the term "import," by which to limit the obvious meaning of this paragraph, is scarcely admissible in construing so grave an instrument.

Commerce is defined to be "an exchange of commodities." But this definition does not convey the full meaning of the term. It includes "navigation and intercourse." That the transportation of passengers is a part of commerce, is not now an open question. In *Gibbons* v. *Ogden*, this court say: "No clear distinction is perceived between the powers to regulate vessels in transporting men for hire, and property for hire." The provision of the Constitution, that "the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by Congress prior to the year 1808," is a restriction on the general power of Congress to regulate commerce. In reference to this clause, this court say, in the above case: "This section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men who pass from place to place voluntarily, and to those who pass involuntarily."

To encourage foreign emigration was a cherished policy of this country at the time the Constitution was adopted. As a branch of commerce, the transportation of passengers has always given a profitable employment to our ships, and, within a few years past, has required an amount of tonnage nearly equal to that of imported merchandise. Is this great branch of our commerce left open to State regulation on the ground that the prohibition refers to an import, and a man is not an import?

Pilot laws, enacted by the different States, have been referred to as commercial regulations. That these laws do regulate commerce, to a certain extent, is admitted; but from what authority do they derive their force? Certainly, not from the States. By the fourth section of the Act of the 7th of August, 1789, 1 Stats. at Large, 54, it is provided: "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." These State laws, by adoption, are the laws of Congress, and as such, effect is given to them. So the laws of the States which regulate the practice of their courts, are adopted by Congress to regulate the practice of the Federal courts. But these laws, so far as they are adopted, are as much the laws of the United States, and it has often been so held, as if they had been specially enacted by Congress. A repeal of them by the State, unless future changes in the Acts be also adopted, does not affect their force in regard to Federal action.

In the above instances, it has been deemed proper for Congress to legislate, by adopting the law of the States. And it is not doubted that this has been found convenient to the public service. Pilot laws were in force in every commercial State on the seaboard when the Constitution was adopted; and on the introduction of a new system, it was prudent to preserve, as far as practicable, the modes of proceeding with which the people of the different States were familiar. In regard

to pilots, it was not essential that the laws should be uniform, — their duties could be best regulated by an authority acquainted with the local circumstances under which they were performed; and the fact that the same system is continued, shows that the public interest has required no change.

No one has yet drawn the line clearly, because, perhaps, no one can draw it, between the commercial power of the Union, and the municipal power of a State. Numerous cases have arisen, involving these powers, which have been decided, but a rule has necessarily been observed as applicable to the circumstances of each case. And so must every case be adjudged. A State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property owned by its citizens. A State may tax the stages in which the mail is transported; but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce. And yet, in both instances, the tax on the property in some degree affects its use.

An inquiry is made whether Congress, under "the power to regulate commerce among the several States," can impose a tax for the use of canals, railroads, turnpike roads, and bridges, constructed by a State, or its citizens? I answer, that Congress has no such power. The United States cannot use any one of these works without paying the customary tolls. The tolls are imposed, not as a tax, in the ordinary sense of that term, but as compensation for the increased facility afforded by the improvement.

The Act of New York now under consideration is called a health law. It imposes a tax on the master and every cabin passenger of a vessel from a foreign port of $1.50; and of $1 on the mate, each steerage passenger, sailor, or mariner. And the master is made responsible for the tax, he having a right to exact it of the others. The funds so collected are denominated hospital moneys, and are applied to the use of the marine hospital; the surplus to be paid to the treasurer of the Society for the Reformation of Juvenile Delinquents in the city of New York, for the use of that society.

To call this a health law would seem to be a misapplication of the term. It is difficult to perceive how a health law can be extended to the reformation of juvenile offenders. On the same principle, it may be made to embrace all offenders, so as to pay the expenses incident to an administration of the criminal law. And with the same propriety, it may include the expenditures of any branch of the civil administration of the city of New York, or of the State. In fact, I can see no principle on which the fund can be limited, if it may be used as authorized by the Act. The amount of the tax is as much within the discretion of the Legislature of New York as the objects to which it may be applied.

It is insisted, that if the Act, as regards the hospital fund, be within the power of the State, the application of a part of the fund to other objects, as provided in the Act, cannot make it unconstitutional. This

argument is unsustainable. If the State has power to impose a tax to defray the necessary expenses of a health regulation, and this power being exerted, can the tax be increased so as to defray the expenses of the State government? This is within the principle asserted.

The case of *The City of New York* v. *Miln*, 11 Pet. 102, is relied on with great confidence, as sustaining the Act in question. As I assented to the points ruled in that case, consistency, unless convinced of having erred, will compel me to support the law now before us, if it be the same in principle. The law in Miln's case required that "the master or commander of any ship or other vessel arriving at the port of New York shall, within twenty-four hours after his arrival, make a report, in writing, on oath or affirmation, to the mayor of the city of New York, of the name, place of birth, and last legal settlement, age, and occupation of every person brought as a passenger; and of all persons permitted to land at any place during the voyage, or go on board of some other vessel, with the intention of proceeding to said city; under the penalty on such master or commander, and the owner or owners, consignee or consignees, of such ship or vessel, severally and respectively, of $75 for each individual not so reported." And the suit was brought against Miln, as consignee of the ship "Emily," for the failure of the master to make report of the passengers on board of his vessel.

In their opinion, this court say: "The law operated on the territory of New York, over which that State possesses an acknowledged and undisputed jurisdiction for every purpose of internal regulation;" and "on persons whose rights and duties are rightfully prescribed and controlled by the laws of the respective States, within whose territorial limits they are found." This law was considered as an internal police regulation, and as not interfering with commerce.

A duty was not laid upon the vessel or the passengers, but the report only was required from the master, as above stated. Now, every State has an unquestionable right to require a register of the names of the persons who come within it to reside temporarily or permanently. This was a precautionary measure to ascertain the rights of the individuals, and the obligations of the public, under any contingency which might occur. It opposed no obstruction to commerce, imposed no tax or delay, but acted upon the master, owner, or consignee of the vessel, after the termination of the voyage, and when he was within the territory of the State, mingling with its citizens, and subject to its laws.

But the health law, as it is called, under consideration, is altogether different in its objects and means. It imposes a tax or duty on the passengers, officers, and sailors, holding the master responsible for the amount at the immediate termination of the voyage, and, necessarily, before the passengers have set their feet on land. The tax on each passenger, in the discretion of the legislature, might have been $5 or $10, or any other sum, amounting even to a prohibition of the transportation of passengers; and the professed object of the tax is as well for the benefit of juvenile offenders as for the marine hospital. And it

is not denied that a considerable sum thus received has been applied to the former object. The amount and application of this tax are only important to show the consequences of the exercise of this power by the States. The principle involved is vital to the commercial power of the Union.

The transportation of passengers is regulated by Congress. More than two passengers for every five tons of the ship or vessel are prohibited, under certain penalties; and the master is required to report to the collector a list of the passengers from a foreign port, stating the age, sex, and occupation of each, and the place of their destination. In England, the same subject is regulated by Act of Parliament, and the same thing is done, it is believed, in all commercial countries. If the transportation of passengers be a branch of commerce, of which there can be no doubt, it follows that the Act of New York, in imposing this tax, is a regulation of commerce. It is a tax upon a commercial operation, — upon what may, in effect, be called an import. In a commercial sense, no just distinction can be made, as regards the law in question, between the transportation of merchandise and passengers. For the transportation of both, the ship-owner realizes a profit, and each is the subject of a commercial regulation by Congress. When the merchandise is taken from the ship, and becomes mingled with the property of the people of the State, like other property, it is subject to the local law; but until this shall take place, the merchandise is an import, and is not subject to the taxing power of the State, and the same rule applies to passengers. When they leave the ship and mingle with the citizens of the State, they become subject to its laws.

In *Gibbons* v. *Ogden*, the court held that the Act of laying "duties or imposts on imports or exports" is derived from the taxing power; and they lay much stress on the fact that this power is given in the same sentence as the power to "lay and collect taxes." "The power," they say, "to regulate commerce is given" in a separate clause, "as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred;" and they remark, that, had not the States been prohibited, they might, under the power to tax, have levied "duties on imports or exports." 9 Wheat. 201.

The Constitution requires that all "duties and imposts shall be uniform," and declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." Now, it is inexplicable to me how thirteen or more independent States could tax imports under these provisions of the Constitution. The tax must be uniform throughout the Union; consequently, the exercise of the power by any one State would be unconstitutional as it would destroy the uniformity of the tax. To secure this uniformity was one of the motives which led to the adoption of the Constitution. The want of it produced collisions in the commercial regulations of the States. But if, as is contended, these provisions of the Constitution operate only on the Federal government, and the States are free to regulate

commerce by taxing its operations in all cases where they are not expressly prohibited, the Constitution has failed to accomplish the great object of those who adopted it.

These provisions impose restrictions on the exercise of the commercial power, which was exclusively vested in Congress; and it is as binding on the States as any other exclusive power with which it is classed in the Constitution.

It is immaterial under what power duties on imports are imposed. That they are the principal means by which commerce is regulated, no one can question. Whether duties shall be imposed with the view to protect our manufactures, or for purposes of revenue only, has always been a leading subject of discussion in Congress; and also what foreign articles may be admitted free of duty. The force of the argument, that things untouched by the regulating power have been equally considered with those of the same class on which it has operated, is not admitted by the counsel for the defendant. But does not all experience sustain the argument? A large amount of foreign articles brought into this country for several years, have been admitted free of duty. Have not these articles been considered by Congress? The discussion in both Houses of Congress, the report by the committees of both, and the laws that have been enacted, show that they have been duly considered.

Except to guard its citizens against diseases and paupers, the municipal power of a State cannot prohibit the introduction of foreigners brought to this country under the authority of Congress. It may deny to them a residence, unless they shall give security to indemnify the public should they become paupers. The slave States have the power, as this court held in *Groves* v. *Slaughter*, to prohibit slaves from being brought into them as merchandise. But this was on the ground that such a prohibition did not come within the power of Congress "to regulate commerce among the several States." It is suggested that, under this view of the commercial power, slaves may be introduced into the free States. Does any one suppose that Congress can ever revive the slave-trade? And if this were possible, slaves, thus introduced, would be free.

As early as May 27, 1796, 1 Stats. at Large, 474, Congress enacted, that "the President be authorized to direct the revenue-officers commanding forts and revenue cutters, to aid in the execution of quarantine, and also in the execution of the health laws of the States respectively." And by the Act of Feb. 25, 1799, 1 Stats. at Large, 619, which repealed the above Act, more enlarged provisions were enacted, requiring the revenue-officers of the United States to conform to and aid in the execution of the quarantine and health laws of the States. In the first section of this law there is a proviso that "nothing therein shall enable any State to collect a duty of tonnage or impost without the consent of Congress." A proviso limits the provisions of the Act into which it is introduced. But this proviso may be considered as not restricted to

this purpose. It shows with what caution Congress guarded the commercial power, and it is an authoritative provision against its exercise by the States. An impost, in its enlarged sense, means any tax or tribute imposed by authority, and applies as well to a tax on persons as to a tax on merchandise. In this sense it was no doubt used in the above Act. Any other construction would be an imputation on the intelligence of Congress.

If this power to tax passengers from a foreign country belongs to a State, a tax, on the same principle, may be imposed on all persons coming into or passing through it from any other State of the Union. And the New York statute does in fact lay a tax on passengers on board of any coasting-vessel which arrives at the port of New York, with an exception of passengers in vessels from New Jersey, Connecticut, and Rhode Island, who are required to pay for one trip in each month. All other passengers pay the tax every trip.

If this may be done in New York, every other State may do the same, on all the lines of our internal navigation. Passengers on a steamboat which plies on the Ohio, the Mississippi, or on any of our other rivers, or on the lakes, may be required to pay a tax, imposed at the discretion of each State within which the boat shall touch. And the same principle will sustain a right in every State to tax all persons who shall pass through its territory on railroad cars, canal boats, stages, or in any other manner. This would enable a State to establish and enforce a non-intercourse with every other State.[1]

The ninth section of the first article of the Constitution declares: "Nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another." But if the commercial power of the Union over foreign commerce does not exempt passengers brought into the country from State taxation, they can claim no exemption under the exercise of the same power among the States. In *McCulloch* v. *The State of Maryland*, 4 Wheat. 431, this court say: "That there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, is a proposition not to be denied."

The officers and crew of the vessel are as much the instruments of commerce as the ship, and yet they are taxed under this health law of New York as such instruments. The passengers are taxed as passengers, being the subjects of commerce from a foreign country. By the fourteenth article of the treaty of 1794, 8 Stats. at Large, 116, with England, it is stipulated that the people of each country may freely come, with their ships and cargoes, to the other, subject only to the laws and statutes of the two countries respectively. The statutes here referred to are those of the Federal government, and not of the States. The general government only is known in our foreign intercourse.

[1] See *Crandall* v. *Nevada*, *supra*, p. 1364. — Ed.

By the forty-sixth section of the Act of March, 1779, 1 Stats. at Large, 661, the wearing apparel and other personal baggage, and the tools or implements of a mechanical trade, from a foreign port, are admitted free of duty. These provisions of the treaty and of the Act are still in force, and they have a strong bearing on this subject. They are, in effect, repugnant to the Act of New York.

It is not doubted that a large portion, perhaps nine-tenths, of the foreign passengers landed at the port of New York pass through the State to other places of residence. At such places, therefore, pauperism must be increased much more by the influx of foreigners than in the city of New York. If, by reason of commerce, a burden is thrown upon our commercial cities, Congress should make suitable provisions for their relief. And I have no doubt this will be done.

The police power of the State cannot draw within its jurisdiction objects which lie beyond it. It meets the commercial power of the Union in dealing with subjects under the protection of that power, yet it can only be exerted under peculiar emergencies, and to a limited extent. In guarding the safety, the health, and morals of its citizens, a State is restricted to appropriate and constitutional means. If extraordinary expense be incurred, an equitable claim to an indemnity can give no power to a State to tax objects not subject to its jurisdiction.

The Attorney-General of New York admitted that if the commercial power were exclusively vested in Congress, no part of it can be exercised by a State. The soundness of this conclusion is not only sustainable by the decisions of this court, but by every approved rule of construction. That the power is exclusive seems to be as fully established as any other power under the Constitution which has been controverted.

A tax or duty upon tonnage, merchandise, or passengers is a regulation of commerce, and cannot be laid by a State, except under the sanction of Congress and for the purposes specified in the Constitution. On the subject of foreign commerce, including the transportation of passengers, Congress have adopted such regulations as they deemed proper, taking into view our relations with other countries. And this covers the whole ground. The Act of New York which imposes a tax on passengers of a ship from a foreign port, in the manner provided, is a regulation of foreign commerce, which is exclusively vested in Congress; and the Act is, therefore, void.

Norris *v.* City of Boston.

This is a writ of error, which brings before the court the judgment of the Supreme Court of the State of Massachusetts.

"An Act relating to alien passengers," passed the 20th of April, 1837, by the Legislature of Massachusetts, contains the following provisions: —

"§ 1. When any vessel shall arrive at any port or harbor within this State, from any port or place without the same, with alien pas-

sengers on board, the officer or officers whom the mayor and aldermen of the city, or the selectmen of the town, where it is proposed to land such passengers, are hereby authorized and required to appoint, shall go on board such vessels and examine into the condition of said passengers.

"§ 2. If, on such examination, there shall be found, among said passengers, any lunatic, idiot, maimed, aged, or infirm person, incompetent, in the opinion of the officer so examining, to maintain themselves, or who have been paupers in any other country, no such alien passenger shall be permitted to land, until the master, owner, consignee, or agent of such vessel shall have given to such city or town a bond in the sum of $1,000, with good and sufficient security, that no such lunatic or indigent passenger shall become a city, town, or State charge within ten years from the date of said bond.

"§ 3. No alien passenger, other than those spoken of in the preceding section, shall be permitted to land, until the master, owner, consignee, or agent of such vessel shall pay to the regularly appointed boarding officer the sum of two dollars for each passenger so landing; and the money so collected shall be paid into the treasury of the city or town, to be appropriated, as the city or town may direct, for the support of foreign paupers."

The plaintiff being an inhabitant of St. John's, in the Province of New Brunswick and Kingdom of Great Britain, arriving in the port of Boston, from that place, in command of a schooner called "The Union Jack," which had on board nineteen alien passengers, for each of which two dollars were demanded of the plaintiff, and paid by him, on protest that the exaction was illegal. An action being brought, to recover back this money, against the city of Boston, in the Court of Common Pleas, under the instructions of the court, the jury found a verdict for the defendant, on which judgment was entered, and which was affirmed on a writ of error to the Supreme Court.

Under the first and second sections of the above Act, the persons appointed may go on board of a ship from a foreign port, which arrives at the port of Boston with alien passengers on board, and examine whether any of them are lunatics, idiots, maimed, aged, or infirm, incompetent to maintain themselves, or have been paupers in any other country, and not permit such persons to be put on shore, unless security shall be given that they shall not become a city, town, or State charge. This is the exercise of an unquestionable power in the State to protect itself from foreign paupers and other persons who would be a public charge; but the nineteen alien passengers for whom the tax was paid did not come, nor any one of them, within the second section. The tax of two dollars was paid by the master for each of these passengers before they were permitted to land. This according to the view taken in the above case of *Smith* v. *Turner*, was a regulation of commerce, and not being within the power of the State, the Act imposing the tax is void.

The fund thus raised was no doubt faithfully applied for the support

of foreign paupers, but the question is one of power, and not of policy. The judgment of the Supreme Court, in my opinion, should be reversed, and this cause be remanded to that court, with instructions to carry out the judgment of this court.

Norris *v.* City of Boston, and Smith *v.* Turner.

Wayne, J. I agree with Mr. Justice M'Lean, Mr. Justice Catron, Mr. Justice M'Kinley, and Mr. Justice Grier, that the laws of Massachusetts and New York, so far as they are in question in these cases, are unconstitutional and void. I would not say so if I had any, the least, doubt of it; for, I think it obligatory upon this court, when there is a doubt of the unconstitutionality of a law, that its judgment should be in favor of its validity. I have formed my conclusions in these cases with this admission constantly in mind.

Before stating, however, what they are, it will be well for me to say that the four judges and myself, who concur in giving the judgment in these cases, do not differ in the grounds upon which our judgment has been formed, except in one particular, in no way at variance with our united conclusion; and that is, that a majority of us do not think it necessary in these cases to reaffirm, with our brother M'Lean, what this court has long since decided, that the constitutional power to regulate "commerce with foreign nations, and among the several States, and with the Indian tribes," is exclusively vested in Congress, and that no part of it can be exercised by a State.

I believe it to be so, just as it is expressed in the preceding sentence. And in the sense in which those words were used by this court in the case of *Gibbons* v. *Ogden*, 9 Wheat. 198. All that was decided in that case remains unchanged by any subsequent opinion or judgment of this court. Some of the judges of it have, in several cases, expressed opinions that the power to regulate commerce is not exclusively vested in Congress. But they are individual opinions, without judicial authority to overrule the contrary conclusion, as it was given by this court in *Gibbons* v. *Ogden*.

Still, I do not think it necessary to reaffirm that position in these cases as a part of our judgments upon them. . . .

I have been more particular in speaking of the opinions of Messrs. Justices M'Lean and Catron than I would otherwise have been, and of the points of agreement between them, and of the concurrence of Messrs. Justices M'Kinley and Grier and myself in all in which both opinions agree, because a summary may be made from them of what the court means to decide in the cases before us. In my view, after a very careful perusal of those opinions, and of those also of Mr. Justice M'Kinley and Mr. Justice Grier, I think the court means now to decide: —

1. That the Acts of New York and Massachusetts imposing a tax upon passengers, either foreigners or citizens, coming into the ports in

those States, either in foreign vessels or vessels of the United States, from foreign nations or from ports in the United States, are unconstitutional and void, being in their nature regulations of commerce contrary to the grant in the Constitution to Congress of the power to regulate commerce with foreign nations and among the several States.

2. That the States of this Union cannot constitutionally tax the commerce of the United States for the purpose of paying any expense incident to the execution of their police laws; and that the commerce of the United States includes an intercourse of persons, as well as the importation of merchandise.

3. That the Acts of Massachusetts and New York in question in these cases conflict with treaty stipulations existing between the United States and Great Britain, permitting the inhabitants of the two countries "freely and securely to come, with their ships and cargoes, to all places, ports, and rivers in the territories of each country to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of said territories, respectively; also, to hire and occupy houses and warehouses for the purposes of their commerce, and generally the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries respectively;" and that said laws are therefore unconstitutional and void.

4. That the Congress of the United States having by sundry Acts, passed at different times, admitted foreigners into the United States with their personal luggage and tools of trade, free from all duty or imposts, the Acts of Massachusetts and New York, imposing any tax upon foreigners or immigrants for any purpose whatever, whilst the vessel is *in transitu* to her port of destination, though said vessel may have arrived within the jurisdictional limits of either of the States of Massachusetts and New York, and before the passengers have been landed, are in violation of said Acts of Congress, and therefore unconstitutional and void.

5. That the Acts of Massachusetts and New York, so far as they impose any obligation upon the owners or consignees of vessels, or upon the captains of vessels or freighters of the same, arriving in the ports of the United States within the said States, to pay any tax or duty of any kind whatever, or to be in any way responsible for the same, for passengers arriving in the United States, or coming from a port in the United States, are unconstitutional and void, being contrary to the constitutional grant to Congress of the power to regulate commerce with foreign nations and among the several States, and to the legislation of Congress under the said power, by which the United States have been laid off into collection districts, and ports of entry established within the same, and commercial regulations prescribed, under which vessels, their cargoes and passengers, are to be admitted into the ports of the United States, as well from abroad as from other

ports of the United States. That the Act of New York now in question, so far as it imposes a tax upon passengers arriving in vessels from other ports in the United States, is properly in this case before this court for construction, and that the said tax is unconstitutional and void. That the ninth section of the first article of the Constitution includes within it the migration of other persons, as well as the importation of slaves, and in terms recognizes that other persons, as well as slaves, may be the subjects of importation and commerce.

6. That the fifth clause of the ninth section of the first article of the Constitution, which declares that "no prefcrence shall be given by any regulation of commerce or revenue to the ports of one State over those of another State; nor shall vessels bound to or from one State, be obliged to enter clear, or pay duties in another," is a limitation upon the power of Congress to regulate commerce for the purpose of producing entire commercial equality within the United States, and also a prohibition upon the States to destroy such equality by any legislation prescribing a condition upon which vessels bound from one State, shall enter the ports of another State.

7. That the Acts of Massachusetts and New York, so far as they impose a tax upon passengers, are unconstitutional and void, because each of them so far conflicts with the first clause of the eighth section of the first article of the Constitution, which enjoins that all duties, imposts, and excises shall be uniform throughout the United States; because the constitutional uniformity enjoined in respect to duties and imposts is as real and obligatory upon the States, in the absence of all legislation by Congress, as if the uniformity had been made by the legislation of Congress; and that such constitutional uniformity is interfered with and destroyed by any State imposing any tax upon the intercourse of persons from State to State, or from foreign countries to the United States.

8. That the power in Congress to regulate commerce with foreign nations and among the several States, includes navigation upon the high seas, and in the bays, harbors, lakes, and navigable waters within the United States, and that any tax by a State in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the aforesaid grant.

9. That the States of this Union may, in the exercise of their police powers, pass quarantine and health laws, interdicting vessels coming from foreign ports, or ports within the United States, from landing passengers and goods, prescribe the places and time for vessels to quarantine, and impose penalties upon persons for violating the same; and that such laws, though affecting commerce in its transit, are not regulations of commerce prescribing terms upon which merchandise and persons shall be admitted into the ports of the United States, but precautionary regulations to prevent vessels engaged in commerce from introducing disease into the ports to which they are bound; and that the States may, in the exercise of such police power, without any violation of the

power in Congress to regulate commerce, exact from the owner or consignee of a quarantined vessel, and from the passengers on board of her, such fees as will pay to the State the cost of their detention and of the purification of the vessel, cargo, and apparel of the persons on board.

[The dissenting opinions of TANEY, C. J. (with whom NELSON, J., concurred), and JUSTICES DANIEL and WOODBURY are omitted].[1]

COOLEY *v.* THE BOARD OF WARDENS OF THE PORT OF PHILADELPHIA.

SUPREME COURT OF THE UNITED STATES. 1851.

[12 *Howard*, 299; s. c. 19 *Curtis's Decisions*, 143.][2]

THE case is stated in the opinion of the court.

Morris and *Tyson*, for the plaintiffs; *St. George Tucker Campbell* and *Dallas*, *contra*.

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.

[1] In his opinion, TANEY, C. J., said: "It is argued in support of the plaintiff that . . . the grant to Congress of the power to regulate commerce is of itself a prohibition to the States to make any regulation upon the subject. The construction of this article of the Constitution was fully discussed in the opinions delivered in the license cases, reported in 5 How. 504. I do not propose to repeat here what I then said, or what was said by other members of the court with whom I agreed. It will appear by the report of the case, that five of the justices of this court, being a majority of the whole bench, held that the grant of the power to Congress was not a prohibition to the States to make such regulations as they deemed necessary, in their own ports and harbors, for the convenience of trade or the security of health; and that such regulations were valid, unless they came in conflict with an Act of Congress. After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." — ED.

[2] The case is taken from Curtis's Decisions. — ED.

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, etc., 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, etc.," 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.

It is urged that the second section of the Act of the Legislature of Pennsylvania, of the 11th of June, 1832, proves that the State had other objects in view than the regulation of pilotage. That section is as follows: "And be it further enacted, by the authority aforesaid, that from and after the first day of July next, no health-fee or half-pilotage shall be charged on any vessel engaged in the Pennsylvania coal trade."

It must be remembered, that the fair objects of a law imposing half-pilotage when a pilot is not received, may be secured, and at the same time some classes of vessels exempted from such charge. Thus, the very section of the Act of 1803, now under consideration, does not apply to coasting vessels of less burden than seventy-five tons, nor to those bound to, or sailing from, a port in the river Delaware. The purpose of the law being to cause masters of such vessels as generally need a pilot, to employ one, and to secure to the pilots a fair remuneration for cruising in search of vessels, or waiting for employment in port, there is an obvious propriety in having reference to the number, size, and nature of employment of vessels frequenting the port; and it will be found, by an examination of the different systems of these regulations, which have from time to time been made in this and other countries, that the legislative discretion has been constantly exercised in making discriminations, founded on differences both in the character of the trade, and the tonnage of vessels engaged therein.

We do not perceive anything in the nature or extent of this particular discrimination in favor of vessels engaged in the coal trade, which would enable us to declare it to be other than a fair exercise of legislative discretion, acting upon the subject of the regulation of the pilotage of this port of Philadelphia, with a view to operate upon the masters of those vessels, who, as a general rule, ought to take a pilot, and with the further view of relieving from the charge of half-pilotage such vessels as from their size, or the nature of their employment, should be exempted from contributing to the support of pilots, except so far as they actually receive their services. In our judgment, though this law of 1832 has undoubtedly modified the 29th section of the Act of 1803, and both are to be taken together as giving the rule on this subject of half-pilotage, yet this change in the rule has not changed the nature of the law, nor deprived it of the character and attributes of a law for the regulation of pilotage.

Nor do we consider that the appropriation of the sums received under this section of the Act, to the use of the society for the relief of distressed and decayed pilots, their widows and children, has any legitimate tendency to impress on it the character of a revenue law. Whether these sums shall go directly to the use of the individual pilots by whom the service is tendered, or shall form a common fund, to be administered by trustees for the benefit of such pilots and their families as may stand in peculiar need of it, is a matter resting in legislative discretion, in the proper exercise of which the pilots alone are interested.

For these reasons, we cannot yield our assent to the argument that this provision of law is in conflict with the second and third clauses of the tenth section of the first article of the Constitution, which prohibit a State, without the assent of Congress, from laying any imposts or duties on imports or exports, or tonnage. 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 pilot-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 use this language. It cannot be denied that a tonnage duty, or an impost on imports or exports, may be levied under the name of pilot dues or penalties; and certainly it is the thing, and not the name, which is to be considered. But, having previously stated that, in this instance, the law complained of does not pass the appropriate line which limits laws for the regulation of pilots and pilotage, the suggestion that this law levies a duty on tonnage or on imports or exports is not admissible; and, if so, it also follows that this law is not repugnant to the first clause of the eighth section of the first article of the Constitution, which declares that all duties, imposts, and excises shall be uniform throughout the United States; for, if it is not to be deemed a law levying a duty, impost, or excise, the want of uniformity throughout the United States is not objectionable. Indeed, the necessity of conforming regulations of pilotage to the local peculiarities of each port, and the consequent impossibility of having its charges uniform throughout the United States, would be sufficient of itself to prove that they could not have been intended to be embraced within this clause of the Constitution; for it cannot be supposed uniformity was required, when it must have been known to be impracticable.

It is further objected that this law is repugnant to the fifth clause of the ninth section of the first article of the Constitution, namely:

"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, to or from one State, be obliged to enter, clear, or pay duties in another."

But, as already stated, pilotage fees are not duties within the meaning of the Constitution; and, certainly, Pennsylvania does not give a preference to the port of Philadelphia, by requiring the masters, owners, or consignees of vessels sailing to or from that port, to pay the charges imposed by the twenty-ninth section of the Act of 1803. It is an objection to, and not a ground of preference of a port, that a charge of this kind must be borne by vessels entering it; and, accordingly, the interests of the port require, and generally produce, such alleviations of these charges as its growing commerce from time to time renders consistent with the general policy of the pilot laws. This State, by its Act of the 24th of March, 1851, has essentially modified the law of 1803, and further exempted many vessels from the charge now in question. Similar changes may be observed in the laws of New York, Massachusetts, and other commercial States, and they undoubtedly spring from the conviction that burdens of this kind, instead of operating to give a preference to a port, tend to check its commerce, and that sound policy requires them to be lessened and removed as early as the necessities of the system will allow.

In addition to what has been said respecting each of these constitutional objections to this law, it may be observed that similar laws have existed and been practised on in the States since the adoption of the Federal Constitution; that, by the Act of the 7th of August, 1789, 1 Stats. at Large, 54, Congress declared 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, etc.; and that this contemporaneous construction of the Constitution since acted on with such uniformity in a matter of much public interest and importance, is entitled to great weight, in determining whether such a law is repugnant to the Constitution, as levying a duty not uniform throughout the United States, or, as giving a preference to the ports of one State over those of another, or, as obliging vessels to or from one State to enter, clear, or pay duties in another. *Stuart* v. *Laird*, 1 Cranch, 299; *Martin* v. *Hunter*, 1 Wheat. 304; *Cohens* v. *The Commonwealth of Virginia*, 6 Wheat. 264; *Prigg* v. *The Commonwealth of Pennsylvania*, 16 Pet. 621.

The opinion of the court is, that the law now in question is not repugnant to either of the above-mentioned clauses of the Constitution.

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 navi-

gation, 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, or 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.[1]

McLEAN, J., and WAYNE, J., dissented; and DANIEL, J., although he concurred in the judgment of the court, yet dissented from its reasoning.

[JUSTICES McLEAN and DANIEL, gave separate opinions, which are omitted.][2]

THE STATE OF PENNSYLVANIA *v.* THE WHEELING AND BELMONT BRIDGE COMPANY, ET AL.

SUPREME COURT OF THE UNITED STATES. 1855.

[18 *Howard*, 421.]

[THIS case was one of original jurisdiction in this court, being a suit in equity where a State was party plaintiff. The principal case is reported in 13 How. 518. See also s. c. 9 How. 647 (1850), and 11 How. 528 (1851).[3] The case was now heard on several motions to

[1] This was Mr. Justice Curtis's first constitutional opinion. — ED.

[2] McLEAN, J., in his opinion (p. 324) said: "That a State may regulate foreign commerce, or commerce among the States, is a doctrine which has been advanced by individual judges of this court; but never before, I believe, has such a power been sanctioned by the decision of this court." — ED.

[3] The case (13 How. 518) was an original bill in equity in the Supreme Court of the United States, brought by the State, asking an injunction against the building of the defendant's bridge, and, by supplemental bill, for an abatement of the completed bridge as a public nuisance. It was found as a fact that the bridge was an obstruction to the free navigation of the Ohio River, and that a certain change in the structure would remove the obstruction.

The Statute of Virginia which authorized the building of the bridge provided that it should not obstruct navigation; and that if such obstruction should be found to exist and were not immediately remedied, the bridge should be subject to abatement as a public nuisance. The court in May, 1852, decreed that certain changes should be made in the bridge, or in the alternative, certain changes in the channel of the river, by the first Monday in February, 1853. In the opinion of the court (13 How. 518, 565, 566) McLEAN, J., after citing the above-named provisions of the Virginia statute, said: "This is a full recognition of the public right on this great highway, and the grant to the Bridge Company was made subject to that right.

"It is objected that there is no Act of Congress prohibiting obstructions on the Ohio River, and that until there shall be such a regulation, a State, in the construction of bridges, has a right to exercise its own discretion on the subject.

"Congress have not declared in terms that a State, by the construction of bridges, or

enforce the original decree by process of attachment for contempt, and in regard to an injunction granted by MR. JUSTICE GRIER in vacation against the Bridge Company, which the company had disregarded.]

Mr. Edwin M. Stanton, for complainant; *Mr. Johnson* and *Mr. Charles M. Russell*, for defendants.

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

otherwise, shall not obstruct the navigation of the Ohio, but they have regulated navigation upon it, as before remarked, by licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, and inflicting severe penalties for neglect of those duties, by which damage to life or property has resulted. And they have expressly sanctioned the compact made by Virginia with Kentucky, at the time of its admission into the Union, 'that the use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States.' Now, an obstructed navigation cannot be said to be free. It was, no doubt, in view of this compact, that in the charter for the bridge, it was required to be so elevated, as not, at the greatest height of the water, to obstruct navigation. Any individual may abate a public nuisance. 5 Bac. Ab. 797; 2 Roll. Ab. 144, 145; 9 Co. 54; Hawk. P. C. 75, § 12.

"This compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action? In the case of *Green et al.* v. *Biddle*, 8 Wheat. 1, this court held that a law of the State of Kentucky, which was in violation of this compact between Virginia and Kentucky, was void; and they say this court has authority to declare a State law unconstitutional, upon the ground of its impairing the obligation of a compact between different States of the Union.

"The case of *Wilson* v. *The Blackbird Creek Marsh Company*, 2 Pet. 250, is different in principle from the case before us. A dam was built over a creek to drain a marsh, required by the unhealthiness it produced. It was a small creek, made navigable by the flowing of the tide. The Chief Justice said it was a matter of doubt, whether the small creeks, which the tide makes navigable a short distance, are within the general commercial regulation, and that, in such cases of doubt, it would be better for the court to follow the lead of Congress. Congress have led in regulating commerce on the Ohio, which brings the case within the rule above laid down. The facts of the two cases, therefore, instead of being alike, are altogether different.

"No State law can hinder or obstruct the free use of a license granted under an Act of Congress. Nor can any State violate the compact, sanctioned as it has been, by obstructing the navigation of the river. More than this is not necessary to give a civil remedy for an injury done by an obstruction. Congress might punish such an act criminally, but until they shall so provide, an indictment will not lie in the courts of the United States for an obstruction which is a public nuisance. But a public nuisance is also a private nuisance, where a special and an irremediable mischief is done to an individual." — ED.

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, anything 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.

We do not enter upon the question, whether or not Congress possess the power, under the authority in the Constitution "to establish post-offices and post-roads," to legalize this bridge; for, conceding that no such powers can be derived from this clause, it must be admitted that it is, at least, necessarily included in the power conferred to regulate commerce among the several States. The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation; and that power, as we have seen, has been exercised consistent with the continuance of the bridge.

But it is urged, that the Act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it.

The case before us, however, is distinguishable from this class of cases, so far as it respects that portion of the decree directing the abatement of the bridge. Its interference with the free navigation of the river constituted an obstruction of a public right secured by Acts of Congress.

But, although this right of navigation be a public right common to all, yet a private party sustaining special damage by the obstruction may, as has been held in this case, maintain an action at law against the party creating it, to recover his damages; or, to prevent irreparable injury, file a bill in chancery for the purpose of removing the obstruction. In both cases, the private right to damages, or to the removal, arises out of the unlawful interference with the enjoyment of the public right, which, as we have seen, is under the regulation of

Congress. Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. The decree before us, so far as it respects the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law. But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the mean time, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law, no more than there would be where the plaintiff himself had consented to it, after the rendition of the decree. Suppose the decree had been executed, and after that the passage of the law in question, can it be doubted but that the defendants would have had a right to reconstruct it? And is it not equally clear that the right to maintain it, if not abated, existed from the moment of the enactment?

A class of cases that have frequently occurred in the State courts contain principles analogous to those involved in the present case. The purely internal streams of a State which are navigable belong to the riparian owners to the thread of the stream, and, as such, they have a right to use the waters and bed beneath, for their own private emolument, subject only to the public right of navigation. They may construct wharves or dams or canals for the purpose of subjecting the stream to the various uses to which it may be applied, subject to this public easement. But, if these structures materially interfere with the public right, the obstruction may be removed or abated as a public nuisance.

In respect to these purely internal streams of a State, the public right of navigation is exclusively under the control and regulation of the State legislature; and in cases where these erections or obstructions to the navigation are constructed under a law of the State, or sanctioned by legislative authority, they are neither a public nuisance subject to abatement, nor is the individual who may have sustained special damage from their interference with the public use entitled to any remedy for his loss. So far as the public use of the stream is concerned, the legislature having the power to control and regulate it, the statute authorizing the structure, though it may be a real impediment to the navigation, makes it lawful. 5 Wend. 448, 449; 15 Ib. 113; 17 T. R. 195; 20 Ib. 90, 101; 5 Cow. 165.

It is also urged that this Act of Congress is void, for the reason that

it is inconsistent with the compact between the States of Virginia and Kentucky, at the time of the admission of the latter into the Union, by which it was agreed, "that the use and navigation of the river Ohio, so far as the territory of the proposed, or the territory that shall remain within the limits of this Commonwealth, lies thereon, shall be free and common to the citizens of the United States," and which compact was assented to by Congress at the time of the admission of the State.

This court held, in the case of *Green et al.* v. *Biddle*, 2 Wheat. 1, that an Act of the Legislature of Kentucky in contravention of the compact was null and void, within the provision of the Constitution forbidding a State to pass any law impairing the obligation of contracts. But that is not the question here. The question here is, whether or not the compact can operate as a restriction upon the power of Congress under the Constitution to regulate commerce among the several States? Clearly not. Otherwise Congress and two States would possess the power to modify and alter the Constitution itself. . . .

[JUSTICES MCLEAN, GRIER, and WAYNE dissented on the points above discussed.][1]

[1] See *Willamette Iron Bridge Co.* v. *Hatch*, *infra*, p. 2075.

The Wheeling Bridge case has sometimes been misunderstood. In *Devoe et al.* v. *The Penrose Ferry Bridge Co.*, 3 Am. Law Reg. 79 (1854) GRIER, J., in granting a preliminary injunction, said of it: "It is there decided that, although the courts of the United States cannot punish by indictment the erection of a nuisance on our public rivers, erected by authority of a State, yet that as Courts of Chancery they may interfere at the instance of an individual or corporation, who are likely to suffer some special injury, and prohibit by injunction the erection of nuisances to the navigation of the great navigable rivers leading to ports of entry within a State."

In *Milnor* v. *The N. J. R. R. Co. et al.*, 6 Am. Law Reg. 6 (1857); s. c. *sub nom. The Passaic Bridge*, 3 Wall. 782, in dismissing bills where, in somewhat similar cases, preliminary injunctions had been granted, the same Justice, after saying that the above quoted "dictum" was not well founded, said: "The fact that Pittsburg has been made a port of entry may have been mentioned [in the Wheeling Bridge case] as an additional or cumulative reason why Virginia should not be allowed to license a nuisance on the Ohio, below that city. But the question whether the power to regulate bridges over navigable rivers wholly within the bounds of a State, could be exercised by it below a port of entry, and whether the establishment of such a port did *ipso facto* divest the State of such a power, was not in that case, and therefore not decided. This assertion will be fully vindicated by a careful examination of the record in that case."

In *South Carolina* v. *Georgia*, 93 U. S. 4 (1876), an Act of Congress had provided for making certain improvements in the harbor of the city of Savannah. The Savannah River flows by the city in two channels. The improvement consisted in an attempt by means of a crib dam, at a point called the cross-tides, to divert water enough from the back river channel into that of the front river, to make a depth there of fifteen feet at low water. The State of South Carolina filed a bill in equity in the Supreme Court of the United States praying for an injunction restraining the State of Georgia, the Secretary of War, and certain other officials of the United States, from "obstructing or interrupting" the navigation of the Savannah River, in violation of the compact entered into between the States of South Carolina and Georgia on April 24, 1787. In dismissing the bill, the court (STRONG, J.), said: "We do not perceive that, in this suit, the State of South Carolina stands in any

better position than that which she would occupy if the compact of 1787 between herself and Georgia had never been made. That compact defined the boundary between the two States as the most northern branch or stream of the river Savannah from the sea, or mouth of the stream, to the fork or confluence of the rivers then called Tugoloo and Keowee. [A summary of the second article is here given.] But it matters not to this case how the right was acquired, whether under the compact or not, or what the extent of the right of South Carolina was in 1787. After the treaty between the two States was made, both the parties to it became members of the United States. Both adopted the Federal Constitution, and thereby joined in delegating to the general government the right to 'regulate commerce with foreign nations, and among the several States.' Whatever, therefore, may have been their rights in the navigation of the Savannah River before they entered the Union, either as between themselves or against others, they both agreed that Congress might thereafter do every thing which is within the power thus delegated. That the power to regulate interstate commerce, and commerce with foreign nations, conferred upon Congress by the Constitution, extends to the control of navigable rivers between States — rivers that are accessible from other States, at least to the extent of improving their navigability — has not been questioned during the argument, nor could it be with any show of reason. . . .

"But it is insisted on behalf of the complainant, that, though Congress may have the power to remove obstructions in the navigable waters of the United States, it has no right to authorize placing obstructions therein; that while it may improve navigation, it may not impede or destroy it. Were this conceded, it could not affect our judgment of the present case. The record exhibits that immediately above the city of Savannah the river is divided by Hutchinson's Island, and that there is a natural channel on each side of the island, both uniting at the head. The obstruction complained of is at the point of divergence of the two channels, and its purpose and probable effect are to improve the southern channel at the expense of the northern, by increasing the flow of the water through the former, thus increasing its depth and water-way, as also the scouring effects of the current. The action of the defendants is not, therefore, the destruction of the navigation of the river. True, it is obstructing the water-way of one of its channels, and compelling navigation to use the other channel; but it is a means employed to render navigation of the river more convenient, — a mode of improvement not uncommon. The two channels are not two rivers, and closing one for the improvement of the other is in no just or legal sense destroying or impeding the navigation. If it were, every structure erected in the bed of the river, whether in the channel or not, would be an obstruction. It might be a light-house erected on a submerged sand-bank, or a jetty pushed out into the stream to narrow the water-way, and increase the depth of water and the direction and the force of the current, or the pier of a bridge standing where vessels now pass, and where they can pass only at very high water. The impediments to navigation caused by such structures are, it is true, in one sense, obstructions to navigation; but, so far as they tend to facilitate commerce, it is not claimed that they are unlawful. In what respect, except in degree, do they differ from the acts and constructions of which the plaintiff complains? All of them are obstructions to the natural flow of the river, yet all, except the pier, are improvements to its navigability, and consequently they add new facilities to the conduct of commerce. It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage. If, as we have said, the United States have succeeded to the power and rights of the several States, so far as control over interstate and foreign commerce is concerned, this is not to be doubted. Might not the States of South Carolina and Georgia, by mutual agreement, have constructed a dam across the cross tides between Hutchinson and Argyle Islands, and thus have confined the navigation of the Savannah River to the

In *The Passaic Bridges*, 3 Wall. (Appendix), 782 (1857), s. c. *sub nom. Milnor* v. *N. J. R. R. Co. et al.*, 6 Am. Law Reg. 6, in the Circuit Court of the United States for New Jersey, a bill was filed by citizens of New York owning wharves in Newark, New Jersey, to restrain the New Jersey Railroad Company from building two bridges over the Passaic River, one in the city and one about two miles and a half below the region of the city wharves. The bridges were authorized by a statute of New Jersey. The reporter states that the river had its springs, course, and outlet wholly in New Jersey. Though a small and narrow river, it is navigable for sloops, schooners, and the smaller class of steamboats, as far as the tide flows, which is some distance above Newark. At the upper end, above the city, there were several bridges with small draws, and difficult to pass, all of which were erected by authority of the State, and one of them more than fifty years ago. The city had been made a port of entry by Act of Congress, and the United States had surveyed the channel, built two lighthouses, "fog-lights," spar-buoys, etc. The city had some little foreign commerce, and some with ports of other States; but vastly the largest portion of it all was with New York, to which it had become, in some sort, a manufacturing suburb, and nearly all this was carried on by the railroad, whose contemplated bridges the bill now sought to restrain.

Grier, J., for the court, said: "That the proposed bridges will in some measure cause an obstruction to the navigation of the river, and some inconvenience to vessels passing the draws, is certainly true. Every bridge may be said to be an obstruction on the channel of a river, but it is not necessarily a nuisance. Bridges are highways, as

southern channel? Might they not have done this before they surrendered to the Federal government a portion of their sovereignty? Might they not have constructed jetties, or manipulated the river, so that commerce could have been carried on exclusively through the southern channel, on the south side of Hutchinson's Island? It is not thought that these questions can be answered in the negative. Then why may not Congress, succeeding, as it has done, to the authority of the States, do the same thing? Why may it not confine the navigation of the river to the channel south of Hutchinson's Island; and why is this not a regulation of commerce, if commerce includes navigation? We think it is such a regulation.

"Upon this subject the case of *Pennsylvania* v. *The Wheeling and Belmont Bridge Co.*, 18 How. 421, is instructive. There it was ruled that the power of Congress to regulate commerce includes the regulation of intercourse and navigation, and consequently the power to determine what shall or shall not be deemed, *in the judgment of law*, an obstruction of navigation. It was, therefore, decided that an Act of Congress declaring a bridge over the Ohio River, which in fact did impede steamboat navigation, to be a lawful structure, and requiring the officers and crews of vessels navigating the river to regulate their vessels so as not to interfere with the elevation and construction of the bridge, was a legitimate exercise of the power of Congress to regulate commerce. It was further ruled that the Act was not in conflict with the provision of the Constitution which declares that no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another. The judgment in that case is, also, a sufficient answer to the claim made by the present complainant, that closing the channel on the South Carolina side of Hutchinson's Island is a preference given to the ports of Georgia forbidden by this clause of the Constitution." — Ed.

necessary to the commerce and intercourse of the public as rivers. That which the public convenience imperatively demands cannot be called a public nuisance because it causes some inconvenience, or affects the private interests of a few individuals.

"Now if every bridge over a navigable river be not necessarily a nuisance, but may be erected for the public benefit, without being considered in law or in fact a nuisance, though certainly an inconvenience affecting the navigation of the river, the question recurs, who is to judge of this necessity? Who shall say what shall be the height of a pier, the width of a draw, and how it shall be erected, managed, and controlled? Is this a matter of judicial discretion or of legislative enactment? Can that be a nuisance which is authorized by law? Does a State lose the great police power of regulating her own highways, and bridges over her own rivers, because the tide may flow therein, or as soon as they become a highway to a port of entry within her own borders? In the course of seventy years' practical construction of the Constitution, no Act of Congress is to be found regulating such erections, or assuming to license a bridge over such a river, wholly within the jurisdiction of a State, if we except the doubtful precedent of the Cumberland Road; and during all this time States have assumed and exercised this power. If we now deny it to the States, where do we find any authority in the Constitution or Acts of Congress for assuming it ourselves?

"These are questions which must be resolved before this court can constitute itself '*arbiter pontium*,' and assume the power of deciding where and when the public necessity demands a bridge, what is sufficient draw, or how much inconvenience to navigation will constitute a nuisance.

"The complainants in these bills, in order to show jurisdiction in the court, have stated themselves to be citizens of the State of New York. Their right to a remedy in the courts of the United States is not asserted, on account of the subject-matter of the controversy; nor do they allege any peculiar jurisdiction as given to us by any Act of Congress, but rest upon their personal right as citizens of another State to sue in this tribunal. It is plain, by their own showing, that they can demand no other remedy from this court than would be administered by the tribunals of the State of New Jersey in a suit between her own citizens. A citizen of New York who purchases wharves in Newark, or owns a vessel navigating to that port, has no greater right than the citizens of New Jersey. A court of chancery in New Jersey would not interfere with the course of public improvements authorized by the State, at the instance of a wharf owner, on the suggestion that a change in the location of a bridge would cause a depreciation in the value of his property. This is not a result for which (if the court can give any remedy at all) it will interfere by injunction. The court has no power to arrest the course of public improvements on account of their effects upon the value of property, appreciating it in one place and depreciating it in another. If special damage occurs to an individual, the law gives him a remedy;

but he cannot recover, either in a court of law or equity, special damage as for a common nuisance, if the erection complained of be not a nuisance. A bridge authorized by the State of New Jersey cannot be treated as a nuisance under the laws of New Jersey. That the police power of a State includes the regulation of highways and bridges within its boundaries has never been questioned. If the legislature has declared that bridges erected with draws of certain dimensions will not so impede the commerce of the river as to be injurious or become a public nuisance, where can the courts of New Jersey find any authority for overruling, reversing, or nullifying legislative Acts on a subject-matter over which it has exclusive jurisdiction? Admitting, for sake of argument, that Congress, in the exercise of the commercial power, may regulate the height of bridges on a public river in a State below a port of entry, or may forbid their erection altogether, they have never yet assumed the exercise of such a power; nor have they by any legislative Act conferred this power on the courts. The bridges will not be nuisances by the law of New Jersey. The United States has no common-law offences, and has passed no statute declaring such an erection to be a nuisance. If so, a court cannot interfere by arbitrary decree either to restrain the erection of a bridge, or to define its form and proportions. It is plain that these are subjects of legislative, not judicial, discretion. It is a power which has always heretofore been exercised by State legislatures over rivers wholly within their jurisdiction, and where the rights of citizens of other States to navigate the river are not injured for the sake of some special benefit to the citizens of the State exercising the power. . . .

"The Passaic River, though navigable for a few miles within the State of New Jersey, and therefore a public river, belongs wholly to that State. It is no highway to other States; no commerce passes thereon from States below the bridge to States above. Being the property of the State, and no other State having any title to interfere with her absolute dominions, she alone can regulate the harbors, wharves, ferries, or bridges, in or over it. Congress has the exclusive power to regulate commerce; but that has never been construed to include the means by which commerce is carried on within a State. Canals, turnpikes, bridges, and railroads, are as necessary to the commerce between and through the several States as rivers, yet Congress has never pretended to regulate them. When a city is made a port of entry, Congress does not thereby assume to regulate its harbor, or detract from the sovereign rights before exercised by each State over her own public rivers. Congress may establish post-offices and post-roads; but this does not affect or control the absolute power of the State over its highways and bridges. If a State does not desire the accommodation of mails at certain places, and will not make roads and bridges on which to transport them, Congress cannot compel it to do so, or require it to receive favors by compulsion. Constituting a town or city a port of entry is an Act for the convenience and benefit of such place and its commerce; but for the sake of this benefit the Constitution does not require the State

to surrender her control over the harbor or the highways leading to it, either by land or water, provided all citizens of the United States enjoy the same privileges which are enjoyed by her own.

"Whether a bridge over the Passaic will injuriously affect the harbor of Newark is a question which the people of New Jersey can best determine, and have a right to determine for themselves. If the bridges be an inconvenience to sloops and schooners navigating their port, it is no more so to others than to them. I see no reason why the State of New Jersey, in the exercise of her absolute sovereignty over the river, may not stop it up altogether, and establish the harbor and wharves of Newark at the mouth of the river. It would affect the rights of no other State; it would still be a port of entry if Congress chose to continue it so. Such action would not be in conflict with any power vested in Congress. A State may, in the exercise of its reserved powers, incidentally affect subjects intrusted to Congress without any necessary collision. All railroads, canals, harbors, or bridges, necessarily affect the commerce not only within a State, but between the States. Congress, by conferring the privilege of a port of entry upon a city or town, does not come in conflict with the police power of a State exercised in bridging her own rivers below such port. If the power to make a town a port of entry includes the right to regulate the means by which its commerce is carried on, why does it not extend to its turnpikes, railroads, and canals — to land as well as water? Assuming the right (which I neither affirm nor deny) of Congress to regulate bridges over navigable rivers below ports of entry, yet not having done so, the courts cannot assume to themselves such a power. There is no Act of Congress or rule of law which courts could apply to such a case. It is possible that courts might exercise this discretionary power as judiciously as a legislative body, yet the praise of being 'a good judge' could hardly be given to one who would endeavor to 'enlarge his jurisdiction' by the assumption, or rather usurpation, of such an undefined and discretionary power.

"The police power to make bridges over its public rivers is as absolutely and exclusively vested in a State as the commercial power is in Congress; and no question can arise as to which is bound to give way, when exercised over the same subject-matter, till a case of actual collision occurs. This is all that was decided in the case of *Wilson* v. *The Blackbird Creek, &c.*, 2 Peters, 257. That case has been the subject of much comment, and some misconstruction. It was never intended as a retraction or modification of anything decided in *Gibbons* v. *Ogden*, or to the exclusive power of Congress to regulate commence. Nor does the Wheeling Bridge case at all conflict with either. The case of *Wilson* v. *The Blackbird Creek, &c.*, governs this, while it has nothing in common with that of the Wheeling bridge.

"The view taken by the court of this point dispenses with the necessity of an expression of opinion on the questions on which so much testimony has been accumulated: What is the proper width of draws on bridges

over the Passaic? How far the public necessity requires them? What is the comparative value of the commerce passing over or under them? What the amount of inconvenience such draws may be to the navigation, and whether it is for the public interest that this should be encountered rather than the greater one consequent on the want of such bridges? and, finally, the comparative merits of curved and straight lines in the construction of railroads. These questions have all been ruled by the Legislature of New Jersey, having (as we believe) the sole jurisdiction in the matter. They have used their discretion in a matter properly submitted to it, and this court has neither the power to decide, nor the disposition to say, that it has been injudiciously exercised.

Bills dismissed with costs.

[This case was carried to the Supreme Court of the United States, and, after full argument, the court was equally divided. The judgment below, therefore, stood affirmed. See 3 Wall. 794.]

In *Sinnot* v. *Davenport*, 22 How. 227 (1859), Mr. Justice Nelson delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Alabama.

The suit was brought by the plaintiffs below, commissioners of pilotage of the harbor of Mobile, against the steamboat "Bagaby," of which Sinnot, the defendant, was master, to recover certain penalties for a violation of the law of the State of Alabama, passed February 15, 1854, entitled "An Act to provide for the registration of the names of steamboat owners." [The substance of the first section appears below.] The second section provides that if any person or persons, being owner or owners of any steamboat, shall run, or permit the same to be run or navigated, on any of the waters of the State, without having first filed the statement as provided by the Act, he or they shall forfeit the sum of $500, to be recovered in the name of the commissioners of pilotage of the bay of Mobile, either by a suit against the owners or by attachment against the boat, the one half to the use of the commissioners, and the other half to the person or persons who shall first inform said commissioners.

The steamboat "Bagaby" in question was seized and detained under this Act until discharged, on a bond being given to pay and satisfy any judgment that might be rendered in the suit. A judgment was subsequently rendered against the vessel in the city court of Mobile, for the penalty of $500, with costs, which on an appeal to the Supreme Court was affirmed.

The material facts in the case are that the steamboat was engaged in navigation and commerce between the city of New Orleans, in the State of Louisiana, and the cities of Montgomery and Wetumpka, in the State of Alabama, and that she touched at the city of Mobile only in the course of her navigation and trade between the ports and places above mentioned; that she was an American vessel, built at Pittsburg,

in the State of Pennsylvania, and was duly enrolled and licensed in pursuance of the laws of the United States, and had been regularly cleared at the port of New Orleans for the ports of Montgomery and Wetumpka, whither she was destined at the time of the seizure and detention under the Act in question.

The plaintiffs in error, the master and stipulators in the court below, insist that the judgment rendered against them is erroneous, upon the ground that the statute of the Legislature of the State of Alabama is unconstitutional and void, it being in conflict with that clause in the Constitution which confers upon Congress the power "to regulate commerce with foreign nations and among the several States," and the Acts of Congress passed in pursuance thereof. The Act of Congress relied on is that of the 17th February, 1793, providing for the enrolment and license of vessels engaged in the coasting trade. The force and effect of this Act was examined in the case of *Gibbons* v. *Ogden*, 9 Wh. 210, 214, and it was there held that vessels enrolled and licensed in pursuance of it had conferred upon them as full and complete authority to carry on this trade as was in the power of Congress to confer. The Chief Justice says (speaking of the first section): "This section seems to the court to contain a positive enactment that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade, and cannot be enjoyed unless the trade may be prosecuted." Again, the court say, 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. And again, speaking of the license provided for in the fourth section, the word "license" means permission or authority; and a license to do any particular thing is a permission or authority to do that thing, and, if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license.

The license is general in its terms, according to the form given in the Act of Congress: "License is hereby granted for the said steamboat (naming her) to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

On looking into the Act of Congress regulating the coasting trade, it will be found that many conditions are to be complied with by the owners of vessels before the granting of the enrolment or license. 1. The vessel must possess the same qualifications, and the same requisites must be complied with, as are made necessary to the registering of ships or vessels engaged in the foreign trade by the Act of December 31, 1792. These conditions are many and important, as will be seen by a reference to the Act. 2. A bond must be given by the husband or managing owner, and the master, with sureties to the satisfaction of the collector, conditioned that such vessel shall not be employed in any trade by

which the United States shall be defrauded of its revenues; and also the master must make oath that he is a citizen of the United States; that the license shall not be used for any other vessel or any other employment than that for which it is granted, or in any trade or business in fraud of the public revenues, as a condition to the granting of the license. These are the guards and restraints, and the only guards and restraints, which Congress has seen fit to annex to the privileges of ships and vessels engaged in the coasting trade, and upon a compliance with which, as we have seen, as full and complete authority is conferred by the license to carry on the trade as Congress is capable of conferring.

Now, the Act of the Legislature of the State of Alabama imposes another and an additional condition to the privilege of carrying on this trade within her waters, namely: the filing of a statement in writing, in the office of the probate judge of Mobile County, setting forth: 1. The name of the vessel; 2. The name of the owner or owners; 3. His or their place or places of residence; and 4. The interest each has in the vessel. Which statement must be sworn to by the party, or his agent or attorney. And the like statement, *mutatis mutandis,* is required to be made each time a change of owners of the vessel takes place. Unless this condition of navigation and trade within the waters of Alabama is complied with, the vessel is forbidden to leave the port of Mobile, under the penalty of $500 for each offence.

If the interpretation of the court, as to the force and effect of the privileges afforded to the vessel by the enrolment and license in the case of *Gibbons* v. *Ogden* are to be maintained, it can require no argument to show a direct conflict between this Act of the State and the Act of Congress regulating this trade. Certainly, if this State law can be upheld, the full enjoyment of the right to carry on the coasting trade, as heretofore adjudged by this court, under the enrolment and license, is denied to the vessel in question.

If anything further could be necessary, we might refer to the enrolment prescribed by the Act of Congress, by which it is made the duty of the owner to furnish, under oath, to the collectors, all the information required by this State law, and which is incorporated in the body of the enrolment. Congress, therefore, has legislated on the very subject which the State Act has undertaken to regulate, and has limited its regulation in the matter to a registry at the home port.

It has been argued, however, that this Act of the State is but the exercise of a police power, which power has not been surrendered to the general government, but reserved to the States; and hence, even if the law should be found in conflict with the Act of Congress, it must still be regarded as a valid law, and as excepted out of and from the commercial power.

This position is not a new one; it has often been presented to this court, and in every instance the same answer given to it. It was strongly pressed in the New York case of *Gibbons* v. *Ogden.* The

court, in answer to it, observed: "It has been contended that if a law passed by a State in the exercise of its acknowledged sovereignty comes in conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other, like equal opposing forces." But, the court say, the framers of the 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 treaty is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." The same doctrine was asserted in the case of *Brown* v. *The State of Maryland*, 12 Wh. 448, 449, and in numerous other cases. (5 How. 573, 574, 579, 581; 2 Peters, 251, 252; 4 Wh. 405, 406, 436.)

We agree, that in the application of this principle of supremacy of an Act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two Acts could not be reconciled or consistently stand together; and, also, that the Act of Congress should have been passed in the exercise of a clear power under the Constitution, such as that in question.

The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an Act of the Legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the State law must give way; and this, without regard to the source of power whence the State legislature derived its enactment.

This paramount authority of the Act of Congress is not only conferred by the Constitution itself, but is the logical result of the power over the subject conferred upon that body by the States. They surrendered this power to the general government; and to the extent of the fair exercise of it by Congress, the Act must be supreme.

The power of Congress, however, over the subject does not extend further than the regulation of commerce with foreign nations and among the several States. Beyond these limits, the States have not surrendered their power over the subject, and may exercise it independently of any control or interference of the general government; and there has been much controversy, and probably will continue to be, both by the bench and the bar, in fixing the true boundary line between the

power of Congress under the commercial grant and the power reserved to the States. But in all these discussions, or nearly all of them, it has been admitted that if the Act of Congress fell clearly within the power conferred upon that body by the Constitution, there was an end of the controversy. The law of Congress was supreme.

These questions have arisen under the quarantine and health laws of the States — laws imposing a tax upon imports and passengers, admitted to have been passed under the police power of the States, and which had not been surrendered to the general government. The laws of the States have been upheld by the court, except in cases where they were in conflict, or were adjudged by the court to be in conflict, with the Act of Congress.

Upon the whole, after the maturest consideration the court have been able to give to the case, we are constrained to hold that the Act of the Legislature of the State is in conflict with the Constitution and law of the United States, and therefore void.

The judgment of the court below is reversed.[1]

In *Lemmon* v. *The People*, 20 N. Y. 562, 611 (1860), where slaves brought by their mistress into New York on their way from one slave State to another, were discharged on *habeas corpus* (for the facts of the case see *supra*, p. 496), the court (Denio, J.) said: "It remains to consider the effect upon this case of the provision by which power is given to Congress to regulate commerce among the several States. (Art. 1, § 8, ¶ 3.) If the slaves had been passing through the navigable waters of this State in a vessel having a coasting license granted

[1] And so *Foster* v. *Com'rs*, 22 How. 244.

In *Moran* v. *N. O.*, 112 U. S. 69 (1884), on error to the Supreme Court of Louisiana, it was held that an ordinance was void which imposed a license tax on the owner of steam propellers engaged in the coasting trade, already duly enrolled and licensed under the Acts of Congress. The court (Matthews, J.), after citing *Gibbons* v. *Ogden* and *Sinnot* v. *Davenport*, said: "The present case would seem to fall directly within the rule of these decisions, unless the fact that the ordinance of the city of New Orleans is the exercise of the taxing power of the State, can be supposed to make a material difference. But since the case of *Brown* v. *Maryland*, 12 Wheat. 419, it has been repeatedly decided by this court that when a law of a State imposes a tax under such circumstances and with such effect as to constitute it a regulation of commerce, either foreign or interstate, it is void on that account. *Telegraph Co.* v. *Texas*, 105 U. S. 460, and cases there cited. . . . 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." — Ed.

under the Act of Congress regulating the coasting trade, in the course of a voyage between two slave States, and in that situation had been interrupted by the operation of the writ of *habeas corpus*, I am not prepared to say that they could have been discharged under the provision of the statute. So if in the course of such a voyage they had been landed on the territory of the State in consequence of a marine accident or by stress of weather. In either case they would, in strictness of language, have been introduced and brought into the State. In the latter case, their being here being involuntary as regards the owner, they would not have been 'brought here' within the meaning of the statute. (*Case of the Brig Enterprise*, in the decisions of the Commission of Claims, under the Convention of 1853, p. 187.) But the case does not present either of these features. [The court here considers the principle to be derived from various Federal cases, concluding with that of *Cooley* v. *The Board of Wardens*, 12 How. 299.]

"The application of the rule to the present case is plain. We will concede, for the purpose of the argument, that the transportation of slaves from one slaveholding State to another is an Act of interstate commerce, which may be legally protected and regulated by Federal legislation. Acts have been passed to regulate the coasting trade, so that if these slaves had been *in transitu* between Virginia and Texas, in a coasting vessel, at the time the *habeas corpus* was served, they could not have been interfered with while passing through the navigable waters of a free State by the authority of a law of such State. But they were not thus in transit at that time. Congress has not passed any Act to regulate commerce between the States when carried on by land, or otherwise than in coasting vessels. But conceding that, in order to facilitate commerce among the States, Congress has power to provide for precisely such a case as the present — the case of persons whose transportation is the subject of commercial intercourse, being carried by a coasting vessel to a convenient port in another State, with a view of being there landed, for the purpose of being again embarked on a fresh coasting voyage to a third port, which was to be their final destination — the unexercised power to enact such a law, to regulate such a transit, would not affect the power of the States to deal with the *status* of all persons within their territory in the mean time, and before the existence of such a law. It would be a law to regulate commerce carried on partly by land and partly by water — a subject upon which Congress has not thought proper to act at all. Should it do so hereafter, it might limit and curtail the authority of the States to execute such an Act as the present in a case in which it should interfere with such paramount legislation of Congress. I repeat the remark, that the law of the State under consideration has no aspect which refers directly to commerce among the States. It would have a large and important operation upon cases falling within its provisions, and having no connection with any commercial enterprise. It is then, so far as the com-

mercial clause is concerned, generally valid; but in the case of supposable Federal legislation, under the power conferred upon Congress to regulate commerce, circumstances might arise where its execution, by freeing a slave cargo landed on our shores, in the course of an interstate voyage, would interfere with the provisions of an Act of Congress. The present state of Federal legislation, however, does not, in my opinion, raise any conflict between it and the laws of this State under consideration."[1]

In *Conway et al.* v. *Taylor's Executor*, 1 Black, 603 (1861), Mr. Justice Swayne delivered the opinion of the court. The appellees filed their bill in equity in the Circuit Court of Campbell County, Kentucky, seeking thereby to enjoin the appellants from invading the ferry rights claimed by them as set forth in their bill, and also praying for an account and a decree against the appellants in respect of the moneys received by them in violation of the alleged rights of the complainants. The appellants answered, proofs were taken, and the case brought to hearing.

The Circuit Court of Campbell County entered a decree against the appellants. They removed the cause to the Court of Appeals of Kentucky. That court modified the decree of the court below, but also decreed against them. They thereupon brought the cause to this court by a writ of error under the 25th section of the Judiciary Act of 1789. . . .

No claim is set up in the bill as to any ferry license from Ohio, or to any right of landing on the Ohio side.

In 1853 the appellants built the steamer "Commodore," and constituted themselves "The Cincinnati and Newport Packet Company," for the purpose of running that steamer as a ferry-boat from Cincinnati to Newport, and from Newport to Cincinnati. They rented, for five years, a portion of the esplanade in front of Monmouth Street, in the city of Newport, from the Common Council of that city.

The "Commodore" was a vessel of 128 tons burden, and in all respects well appointed and equipped. The appellants caused her to be enrolled on the 4th of January, 1854, at the custom-house at Cincinnati, under the Act of Congress for enrolling and licensing vessels to be employed in the coasting trade and fisheries, with Peter Conway as master, and obtained on the same day, from the surveyor of customs at the port of Cincinnati, a license for the employment and carrying of the coasting trade. They commenced running her as a ferry-boat from Cincinnati to Newport, and from Newport to Cincinnati, on the 5th of January, 1854. Her landings were at the wharves on each side of the river, opposite to each other, the landing in Newport being at the foot of Monmouth Street. The right of the "Commodore" to land there, for all lawful purposes, was not contested in the Court of Appeals, and was not questioned in the argument here. In January, 1854, the

[1] The passage here given is the one indicated as omitted *supra*, p. 505. — Ed.

appellees exhibited their bill in equity against the appellants. In the same month a preliminary injunction was granted, restraining the appellants from running the "Commodore" as a ferry-boat between the cities of Cincinnati and Newport. In the progress of the cause, proceedings were instituted against the appellants for contempt of the court in violating this injunction. It was then made to appear that the appellants had, on the 6th of March, 1854, obtained a ferry license under the laws of Ohio. This fact appears in the record, and is adverted to in the judgment of the Court of Appeals. . . .

It is objected by the appellants, that no such ferry franchise exists as was sought to be protected by this decree, because it was granted under the laws of Kentucky, and did not embrace a landing on the Ohio shore. It is insisted that such a franchise, when confined to one shore, is a nullity, and that the concurrent action of both States is necessary to give it validity. Under the laws of Kentucky a ferry franchise is grantable only to riparian owners. The franchise in this instance was granted in pursuance of those laws. Any riparian ownership, or right of landing, or legal sanction of any kind beyond the jurisdiction of that State, is not required by her laws.

The riparian rights of James Taylor, deceased, and of his executor and devisees, in respect of the Kentucky shore, have been held sufficient to sustain a ferry license by the highest legal tribunal of that State, whenever the subject has been presented. The question came under consideration, and was discussed and decided in the year 1831 in 6 J. J. Marshall, 134, *Trustees of Newport* v. *James Taylor;* in 1850 in Ben. Monroe, 361, *City of Newport* v. *Taylor's Heirs;* in 1855 in this case, 16 Ben. Monroe, 784; and, finally, in 1858, in the *City of Newport* v. *Air & Wallace.* (Pamphlet copy of Record.)

These adjudications constitute a rule of property, and a rule of decision which this court is bound to recognize. Were the question an open one, and now presented for the first time for determination, we should have no hesitation in coming to the same conclusion. We do not see how it could have been decided otherwise. This point was not pressed by the counsel for the appellants. The judgments referred to exhaust the subject. We deem it unnecessary to go again over the same ground. The concurrent action of the two States was not necessary. "A ferry is in respect of the landing-place, and not of the water. The water may be to one, and the ferry to another." 13 Viner's Ab., 208, A.

In 11 Wend. 590, *The People* v *Babcock*, this same objection was urged, in respect of a license under the laws of New York, for a ferry across the Niagara River. The court said: "The privilege of the license may not be as valuable to the grantee, by not extending across the river; but as far as it does extend, he is entitled to all the provisions of the law, the object of which is to secure the exclusive privilege of maintaining a ferry at a designated place." The point has been ruled in the same way in a large number of other cases. . . .

The franchise is confined to the transit from the shore of the State. The same rights which she claims for herself she concedes to others. She has thrown no obstacle in the way of the transit from the States lying upon the other side of the Ohio and Mississippi. She has left that to be wholly regulated by their ferry laws. We have heard of no hostile legislation, and of no complaints, by any of those States. It was shown in the argument at bar that similar laws exist in most, if not all, the States bordering upon those streams. They exist in other States of the Union bounded by navigable waters.

Very few adjudged cases have been brought to our notice in which the ferry rights they authorize to be granted have been challenged; none in which they have been held to be invalid. A ferry franchise is as much property as a rent or any other incorporeal hereditament, or chattels, or realty. It is clothed with the same sanctity and entitled to the same protection as other property. . . .

Rights of commerce give no authority to their possessor to invade the rights of property. He cannot use a bridge, a canal, or a railroad without paying the fixed rate of compensation. He cannot use a warehouse or vehicle of transportation belonging to another without the owner's consent. No more can he invade the ferry franchise of another without authority from the holder. The vitality of such a franchise lies in its exclusiveness. The moment the right becomes common, the franchise ceases to exist. . . .

Undoubtedly, the States, in conferring ferry rights, may pass laws so infringing the commercial power of the nation that it would be the duty of this court to annul or control them. 13 How. 519, Wheeling Bridge case. The function is one of extreme delicacy, and only to be performed where the infraction is clear. The ferry laws in question in this case are not of that character. We find nothing in them transcending the legitimate exercise of the legislative power of the State.

The authorities referred to must be considered as putting the question at rest. The ordinance of 1787 was not particularly brought to our attention in the discussion at bar. Any argument drawn from that source is sufficiently met by what has been already said.

The counsel for the appellees has invoked the authority of *Cooley* v. *The Board of Wardens of Philadelphia*, 12 How. 299, in which a majority of this court held that, upon certain subjects affecting commerce as placed under the guardianship of the Constitution of the United States, the States may pass laws which will be operative till Congress shall see fit to annul them.

In the view we have taken of this case, we have found it unnecessary to consider that subject. There has been now nearly three-quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its birth, the States have exercised the power to establish and regulate ferries; Congress never. We have sought in vain for any Act of Congress which involves the exercise of this power. That the authority lies within the scope of "that im-

mense mass" of undelegated powers which "are reserved to the States respectively," we think too clear to admit of doubt.

We place our judgment wholly upon that ground.[1]

UNITED STATES *v.* HOLLIDAY. SAME *v.* HAAS.

SUPREME COURT OF THE UNITED STATES. 1865.

[3 *Wall.* 407.][2]

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. . . .

The indictment [in Haas's case] 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 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. . . .

The indictment [in Holliday's case] charged the defendant with selling liquor, in Gratiot County, Michigan, to one Otibsko, an Indian under the charge of an Indian agent appointed by the United States. . . . [The cases came up on certificate of a division of opinion between the judges of the Circuit Court.]

Mr. Romeyn, for Holliday; no counsel appearing for Haas; *Mr. Assistant Attorney-General Ashton*, *contra.*

MR. JUSTICE MILLER delivered the opinion of the court, NELSON, J., not sitting, having been indisposed.

The questions propounded to this court in the two cases have a close relation to each other, and will be disposed of in one opinion.

The first question on which the judges divided in the case against Haas is, "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." . . .

The offence, then, for which Haas was indicted, although declared by that Act to be cognizable in the district courts, was, by virtue of the Act of 1789, also cognizable in the circuit courts.

[1] And so *Fanning* v. *Gregoire et al.*, 16 How. 524 (1853); *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Glouc. Ferry Co.* v. *Penn.*, 114 U. S. 196; s. c. *infra*, p. 2013. — ED.

[2] The statement of facts is omitted. — ED.

The second question in that 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. . . . [Here follows a passage given *supra*, p. 731, which should be read, holding that the Act in question is a lawful regulation of commerce.]

These views answer the two questions certified up in the case against Haas, and the two first questions in the case against Holliday.

The third question in Holliday's case is, whether, under the circumstances stated in the plea and replication, the Indian named can be considered as under the charge of an Indian agent, within the meaning of the Act?

The substance of the facts as set out in those pleadings is, that the Indian to whom the liquor was sold had a piece of land on which he lived, and that he voted in county and town elections in Michigan, as he was authorized to do by the laws of that State; that he was still, however, so far connected with his tribe that he lived among them, re-

ceived his annuity under the treaty with the United States, and was represented in that matter by the chiefs or head men of his tribe, who received it for him; and that an agent of the government attended to this and other matters for that tribe. These are the substantial facts pleaded on both sides in this particular question, and admitted to be true; and without elaborating the matter, we are of opinion that they show the Indian to be still a member of his tribe, and under the charge of an Indian agent. Some point is made of the dissolution of the tribe by the treaty of August 2, 1855; but that treaty requires the tribal relation to continue until 1865, for certain purposes, and those purposes are such that the tribe is under the charge of an Indian superintendent; and they justify the application of the Act of 1862 to the individuals of that tribe.

Two other questions are propounded by the judges of the Circuit Court for the Eastern District of Michigan, both of which have relation to the effect of the Constitution of Michigan and certain Acts of the Legislature of that State, in withdrawing these Indians from the influence of the Act of 1862.

The facts in the case certified up with the division of opinion, show distinctly "that the Secretary of the Interior and the Commissioner of Indian Affairs have decided that it is necessary, in order to carry into effect the provisions of said treaty, that the tribal organization should be preserved." In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress. This control extends, as we have already shown, to the subject of regulating the liquor traffic with them. This power residing in Congress, that body is necessarily supreme in its exercise. This has been too often decided by this court to require argument, or even reference to authority.

Neither the Constitution of the State, nor any Act of its legislature, however formal or solemn, whatever rights it may confer on those Indians or withhold from them, can withdraw them from the influence of an Act of Congress which that body has the constitutional right to pass concerning them. Any other doctrine would make the legislation of the State the supreme law of the land, instead of the Constitution of the United States, and the laws and treaties made in pursuance thereof.

If authority for this proposition, in its application to the Indians, is needed, it may be found in the cases of the *Cherokee Nation* v. *The State of Georgia*, 5 Peters, 1, and *Worcester* v. *The State of Georgia*, 6 Ib. 515.

The results to which we arrive from this examination of the law, as regards the questions certified to us, is, that both questions in the case

against Haas must be answered in the affirmative; and in the case against Holliday, the first three must be answered in the affirmative, and the last two in the negative.[1] . . .

GILMAN *v.* PHILADELPHIA.

SUPREME COURT OF THE UNITED STATES. 1865.

[3 *Wall.* 713.][2]

[APPEAL from the United States Circuit Court for Pennsylvania.]

The Commonwealth of Pennsylvania in 1857 authorized the city of Philadelphia to erect a permanent bridge over the Schuylkill at Chestnut Street. This street was about five hundred feet below Market Street, where was the other and older bridge. The contemplated erection would be, of course, over a part of the Schuylkill that was tidal wholly, and navigable. Chestnut Street now had an existence on both

[1] For the condition of the tribal Indians, see *supra*, pp. 583–599. It will help to bring out the fundamental peculiarity of the status of these people, if the conception of territorial sovereignty, which is ours, be contrasted with that old conception of "tribe sovereignty" which is pretty nearly theirs. The two are inconsistent, and the attempts to reconcile our claims to the control of these people who live upon our soil, with the fiction that they are independent and govern themselves, has resulted in calamity to them and disgrace to us.

Palgrave, in his "English Commonwealth," vol. i. 62, in speaking of the political conceptions which were at the bottom of the Anglo-Saxon States, says: "We consider that the powers of government result from the right which the sovereign possesses over the land in which the people dwell; the allegiance of the subjects arises from the spot of his domicile, or the accident of his birthplace; and the modern law of nations teaches us that the State is constituted by the arbitrary or geographical boundaries which determine its extent and limit its jurisdiction. This is the principle of the modern commonwealth; but the scheme of government adopted by ancient nations was essentially patriarchal. Kings were the leaders of the people, not the lords of the soil; and their authority was exerted in the first instance over the persons of their subjects, not over the territories which composed their dominion."

And Sir Henry Maine, in his "Ancient Law," ch. iv., while remarking (9th ed. p. 106) that "territorial sovereignty — the view which connects sovereignty with the possession of a limited portion of the earth's surface — was distinctly an offshoot, though a tardy one, of feudalism," further says (Ib. p. 103): "It is a consideration well worthy to be kept in view, that during a large part of what we usually term modern history no such conception was entertained as that of territorial sovereignty. Sovereignty was not associated with dominion over a portion or subdivision of the earth. . . . After the subsidence of the barbarian irruptions, the notion of sovereignty that prevailed seems to have been twofold. On the one hand it assumed the form of what may be called '*tribe* sovereignty.' The Franks, the Burgundians, the Vandals, the Lombards, and Visigoths were masters, of course, of the territories which they occupied, and to which some of them have given a geographical appellation; but they based no claim of right upon the fact of territorial possession, and indeed attached no importance to it whatever. . . . The alternative to this peculiar notion of sovereignty appears to have been . . . the idea of universal dominion" — ED.

[2] A part of the statement of facts is omitted. — ED.

sides of the river. On the eastern, it is one of the chief thoroughfares of Philadelphia, and in West Philadelphia, in anticipation of connection with Chestnut Street on the east, was daily assuming importance. The contemplated bridge would in fact connect parts of one street, municipally speaking; a street having one part on the east and one part on the west of the stream; here about four hundred feet across.

The city being about to begin the erection, Gilman, of New Hampshire, owning valuable coal wharves on the west side of the river, just below the old bridge, and which by the erection of the proposed bridge at Chestnut Street would be shut up between the two erections, now filed his bill in the Circuit Court for Pennsylvania to prevent the structure. It was conceded that he was neither a navigator nor a pilot, nor the owner of a licensed coasting vessel; and this was objected to him. His title to ask relief rested on his ownership of coal wharves, as mentioned, and his citizenship in New Hampshire.

His bill charged that a bridge at that point without suitable draws would be an unlawful obstruction to the navigation of the river, and an illegal interference with his rights, and was a public nuisance producing to him a special damage; that it was not competent for the Legislature of Pennsylvania to sanction such an erection, and that he was entitled to be protected by an injunction to stay further progress on the work, or to a decree of abatement, if it should have been proceeded with, to completion.

The answer admitted the erection of the bridge complained of, justified such erection under the Act of the Legislature of Pennsylvania, and alleged that other obstructions of a similar or greater extent had theretofore been placed across the stream at a higher point of the river, or beyond the complainant's wharves, by virtue of other Acts of the same legislature. The answer conceded that the bridge would prevent masted vessels from approaching to or unloading at the complainant's wharves, and insisted that this was the only injury suffered by the complainant, and that for it the city of Philadelphia, the defendant, was able to respond in damages. The answer further alleged that the proposed bridge was a necessity for public convenience.

The bridge, it was admitted, would be not more than thirty feet high — the same height as the old one above, at Market Street. Being an erection of the city, it was built in the best style of science, and with the greatest practicable regard to the navigation and general interests of commerce; but it necessarily somewhat impeded navigation. The navigation at that point required a wide channel. One pier was indispensable. Vessels with masts could not pass, and the property of the complainant was rendered less valuable.

Mr. Justice Grier dismissed the bill. The same question nearly had been then recently considered by him very fully, in an application made, in New Jersey, to restrain the erection of a railroad bridge over the Passaic, at Newark. . . . The case was, therefore, not argued below.

In this court it was elaborately and well discussed by *Messrs. George*

Harding and *Courtland Parker*, for the appellant Gilman; and by *Messrs. F. C. Brewster* and *D. W. Sellers*, *contra*, for the city of Philadelphia.

[In another part of the statement of facts the reporter says:] This river Schuylkill is tidal from its mouth, seven and a half miles upwards — that is to say, completely past every part of the rear of the city — and though narrow, muddy, and shallow, is navigable for vessels drawing from eighteen to twenty feet of water. It is wholly within the State of Pennsylvania. No large vessels of any kind are seen upon it. Being one outlet of the coal regions of Pennsylvania, the principal, almost the sole commerce of the river is coal. But this is a very large commerce, and one of importance to this country generally. Great numbers of persons, from many States, are engaged in it; and many small steamers, barges, and other vessels concerned in it, are properly enrolled and licensed as vessels of the United States. Millions of dollars have been invested in property on the Schuylkill front of the built city, meant to assist the coal trade. The coal above spoken of as the subject of this river's commerce, is brought by canal-boats into the river, just at or above Philadelphia. The canal-boats are then towed by small steam-tugs along the river. . . .

From an early date the river at and just above and below the city, that is to say within its tidal and navigable parts, had been treated by the State of Pennsylvania as more or less within her jurisdiction.

Thus in 1798, what was then called the Permanent Bridge, a bridge across the river at Market Street, was authorized, and in 1799 a lot granted by the State for its purposes. This bridge was begun in 1801 and finished in 1805. Judge Peters, the district judge of the Federal court of Pennsylvania, himself distinguished as an admiralty lawyer, who was the proprietor of Belmont, near one end of it, having been chiefly instrumental in the erection. In 1806, a bridge at Gray's Ferry (permanent) was authorized; 75 feet high. In the same year the State regulated "the upper and lower ferries" opposite the city. In 1811 another bridge was authorized, at the upper ferry, which was afterward built, burnt down, and rebuilt. In 1815 a large canal, the Schuylkill Navigation Company, was authorized, which drains the river immediately above the city. It was completed in 1826. In 1822 the Fairmount Water-works, which dam the river and supply the old city of Philadelphia with water out of the river, were completed. In 1837 a bridge was authorized to be built by the Philadelphia, Wilmington, and Baltimore Railroad Company, with a draw of 33 feet, and was afterwards built below the town. In 1838 the West Philadelphia Railroad Company was authorized to build a bridge at Market or Callowhill Street. In 1839 a free bridge was authorized at Arch Street. In 1852 free bridges were authorized at Chestnut Street and at Girard Avenue. None of these last four bridges were ever built.

Over one of these bridges runs the great Central Railroad of Pennsylvania; and over another, below the built city, the Gray's Ferry bridge

already mentioned, runs the railway from Philadelphia to Baltimore, which leads from the North to Washington City and the South. This railroad bridge — which has a draw, however — was built in 1838; though a draw-bridge had been there from a time long before the Revolution.

The right of the State to authorize these bridges had not been seriously questioned by any one, while undoubtedly the river from its mouth to and beyond the port of Philadelphia is and has been considered as an ancient, navigable, public river and common highway, free to be used and navigated by all citizens of the United States.

The only legislation, apparently, which Congress had made about the river was in 1789 and in 1790, in both which years Philadelphia was declared a port of entry; in 1793, when the coasting laws were applied to it; in 1799, when two districts were created in Pennsylvania; in 1822, when Philadelphia was made the sole port of entry for the Philadelphia district; and in 1834, when the limits of the port were enlarged on the Delaware front. The important Acts seemed to be those of 1799 and 1834. The former is in these words:

"The district of Philadelphia shall include all the shores and waters of the river Delaware, and the rivers and waters connected therewith lying within the State of Pennsylvania; and the city of Philadelphia shall be the sole port of entry and delivery of the same."

The subsequent Act (that of 1834) thus reads:

"The port of entry and delivery for the district of Philadelphia shall be bounded by the Navy Yard on the south, and Gunner's Run on the north, anything in any former law to the contrary notwithstanding."

No Act spoke of the Schuylkill as within the port: though undoubtedly by its charter the city extended to the Schuylkill. The soundings of the Coast Survey, authorized by the United States, do not come into the Schuylkill. The "Navy Yard" is on the Delaware. "Gunner's Run" was a stream on the north of the city, falling into the Delaware; but nowhere touching or feeding the Schuylkill.

Mr. Justice Swayne delivered the opinion of the court.[1]

There is no contest between the parties about the facts upon which they respectively rely. The complainants are citizens of other States, and own a valuable and productive wharf and dock property above the site of the contemplated bridge. . . . The defendants assert that the Act of the Legislature, under which they are proceeding, justifies the building of the bridge.

The complainants insist that such an obstruction to the navigation of the river is repugnant to the Constitution and laws of the United States, touching the subject of commerce. . . .

The Act of the 18th of February, 1793, authorizes vessels enrolled and licensed according to its provisions to engage in the coasting trade.

Commerce includes navigation. The power to regulate commerce

[1] Nelson, J., not having sat, and taking no part in the decision.

comprehends the control for that purpose, and to the extent necessary, of all the 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 by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England.

It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided.

A license under the Act of 1793, to engage in the coasting trade, carries with it right and authority. "Commerce among the States" does not stop at a State line. Coming from abroad it penetrates wherever it can find navigable waters reaching from without into the interior, and may follow them up as far as navigation is practicable. Wherever "commerce among the States" goes, the power of the nation, as represented in this court, goes with it to protect and enforce its rights. There can be no doubt that the coasting trade may be carried on beyond where the bridge in question is to be built.

We will now turn our attention to the rights and powers of the States which are to be considered.

The national government possesses no powers but such as have been delegated to it. The States have all but such as they have surrendered. The power to authorize the building of bridges is not to be found in the Federal Constitution. It has not been taken from the States. It must reside somewhere. They had it before the Constitution was adopted, and they have it still. "When the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." . . .

The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. To this extent the power to regulate commerce may be exercised by the States.

Whether the power in any given case is vested exclusively in the general government depends upon the nature of the subject to be regulated. Pilot laws are regulations of commerce; but if a State enact them in good faith, and not covertly for another purpose, they are not in conflict with the power "to regulate commerce" committed to Congress by the Constitution.

In the Wheeling bridge case this court placed its judgment upon the ground "that Congress had acted upon the subject, and had regulated 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 interferes 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 Ohio 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."

The most important authority, in its application to the case before us, is *Wilson* v. *The Blackbird Creek Marsh Co.* . . .

This opinion came from the same "expounder of the Constitution" who delivered the earlier and more elaborate judgment in *Gibbons* v. *Ogden.* We are not aware that the soundness of the principle upon which the court proceeded has been questioned in any later case. We can see no difference in principle between that case and the one before us. Both streams are affluents of the same larger river. Each is entirely within the State which authorized the obstruction. The dissimilarities are in facts which do not affect the legal question. Blackbird Creek is the less important water, but it had been navigable, and the obstruction was complete. If the Schuylkill is larger and its commerce greater, on the other hand, the obstruction will be only partial and the public convenience, to be promoted, is more imperative. In neither case is a law of Congress forbidding the obstruction an element to be considered. The point that the vessel was enrolled and licensed for the coasting trade was relied upon in that case by the counsel for the defendant. The court was silent upon the subject. A distinct denial of its materiality would not have been more significant. It seems to have been deemed of too little consequence to require notice. Without overruling the authority of that adjudication we cannot, by our judgment, annul the law of Pennsylvania.

It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs.

It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The States have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the State shall be exerted within the sphere of the commercial power which belongs to the nation.

The States may exercise concurrent or independent power in all cases

but three: 1. Where the power is lodged exclusively in the Federal Constitution. 2. Where it is given to the United States and prohibited to the States. 3. Where, from the nature and subjects of the power, it must necessarily be exercised by the National Government exclusively.

The power here in question does not, in our judgment, fall within either of these exceptions.

"It is no objection to distinct substantive powers that they may be exercised upon the same subject." It is not possible to fix definitely their respective boundaries. In some instances their action becomes blended; in some, the action of the State limits or displaces the action of the nation; in others, the action of the State is void, because it seeks to reach objects beyond the limits of State authority.

A State law, requiring an importer to pay for and take out a license before he should be permitted to sell a bale of imported goods, is void, and a State law which requires the master of a vessel, engaged in foreign commerce, to pay a certain sum to a State officer on account of each passenger brought from a foreign country into the State, is also void. But, a State, in the exercise of its police power, may forbid spirituous liquor imported from abroad, or from another State, to be sold by retail or to be sold at all without a license; and it may visit the violation of the prohibition with such punishment as it may deem proper. Under quarantine laws, a vessel registered, or enrolled and licensed, may be stopped before entering her port of destination, or be afterwards removed and detained elsewhere, for an indefinite period; and 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.

The inconsistency between the powers of the States and the nation, as thus exhibited, is quite as great as in the case before us; but it does not necessarily involve collision or any other evil. None has hitherto been found to ensue. The public good is the end and aim of both.

If it be objected that the conclusion we have reached will arm the States with authority potent for evil, and liable to be abused, there are several answers worthy of consideration. The possible abuse of any power is no proof that it does not exist. Many abuses may arise in the legislation of the States which are wholly beyond the reach of the government of the nation. The safeguard and remedy are to be found in the virtue and intelligence of the people. They can make and unmake constitutions and laws; and from that tribunal there is no appeal. If a State exercise unwisely the power here in question, the evil consequences will fall chiefly upon her own citizens. They have more at stake than the citizens of any other State. Hence, there is as little danger of the abuse of this power as of any other reserved to the States. Whenever it shall be exercised openly or covertly for a purpose in conflict with the Constitution or laws of the United States, it will be within the power, and it will be the duty, of this court, to interpose with a vigor adequate to the correction of the evil. In the Pilot case, the dissent-

ing judge drew an alarming picture of the evils to rush in at the breach made, as he alleged, in the Constitution. None have appeared. The stream of events has since flowed on without a ripple due to the influence of that adjudication. Lastly, Congress may interpose, whenever it shall be deemed necessary, by general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. Within the sphere of their authority both the legislative and judicial power of the nation are supreme. A different doctrine finds no warrant in the Constitution, and is abnormal and revolutionary.

Since the adoption of the Constitution there has been but one instance of such legislative interposition; that was to save, and not to destroy. The Wheeling bridge was legalized, and a decree of this court was, in effect, annulled by an Act of Congress. The validity of the Act, under the power "to regulate commerce," was distinctly recognized by this court in that case. This is, also, the only instance, occurring within the same period, in which the case has been deemed a proper one for the exercise, by this court, of its remedial power.

The defendants are proceeding in no wanton or aggressive spirit. The authority upon which they rely was given, and afterwards deliberately renewed by the State. The case stands before us as if the parties were the State of Pennsylvania and the United States. The river, being wholly within her limits, we cannot say the State has exceeded the bounds of her authority. Until the dormant power of the Constitution is awakened and made effective, by appropriate legislation, the reserved power of the States is plenary, and its exercise in good faith cannot be made the subject of review by this court. It is not denied that the defendants are justified if the law is valid. We find nothing in the record which would warrant us in disturbing the decree of the circuit courts, which is, therefore, *Affirmed with costs.*

[The dissenting opinion of CLIFFORD, J. (with whom concurred JUSTICES WAYNE and DAVIS), is omitted. It proceeded upon the ground "that Congress has regulated the navigation of this river, and that the State law under which the respondents attempt to justify is in conflict with these regulations, and therefore is void."]

IN *The License Tax Cases*, 5 Wall. 462 (1866), nine cases came up from the circuit courts of the United States in several States, raising questions under the United States Internal Revenue Acts of 1864 and 1866, which required a license or imposed a special tax, in the case of persons engaged in selling lottery tickets or in the retail trade in intoxicating liquors. CHASE, C. J., for the court, said:

We come now to examine a more serious objection to the legislation of Congress in relation to the dealings in controversy. It was argued for the defendants in error that a license to carry on a particular business gives an authority to carry it on; that the dealings in controversy were parcel of the internal trade of the State in which the defendants resided;

that the internal trade of a State is not subject, in any respect, to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under Acts of Congress, must, therefore, be absolutely null and void; and, consequently, that penalties for carrying on such trade without such license could not be constitutionally imposed.

This series of propositions, and the conclusion in which it terminates, depends on the postulate that a license necessarily confers an authority to carry on the licensed business. But do the licenses required by the Acts of Congress for selling liquor and lottery tickets confer any authority whatever? . . . [Here follows a passage given *supra*, p. 737, in which it is held that the licenses give no authority to carry on the business, but are merely a mode of taxing.]

This construction is warranted by the practice of the government from its organization. As early as 1794 retail dealers in wines or in foreign distilled liquors were required to obtain and pay for licenses, and renew them annually, and penalties were imposed for carrying on the business without compliance with the law. In 1802 these license-taxes and the other excise or internal taxes, which had been imposed under the exigencies of the time, being no longer needed, were abolished. In 1813 revenue from excise was again required, and laws were enacted for the licensing of retail dealers in foreign merchandise, as well as retail dealers in wines and various descriptions of liquors. These taxes also were abolished after the necessity for them had passed away, in 1817. No claim was ever made that the licenses thus required gave authority to exercise trade or carry on business within a State. They were regarded merely as a convenient mode of imposing taxes on several descriptions of business, and of ascertaining the parties from whom such taxes were to be collected.

With this course of legislation in view, we cannot say that there is anything contrary to the Constitution in these provisions of the recent or existing internal revenue Acts relating to licenses.

Nor are we able to perceive the force of the other objection made in argument, that the dealings for which licenses are required being prohibited by the laws of the State, cannot be taxed by the national government. There would be great force in it if the licenses were regarded as giving authority, for then there would be a direct conflict between National and State legislation on a subject which the Constitution places under the exclusive control of the States.

But, as we have already said, these licenses give no authority. They are mere receipts for taxes. And this would be true had the Internal Revenue Act of 1864, like those of 1794, and 1813, been silent on this head. But it was not silent. It expressly provided, in section sixty-seven, that no license provided for in it should, if granted, be construed to authorize any business within any State or Territory prohibited by the laws thereof, or so as to prevent the taxation of the same business by the State. This provision not only recognizes the full con-

trol by the States of business carried on within their limits, but extends the same principle, so far as such business licensed by the national government is concerned, to the Territories.

There is nothing hostile or contradictory, therefore, in the Acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union.

These considerations require an affirmative answer to the first general question, Whether the several defendants, charged with carrying on business prohibited by State laws, without the licenses required by Acts of Congress, can be convicted and condemned to pay the penalties imposed by these Acts?

The remaining question is, Whether the defendant, indicted for carrying on a business on which a special tax is imposed by the internal revenue law, but which is prohibited by the laws of New York, can be convicted and condemned to pay the penalty imposed for not having paid that tax? What has been already said sufficiently indicates our judgment upon this question. . . .

It was insisted by counsel that whatever might be the power, it could not have been the intention of Congress to tax any business prohibited by State laws. And the argument from public policy was much relied upon in support of this view.

We think it unnecessary to repeat the answer already made to this argument, when urged against the requirements of licenses. It is, if possible, less cogent against the direct imposition of a tax on a prohibited business than against the indirect imposition.

It may, however, be properly said that the law of 1866 was enacted after the arguments of the last term, and that Congress imposed these special taxes with the distinct understanding that several branches of business thus taxed were prohibited by State legislation. This is conclusive as to the intention. The hypothesis we are asked to adopt would nullify some of the plainest provisions of the Act, and is inadmissible. The question must be answered affirmatively.

WOODRUFF *v.* PARHAM.

SUPREME COURT OF THE UNITED STATES. 1868.

[8 *Wall.* 123.]

ERROR to the Supreme Court of Alabama. . . . The city of Mobile, Alabama, in accordance with a provision in its charter, authorized the collection of a tax for municipal purposes on real and personal estate, sales at auction, and sales of merchandise, capital employed in business and income within the city. This ordinance being on the city statute-book, Woodruff and others, auctioneers, received, in the course of their business, for themselves, or as consignees and agents for others, large amounts of goods and merchandise, the products of States other than Alabama, and sold the same in Mobile to purchasers in the original and unbroken packages. Thereupon, the tax collector for the city demanded the tax levied by the ordinance. Woodruff refused to pay the tax, asserting that it was repugnant to the above-quoted provisions of the Constitution [viz. those giving Congress power to regulate commerce, prohibiting the States from imposing duties on imports or exports, and securing to citizens of a State the rights of citizens in other States]. The question coming finally, on a case stated, into the Supreme Court of the State, where the first two of the above-quoted provisions of the Constitution were relied on by the auctioneers as a bar to the suit, the said court decided in favor of the tax. And the question was now here for review. . . .

Messrs. J. A. Campbell and *P. Hamilton*, for the plaintiffs in error; *Mr. P. Phillips, contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

The case was heard in the courts of the State of Alabama upon an agreed statement of facts, and that statement fully raises the question 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. And it is claimed that it also brings the case within the principles laid down by this court in *Brown* v. *Maryland*, 12 Wheat. 419.

That decision has been recognized for over forty years as governing the action of this court in the same class of cases, and its reasoning has been often cited and received with approbation in others to which it was applicable. We do not now propose to question its authority or to depart from its principles. The tax of the State of Maryland, which was the subject of controversy in that case, was limited by its terms to importers of foreign articles or commodities, and the proposition that we are now to consider is whether the provision of the Constitution to which we have referred extends, in its true meaning and intent, to articles brought from one State of the Union into another.

The subject of the relative rights and powers of the Federal and State governments in regard to taxation, always delicate, has acquired an importance by reason of the increased public burdens growing out of the recent war, which demands of all who may be called in the discharge of public duty to decide upon any of its various phases, that it shall be done with great care and deliberation. Happily for us, much the larger share of these responsibilities rests with the legislative departments of the State and Federal governments. But when, under the pressure of a taxation necessarily heavy, and in many cases new in its character, the parties affected by it resort to the courts to ascertain whether their individual rights have been infringed by legislation, and assert rights supposed to be guaranteed by the Federal Constitution, they, in every such case properly brought before us, devolve upon this court an obligation to decide the question raised from which there is no escape.

The words "impost," "imports," and "exports" are frequently used in the Constitution. They have a necessary correlation, 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.

In the case of *Brown* v. *Maryland*, the word "imports," as used in the clause now under consideration, is defined, both on the authority of the lexicons and of usage, to be articles brought into the country; and impost is there said to be a duty, custom, or tax levied on articles brought into the country. In the ordinary use of these terms at this day, no one would, for a moment, think of them as having relation to any other articles than those brought from a country foreign to the United States, and at the time the case of *Brown* v. *Maryland* was decided — namely, in 1827 — it is reasonable to suppose that the general usage was the same, and that in defining imports as articles brought into the country, the Chief Justice used the word "country" as a synonym for United States.

But the word is susceptible of being applied to articles introduced from one State into another, and we must inquire if it was so used by the framers of the Constitution. . . .

Whether we look, then, to the terms of the clause of the Constitution in question, or to its relation to the 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, the right of one State to tax articles brought into it from another. If we examine for a moment the results of an opposite doctrine, we shall be well satisfied with the wisdom of the Constitution as thus construed.

The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all State, county, and city taxes; for all that he is worth is invested in goods which he claims to be pro-

tected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares, or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens. These cases are merely mentioned as illustrations. But it is obvious that if articles brought from one State into another are exempt from taxation, even under the limited circumstances laid down in the case of *Brown* v. *Maryland*, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible.

It is said, however, that, as a court, we are bound, by our former decisions, to a contrary doctrine, and we are referred to the cases of *Almy* v. *State of California*, 24 How. 169, and *Brown* v. *Maryland*, in support of the assertion. The case first mentioned arose under a statute of California, which imposed a stamp tax on bills of lading for the transportation of gold and silver from any point within the State to any point without the State. The master of the ship "Rattler" was fined for violating this law, by refusing to affix a stamp to a bill of lading for gold shipped on board his vessel from San Francisco to New York. It seems to have escaped the attention of counsel on both sides, and of the Chief Justice who delivered the opinion, that the case was one of interstate commerce. No distinction of the kind is taken by counsel, none alluded to by the court, except in the incidental statement of the *termini* of the voyage. In the language of the court, citing *Brown* v. *Maryland* as governing the case, the statute of Maryland is described as a tax on foreign articles and commodities. The only question discussed by the court is, whether the bill of lading was so intimately connected with the articles of export described in it that a tax on it was a tax on the articles exported. And, in arguing this proposition, the Chief Justice says that "a bill of lading, 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." It is impossible to examine the opinion without perceiving that the mind of the writer was exclusively directed to foreign commerce, and there is no reason to suppose that the question which we have discussed was in his thought. We take it to be a sound principle, that no proposition of law can be said to be overruled by a court, which was not in the mind of the court when the decision was made. *The Victory*, 6 Wall. 382.

The case, however, was well decided on the ground taken by Mr. Blair, counsel for defendant, namely: that such a tax was a regulation of commerce, a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons between one State and another, which is

within the rule laid down in *Crandall* v. *Nevada*, 6 Wall. 35, and with the authority of Congress to regulate commerce among the States. We do not regard it, therefore, as opposing the views which we have announced in this case.

The case of *Brown* v. *Maryland*, as we have already said, arose out of a statute of that State, taxing, by way of discrimination, importers who sold, by wholesale, foreign goods. Chief Justice Marshall, in delivering the opinion of the court, distinctly bases the invalidity of the statute, (1.) On the clause of the Constitution which forbids a State to levy imposts or duties on imports; and (2.) That which confers on Congress the power to regulate commerce with foreign nations, among the States, and with the Indian tribes.

The casual remark, therefore, made in the close of the opinion, "that we suppose the principles laid down in this case to apply equally to importations from a sister State," can only be received as an intimation of what they might decide if the case ever came before them, for no such case was then to be decided. It is not, therefore, a judicial decision of the question, even if the remark was intended to apply to the first of the grounds on which that decision was placed.

But the opinion in that case discusses, as we have said, under two distinct heads, the two clauses of the Constitution which he supposed to be violated by the Maryland statute, and the remark above quoted follows immediately the discussion of the second proposition, or the applicability of the commerce clause to that case.

If the court then meant to say that a tax levied on goods from a sister State which was not levied on goods of a similar character produced within the State, would be in conflict with the clause of the Constitution giving Congress the right "to regulate commerce among the States," as much as the tax on foreign goods, then under consideration, was in conflict with the authority "to regulate commerce with foreign nations," we agree to the proposition.

It may not be inappropriate here to refer to *The License Cases*, 5 How. 504.

The separate and diverse opinions delivered by the judges on that occasion leave it very doubtful if any material proposition was decided, though the precise point we have here argued was before the court and seemed to require solution. But no one can read the opinions which were delivered without perceiving that none of them held that goods imported from one State into another are within the prohibition to the States to levy taxes on imports, and the language of the Chief Justice and Judge McLean leave no doubt that their views are adverse to the proposition.

We are satisfied that the question, as a distinct proposition necessary to be decided, is before the court now for the first time.

But, we may be asked, is there no limit to the power of the States to tax the produce of their sister States brought within their borders? And can they so tax them as to drive them out or altogether prevent their introduction or their transit over their territory?

The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. 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. There is also, in addition to the restraints which those provisions impose by their own force on the States, the unquestioned power of Congress, under the authority to regulate commerce among the States, to interpose, by the exercise of this power, in such a manner as to prevent the States from any oppressive interference with the free interchange of commodities by the citizens of one State with those of another. *Judgment affirmed.*

[The dissenting opinion of NELSON, J., is omitted. The tenor of it is indicated by the beginning, which is as follows : —

"I am unable to agree to the judgment of the court in this case. The naked question is, whether a State can tax the sale of an article, the product of a sister State, in the original package, when imported into the former for a market, under the Constitution of the United States? If she can, then no security or protection exists in this government against obstructions and interruptions of commerce among the States; and, one of the principal grievances that led to the Convention of 1787, and to the adoption of the Federal Constitution, has failed to be remedied by that instrument. And hereafter (for this is the first time since its adoption that the clause in question has received the interpretation now given to it), this interstate commerce is necessarily left to the regulation of the legislatures of the different States. We think we hazard nothing in saying, that heretofore the prevailing opinion of jurists and statesmen of this country has been that this commerce was protected by the clause — the subject of discussion — namely: '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.'"] [1]

[1] In a note at the end of *Woodruff* v. *Parham*, at p. 148, the reporter gives the case of *Hinson* v. *Lott*, decided at the same time: —

"The State of Alabama passed a statute, approved February 22d, 1866, which, by its 13th section, enacted: 'Before it shall be lawful for any dealer or dealers in spirituous liquors to offer any such liquors for sale within the limits of this State, such dealer or dealers introducing any such liquors into the State for sale shall first pay the tax-collector of the county into which such liquors are introduced, a tax of fifty cents per gallon upon each and every gallon thereof.'

"Two subsequent sections, the 14th and 15th, provided the mode of enforcing the collection of the tax thus imposed.

"Previous sections of the statute, it ought to be mentioned, laid a tax of fifty cents

per gallon on all whiskey and all brandy from fruits manufactured in the State, and in order to collect this tax, enacted that every distiller should take out a license and make regular returns of the amount of distilled spirits manufactured by him. On this he was to pay the fifty cents per gallon.

"With this statute in force, Hinson, a merchant of Mobile, filed a bill against the tax collector for the city of Mobile, and State of Alabama, in which he set forth that he had on hand five barrels of whiskey consigned to him by one Dexter, of the State of Ohio, to be sold on account of the latter in the State of Alabama, and that he had five other barrels, purchased by himself in the State of Louisiana, and that he had brandy and wine imported from abroad (upon which he had paid the import duties laid by the United States, at the custom-house at Mobile), all of which liquors he now held and was offering for sale in the same packages in which they were imported, and not otherwise; that the tax-collector was about to enforce the collection of State and county taxes on the said liquors, for which he set up the authority of the 13th, 14th and 15th sections of the already quoted Act of the Alabama legislature. Hinson insisted that this Act was void as being in conflict with the Constitution of the United States, and prayed an injunction. The defendant demurred. . . .

"The relief prayed was granted as to all but the State tax, and relief as to that was granted as to goods imported from abroad, but the State tax of fifty cents per gallon on the whiskey of Dexter, of Ohio, and that purchased by plaintiff in Louisiana was held to be valid.

"The case was now here for review. And was argued (like the last one, though being after it, less fully) by *Mr. J. A. Campbell*, for the plaintiff in error, and by *Mr. P. Phillips, contra;* little reference being made to other sections of the statute than the 13th.

"Mr. Justice Miller delivered the opinion of the court.

"In the argument of this case no reference has been made to any other section than the 13th of the statute in question.

"If this section stood alone in the legislation of Alabama on the subject of taxing liquors, the effect of it would be that all such liquors brought into the State from other States and offered for sale, whether in the original casks by which they came into the State or by retail in smaller quantities, would be subject to a heavy tax, while the same class of liquors manufactured in the State would escape the tax. It is obvious that the right to impose any such discriminating tax, if it exist at all, cannot be limited in amount, and that a tax under the same authority can as readily be laid which would amount to an absolute prohibition to sell liquors introduced from without while the privilege would remain unobstructed in regard to articles made in the State. If this can be done in reference to liquors, it can be done with reference to all the products of a sister State, and in this mode one State can establish a complete system of non-intercourse in her commercial relations with all the other States of the Union.

"We have decided, in the case of *Woodruff* v. *Parham*, immediately preceding, that the constitutional provision against taxing imports by the States does not extend to articles brought from a sister State. But if this were otherwise, and we could hold that as to such articles the rule laid down in *Brown* v. *Maryland*, concerning foreign imports, applied, it would prevent but a very little of the evil which we have described; for, under the decision in that case, it is only while the goods so imported were held in the original unbroken condition in which they came into the State, and in the hands of the first importer, that they would be protected from State taxation. As soon as they passed out of his hands into use, or were offered for sale among the community at large, they would be liable to a tax which might render their use or sale impossible.

"But while the case has been argued here with a principal reference to the supposed prohibition against taxing imports, it is to be seen from the opinion of the Supreme Court of Alabama delivered in this case, that the clause of the Constitution which gives to Congress the right to regulate commerce among the States, was supposed to present a serious objection to the validity of the Alabama statute. Nor can it be doubted that a tax which so seriously affects the interchange of commodities between the States as to essentially impede or seriously interfere with it, is a regulation of

IN *Paul* v. *Virginia*, 8 Wall. 168 (1868), the plaintiff, agent in Virginia of several insurance companies incorporated in New York, was

commerce. And it is also true, as conceded in that opinion, that Congress has the same right to regulate commerce among the States that it has to regulate commerce with foreign nations, and that whenever it exercises that power, all conflicting State laws must give way, and that if Congress had made any regulation covering the matter in question we need inquire no further.

"That court seems to have relieved itself of the objection by holding that the tax imposed by the State of Alabama was an exercise of the concurrent right of regulating commerce remaining with the States until some regulation on the subject had been made by Congress. But, assuming the tax to be, as we have supposed, a discriminating tax, levied exclusively upon the products of sister States; and looking to the consequences which the exercise of this power may produce if it be once conceded, amounting, as we have seen, to a total abolition of all commercial intercourse between the States, under the cloak of the taxing power, we are not prepared to admit that a State can exercise such a power, though Congress may have failed to act on the subject in any manner whatever.

"The question of the nature of the power to regulate commerce and how far that power is exclusively vested in Congress, has always been a difficult one, and has seldom been construed in this court with unanimity. In the very latest case on this subject, *Crandall* v. *Nevada*, 6 Wall. 35, the Chief Justice and Mr. Justice Clifford held that a tax on persons passing through the State by railroads or other public conveyances was forbidden to the States by that provision of the Constitution *proprio vigore*, and in the absence of any legislation by Congress on the subject; while a majority of the court, preferring to place the invalidity of the tax on other grounds, merely expressed their inability, on a review of the cases previously decided, to take that view of the question. But in that case the opinion of the court in *Cooley* v. *The Port Wardens* was approved, which holds that there is a class of legislation of a general nature, affecting the commercial interests of all the States, which, from its essential character, is National, and which must, so far as it affects these interests, belong exclusively to the Federal government.

"The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all the other States in favor of those of Alabama, and involving a principle which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation and be forbidden by the clause of the Constitution just mentioned.

"But a careful examination of that statute shows that it is not obnoxious to this objection. A tax is imposed by the previous sections of the same Act of fifty cents per gallon on all whiskey and all brandy from fruits manufactured in the State. In order to collect this tax, every distiller is compelled to take out a license and to make regular returns of the amount of distilled spirits manufactured by him. On this he pays fifty cents per gallon. So that when we come in the light of these earlier sections of the Act, to examine the 13th, 14th, and 15th sections, it is found that no greater tax is laid on liquors brought into the State than on those manufactured within it. And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the State, the tax on those who sold liquors brought in from other States was only the complementary provision necessary to make the tax equal on all liquors sold in the State. As the effect of the Act is such as we have described, and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States.

"*Decree affirmed.*

"MR. JUSTICE NELSON dissented."

indicted, convicted, and sentenced to pay a fine for acting in Virginia as such agent without complying with a requirement of a statute of Virginia that he should take out a license, and as a preliminary thereto deposit with the treasurer of the State certain bonds, to a large amount. On error to the Supreme Court of Appeals of Virginia, FIELD, J., for the court, in affirming the judgment of the State court, said: "We proceed to the second objection urged to the validity of the Virginia statute, which is founded upon the commercial clause of the Constitution. 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. At the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company, may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. 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.

"There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect — are not executed contracts — until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.

"In *Nathan* v. *Louisiana*, 8 Howard, 73, this court held that a law of that State imposing a tax on money and exchange brokers, who dealt entirely in the purchase and sale of foreign bills of exchange, was not

in conflict with the constitutional power of Congress to regulate commerce. . . .

"If foreign bills of exchange may thus be the subject of State regulation, much more so may contracts of insurance against loss by fire." [1]

THE DANIEL BALL.

SUPREME COURT OF THE UNITED STATES. 1870.

[10 *Wall.* 557.]

APPEAL from the Circuit Court for the Western District of Michigan, the case being thus: —

The Act of July 7, 1838, 5 Stat. at Large, 304, provides, in its second section, that it shall not be lawful for the owner, master, or captain of any vessel, propelled in whole or in part by steam, to transport any merchandise or passengers upon "the bays, lakes, rivers, or other navigable waters of the United States," after the 1st of October of that year, without having first obtained from the proper officer a license under existing laws; that for every violation of this enactment the owner or owners of the vessel shall forfeit and pay to the United States the sum of five hundred dollars; and that for this sum the vessel engaged shall be liable, and may be seized and proceeded against summarily by libel in the District Court of the United States.

The Act of August 30, 1852, 10 Stat. at Large, 61, which is amendatory of the Act of July 7, 1838, provides for the inspection of vessels propelled in whole or in part by steam and carrying passengers, and the delivery to the collector of the district of a certificate of such inspection, before a license, register, or enrolment, under either of the Acts, can be granted, and declares that if any vessel of this kind is navigated with passengers on board, without complying with the terms of the Act, the owners and the vessel shall be subject to the penalties prescribed by the second section of the Act of 1838.

In March, 1868, the "Daniel Ball," a vessel propelled by steam, of one hundred and twenty-three tons burden, was engaged in navigating Grand River, in the State of Michigan, between the cities of Grand Rapids and Grand Haven, and in the transportation of merchandise and passengers between those places, without having been inspected or licensed under the laws of the United States; and to recover the penalty, provided for want of such inspection and license, the United States filed a libel in the District Court for the Western District of Michigan.

The libel, as amended, described Grand River as a navigable water of the United States; and, in addition to the employment stated above,

[1] For this case in another aspect, see *supra*, p. 468. — ED.

alleged that in such employment the steamer transported merchandise, shipped on board of her, destined for ports and places in States other than the State of Michigan, and was thus engaged in commerce between the States. The answer of the owners, who appeared in the case, admitted substantially the employment of the steamer as alleged, but set up as a defence that Grand River was not a navigable water of the United States, and that the steamer was engaged solely in domestic trade and commerce, and was not engaged in trade or commerce between two or more States, or in any trade by reason of which she was subject to the navigation laws of the United States, or was required to be inspected and licensed.

It was admitted, by stipulation of the parties, that the steamer was employed in the navigation of Grand River between the cities of Grand Rapids and Grand Haven, and in the transportation of merchandise and passengers between those places; that she was not enrolled and licensed for the coasting trade; that some of the goods that she shipped at Grand Rapids and carried to Grand Haven were destined and marked for places in other States than Michigan, and that some of the goods which she shipped at Grand Haven came from other States and were destined for places within that State.

It was also admitted that the steamer was so constructed as to draw only two feet of water, and was incapable of navigating the waters of Lake Michigan; that she was a common carrier between the cities named, but did not run in connection with or in continuation of any line of steamers or vessels on the lake, or any line of railway in the State, although there were various lines of steamers and other vessels running from places in other States to Grand Haven carrying merchandise, and a line of railway was running from Detroit which touched at both of the cities named.

The District Court dismissed the libel. The Circuit Court reversed this decision, and gave a decree for the penalty demanded.

From this decree the case was brought by appeal to this court.

Mr A. T. McReynolds, for the appellant; *Mr. Bristow*, *Solicitor-General*, *contra*, for the United States.

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 month 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 of 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.*[1]

[1] In *Harrigan* v. *Conn. Riv. Lumber Co.*, 129 Mass. 580 (1880), a statute of Massachusetts (Gen. St. c. 78, § 5), had forbidden the driving or floating of logs down the Connecticut River unless bound into rafts, and under the care of a sufficient number of persons to prevent damage. The plaintiff sued in tort for injuries to his pleasure boats, fastened to a wharf in Springfield, caused by floating logs not thus fastened together and attended. It appeared by uncontradicted evidence that the Connecticut River was navigated from its mouth to Holyoke by a transportation company with barges loaded with seventy-five tons, drawn by steam tugs of fifty tons tonnage, but that the tide did not ebb and flow therein in this State; that the defendant, incorporated in 1878, under the laws of Connecticut, purchased and owned timber lands in the State of Vermont to the extent of one hundred and thirty thousand acres upon the banks of the Connecticut River and its tributaries, upon which were six hundred and fifty million feet of lumber; that it owned a large steam mill at Northampton, in this State, on the said river, turning out sixty thousand feet a day, with an investment of $60,000; that it owned another mill of larger capacity at Holyoke, in this State, with an investment of $80,000, and still another at Hartford, in the State of Connecticut, of nearly as large capacity and capital; that its business was cutting, in the winter, the timber upon said lands, placing the logs in the Connecticut River in the spring, floating the logs down the river in drives of large quantities at a time to its different mills, sawing the logs into lumber, and selling the lumber in the market. There was evidence tending to prove that by reason of the rapids upon said river at Turner's Falls and Holyoke, within this State, it was absolutely impossible to comply with the first clause of said section, and to drive the logs in rafts over said rapids, and it must abandon the use of the Connecticut River if compelled so to do; that the defendant could unloose logs above rapids, and form them into rafts again after passing the rapids, but that the expense of so doing would be pecuniarily ruinous; that there was no other way of getting its timber into the markets of this State or of the State of Connecticut in any manner that was not ruinously expensive. It also appeared that the drives of logs generally occurred in July or August, and at intervals, — the logs running in the river for from two to four weeks, — and when so running, and at the time in question, substantially filled the river and prevented the use of it by pleasure boats, although the same did not intercept or prevent the large barges and steam tugs from the use of the river. . . .

The jury found for the plaintiff, and the case went up on exceptions by the defendant. LORD, J., for the court, said: "At the trial, no question was made of the propriety of any ruling except one upon the provisions of the Gen. Sts. c. 78, § 5. The presiding judge ruled that any acts done in violation of that statute were *prima facie* wrongful; and the only objection made by the defendant to the ruling is that the statute is unconstitutional, for the reason that it is not competent for the legislature of the Commonwealth to pass any law upon that subject, it being within the exclusive jurisdiction of Congress in the exercise of its power 'to regulate commerce among the several States.' . . .

"The statute does not profess to take from the character of the Connecticut River that of a great highway, and it is not necessary to consider whether strictly that river is or is not technically 'navigable waters' The tide does not ebb and flow therein within the limits of this Commonwealth, and dams and bridges by authority of

the Legislature of Massachusetts have been erected over and across it in various places. . . .

"As before said, this legislation does not attempt to deprive the Connecticut River of the character of a highway. It does not interfere with any use of it as such, and all interstate commerce may be conducted over its waters with the same freedom as over its roads, bridges, and other highways. If the legislature had ordered that the Connecticut River should not be used for the transportation of logs, masts, and spars from the State of Vermont to the State of Connecticut, a very different question would have been presented. That question does not arise, and need not be discussed. That it is competent for the legislature of a State to prescribe the mode in which its ways shall be used to avoid collision and conflict, and to prevent injury to persons or property rightfully thereon, and to prevent obstructions therein, cannot be questioned; and such legislation has no relation to, and does not interfere with, commerce between the States. The section of the law declares in its terms the object and purpose of its provisions. It requires logs, masts, and spars to be so arranged that they may be controlled by those having them in charge, and its purpose is to prevent damage to dams and bridges, lawfully erected upon and across the river. Neither a log nor any number of logs floating upon the surface of a stream, uncontrolled and uncontrollable, is navigation or commerce. . . .

"The defendant, however, relies with much confidence upon the decision by the Supreme Court of Maine in the case of *Treat* v. *Lord*, 42 Me. 552. It is contended that, by the decision in that case, the right of every person to float logs upon navigable waters is absolute, and the power to regulate it is alone in Congress. No such principle is embraced within that decision. . . .

"Neither of these propositions, nor any other decided in that case, has the slightest bearing upon any question involved in the present case. There is no intimation that the legislature has not authority to regulate the mode in which the easement should be used; but, on the other hand, the power is expressly asserted in the legislature, not only to regulate, but to prohibit the exercise of the right; nor is there anything in the report of the case which, by implication even, can be understood as recognizing the fact that a single log or many logs floating uncontrolled, with no power of the owner over them, is either commerce or navigation. All the language of the report implies that the logs were at all times under the control and direction of those driving them. It would be impossible upon any other theory to satisfy the rules of law which were given to the jury in regard to the care and diligence of the defendant, and the respect which he was bound to have for the plaintiff's rights, and that his own must be so exercised as to do the least injury to the plaintiff's property. It would be a mere absurdity to say that the right to use the river for logs tumbled into the stream, and floating down uncontrolled, and carrying with them the plaintiff's dam, is consistent with the law declared in that case.

"The case of *Carter* v. *Thurston*, 58 N. H. 104, is no more favorable to the claim of the defendant. In that case it was decided only that any person had the right to make a reasonable use of a public stream; that in such use he was not responsible for any damage done without his fault, that is, that the use itself is not a wrong-doing; but that he is responsible for injury done by his carelessness.

"There is no ground for the inference that, in the use of the river as a highway, the legislature may not make suitable regulations for its more convenient and safe use by persons having equal rights thereon or that a use in violation of such regulation is authorized under the Constitution of the United States, and cannot be limited by State legislation because such regulation is an interference with interstate commerce. *Exceptions overruled.*"

In *Com.* v. *King*, 150 Mass. 221 (1889), the defendant was convicted of running a steamboat without a license required by the statutes of Massachusetts, on the Connecticut River between the towns of Holyoke and South Hadley, above the dam at Holyoke. In sustaining the verdict on defendant's exceptions, the court (FIELD, J.), said: "The statutes of Massachusetts were intended to regulate steamboats used for

the conveyance of passengers which were not subject to regulation by Congress because they were not used in navigating waters of the United States. We think that the Superior Court might take judicial notice that the Connecticut River above the dam at Holyoke does not, either by itself or by uniting with other waters, constitute a public highway over which commerce may be carried on with other States or with foreign countries, although, if the court had entertained any doubt on the subject, it might have required evidence to be produced. It is well known that the waters of the Connecticut River, at the place where it was alleged that the defendant's steamboat was employed, can be used by vessels only for the transportation of persons and property between different places in Massachusetts. They are, therefore, waters not within the maritime jurisdiction of the United States. *Veazie* v. *Moor*, 14 How. 568; *The Montello*, 11 Wall. 411, and 20 Wall. 430; *Miller* v. *New York*, 109 U. S. 385, 395."

In *Gwalteney* v. *The Scottish, &c. Timber and Land Co.*, 111 No. Ca. 547 (1892), the plaintiff sought to recover damages for injuries to his dam and fishery on the French Broad River below Asheville in North Carolina, alleging that the river at that point is not a navigable stream, that he was a riparian owner on the east side, and had built a dam about two thirds across the river, leaving one third open with a free passage, that the defendant had recently engaged in floating large logs down the river, and through negligence in conducting the business had destroyed the dam and fishery. The defendant denied the plaintiff's allegations, and also set up that the French Broad was a river capable of being used for floating rafts, boats, and logs, and had long been so used before the plaintiff built his dam. The plaintiff was nonsuited at the close of his own case and appealed. The Supreme Court gave a new trial, on the ground that there was evidence which entitled the plaintiff to go to the jury. The court (SHEPHERD, C. J.), added: "Conceding that this is a floatable stream (and we think there is testimony tending to show that it is), another serious question to be determined is whether the right to float logs must not be exercised with reference to the rights of riparian proprietors. To sustain the nonsuit in this case would, we fear, be construed as an indication that the right of floatage is paramount to all other interests, and we are not prepared to assent to such a proposition."

MCRAE, J., in a concurring opinion, said (p. 555): "The leading case on the subject of the law of watercourses in North Carolina is *State* v. *Glen*, 7 Jones, 321, in which the late Judge Battle in a very able opinion, discussed the rights of the public, and of the riparian owners, and of the owners of the beds of these streams. He divides them into three classes. . . .

"While it will be noticed that the second class is by his definition confined to such as are sufficiently wide and deep to be navigable by 'boats, flats, and rafts,' no mention is made of logs. [The opinion here refers to a statute passed the same year with the last-named case, providing for gates and slopes in mill-dams "for the convenient passage of floating logs and other timber."] But in the case of *McLaughlin* v. *Manufacturing Co.*, 103 N. C. 100, for the first time I see an allusion to another class of streams called floatable — a term now in general use, especially in those States where there are great timber interests, as in the Northeastern States and upon the Great Lakes. Floatable streams are said to be 'capable of valuable use in bearing the products of mines, forest, and tillage of the country it traverses to the mills and markets.' . . . In the case of *Gaston* v. *Mace*, 33 W. Va. 14, navigable streams are divided into (1) tidal streams; (2) those non-tidal, but navigable for boats or lighters, and (3) floatable, to which last class are given the definition we have quoted, *supra*, and in relation thereto a quotation is used from *Lancy* v. *Clifford*, 54 Me. 487.

"'A stream, which, in its natural condition, is capable of being used for floating logs, lumber, and rafts, is subject to the public use as a highway, though it be private property and not strictly navigable. This right of the public, however, must be exercised in a reasonable manner. . . . The various purposes for which such a highway is used by the public, whether for transporting merchandise, rafting, driving, or booming logs, or securing them at the mill afterwards, if necessary, require so much space as temporarily to obstruct the way, but if parties so conduct themselves in this business as

to discommode others as little as is reasonably practicable, the law holds them harmless.' Speaking of the conflict of interests between the navigators and the riparian owners, 'the common law . . . furnishes a solution of this difficulty by allowing the owner of the soil, over which a floatable stream which is not technically navigable passes, to build a dam across it and erect a mill thereon, provided he furnishes a convenient and suitable sluice or passageway for the public by or through his erection. In this way both these rights may be exercised without substantial prejudice or inconvenience.'"

CLARK, J., and AVERY, J., dissented. The latter in the course of an instructive opinion, dwelling at large upon the doctrine of "floatable" waters, identifying them with "navigable" waters, said (p. 561): "As none but the most valuable hardwood logs will bear transportation by railway from points remote from the coast, as a rule the value of immense forests is often left to depend upon local demand until the cheaper water highways are utilized. Hence, public policy, as well as reason, upon which the recognition of the easement in watercourses is founded, have inclined the courts to sustain the right of the owners of large forests or extensive mining districts to enjoy the privilege, when shown to be very valuable to them, at the comparatively insignificant sacrifice on the part of a riparian proprietor of using his property in subordination to it. It was upon such consideration that the courts of those States where the fresh-water streams were first found useful in the development of mineral or well timbered lands, declared that the reason of the English rule extended, under the widely different circumstances often existing in this country, not only to navigable tidal streams and fresh-water streams large enough for boats and lighters, but to such as subserved the purpose of bearing the products of the mines, forest, and tillage of the country traversed by them to mills or market. Wood L. Nuis., sec. 586; 16 Am. and Eng. Enc. 242; *Moore* v. *Sanborn*, 2 Mich. 526; *Brown* v. *Chadbourne*, *supra*; *Lewis* v. *Coffee*, 77 Ala. 190; *Treat* v. *Lord*, 42 Me. 552; *Canfield* v. *Erie*, 1 Mich. 105; *Grand Rapids* v. *Jarvis*, 30 Mich. 308; *McLaughlin* v. *Mining Co.*, 103 N. C. 100; *State* v. *White Oak River Corporation*, at this term.

"The best criterion of the navigability of a watercourse, therefore, is unquestionably its adaptability for the purposes of useful commerce, and, bearing this controlling principle in mind, we see no sufficient reason for the arbitrary distinction which counsel contended should be drawn between transporting logs in rafts and allowing each log to drift or float with the current of the stream. The object being to develop vast forests of virgin trees, that are located remote from the centres of trade, by utilizing the natural force of the flowing water as a means of cheap transportation, — the reasons offered for sustaining the right to the easement, in a sluggish stream, where the logs can be floated in rafts, and denying its existence in a watercourse of much greater volume and equal depth, because it is studded with immense rocks, and the fall is so great and the current so strong that rafts cannot be handled with safety, seem to me very unsatisfactory. The recognition of the distinction would prohibit the development of the mountain section, where there are generally strong currents and sudden falls, though Nature had furnished the means of reaching the object in view more certainly and expeditiously by using the swift rather than the sluggish current. If logs were attached to each other so as to form large rafts, they might be so steered as to avoid nets, dams, and other obstructions placed in water that moves slowly; but, even though no large stones protruded above the surface of a swift stream, it would be impossible without the aid of a steam tug to protect dams built across them from the consequences of collision, involving much more danger of destroying them than would the lodging of logs, one at a time, against them. In this view we are sustained by abundant authority in those States where the floating of logs to market has become an extensive and profitable industry. *Brown* v *Chadbourne*, *supra*; *Field* v. *Log Co.*, 67 Wis. 569; *Buchanan* v. *Grand River Co.*, 48 Mich. 364; *Muse* v. *Smith*, 3 Oregon, 621; *Grand Rapids* v. *Jarvis*, *supra*; *Treat* v. *Lord*, *supra*.

"It is true, that in one or two of the States where the forests are not extensive or the timber trees very valuable, the rule has been adopted that a due regard for the rights of owners of dams requires the logs should either be transported in rafts in

CASE OF THE STATE FREIGHT TAX.

READING RAILROAD COMPANY *v.* PENNSYLVANIA.

SUPREME COURT OF THE UNITED STATES. 1872.

[15 *Wall.* 232.][1]

Messrs. James E. Gowen and *Robert E. Lamberton*, for the plaintiff in error; a brief of *Mr. J. W. Simonton*, for other railroad companies interested with the plaintiff in error in the question involved, being filed by leave of the court; *Mr. F. Carroll Brewster*, Attorney-General of Pennsylvania, and *Mr. Lewis Waln Smith*, *contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

We are called upon, in this case, to review a judgment of the Supreme Court of Pennsylvania, affirming the validity of a statute of the State, which the plaintiffs in error allege to be repugnant to the Federal Constitution.

The case presents the question whether the statute in question — so far as it imposes a tax upon freight taken up within the State and carried out of it, or taken up outside the State and delivered within it, or, in different words, upon all freight other than that taken up and delivered within the State — is not repugnant to the provision of the Constitution of the United States which ordains "that Congress shall have power to regulate commerce with foreign nations and among the several States," or in conflict with the provision 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."

The question is a grave one. It calls upon us to trace the line, always difficult to be traced, between the limits of State sovereignty in imposing taxation, and the power and duty of the Federal government to protect and regulate interstate commerce. While, upon the one hand, it is of the utmost importance that the States should possess the power to raise revenue for all the purposes of a State government, by any means, and in any manner not inconsistent with the powers which the

charge of some persons who can steer them, or that during the season when they are being floated men should be posted at intervals along the banks of streams to prevent a collection of logs at any one point. But in States where timber has become an important article of commerce, the better rule prevails that when we even concede a stream to be a public highway, all private rights in it must be as completely subordinated as in a public road passing through land of private individuals. . . . The defendant, having the dominant right of navigation for the purpose of transporting logs, was under no greater legal obligation to look after the safety of a dam attached to a fish-trap, by conducting the logs around it, than the commander of a steamer would have been in passing through a navigable sound to steer around a fish-net that had been set across the channel *Hettrick* v. *Page*, 82 N. C. 65; *State* v. *Glen*, *supra*; *State* v. *Narrows Island Club*, *supra*; Angell on Watercourses, §§ 558, 659, 350; 3 Lawson, Rem § 2936; *Davis* v. *Winslow*, 81 Am. Dec. 580." — ED.

[1] The statement of facts is omitted. — ED.

people of the States have conferred upon the general government, it is equally important that the domain of the latter should be preserved free from invasion, and that no State legislation should be sustained which defeats the avowed purposes of the Federal Constitution, or which assumes to regulate, or control subjects committed by that Constitution exclusively to the regulation of Congress.

Before proceeding, however, to a consideration of the direct question whether the statute is in direct conflict with any provision of the Constitution of the United States, it is necessary to have a clear apprehension of the subject and the nature of the tax imposed by it. It has repeatedly been held that the constitutionality, or unconstitutionality of a State tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the cases of *Bank of Commerce* v. *New York City*, 2 Black, 620; in *The Bank Tax Case*, 2 Wallace, 200; *Society for Savings* v. *Coite*, 6 Id. 594; and *Provident Bank* v. *Massachusetts*, Id. 611. In all these cases it appeared that the bank was required by the statute to pay the tax, but the decisions turned upon the question, what was the subject of the tax, upon what did the burden really rest, not upon the question from whom the State exacted payment into its Treasury. Hence, where it appeared that the ultimate burden rested upon the property of the bank invested in United States securities, it was held unconstitutional, but where it rested upon the franchise of the bank, it was sustained.

Upon what, then, is the tax imposed by the Act of August 25th, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried. The companies are required to pay to the State treasurer for the use of the Commonwealth, "on each two thousand pounds of freight so carried," a tax at the specified rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight. And when it is observed that the Act provides "where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried upon one line, and the whole tax shall be paid by such one of said companies as the State treasurer may select and notify thereof," no room is left for doubt. This provision demonstrates that the tax has no reference to the business of the companies. In the case of connected lines thousands of tons may be carried over the line of one company without any liability of that company to pay the tax. The State treasurer is to decide which of several shall pay the whole. There is still

another provision in the Act which shows that the burden of the tax was not intended to be imposed upon the companies designated by it, neither upon their franchises, their property, or their business. The provision is as follows: "Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the same therewith." Evidently this contemplates a liability for the tax beyond that of the company required to pay it into the treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier to the thing carried. Improvement companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their roadway, but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can, therefore, add the tax to the charge for transportation without further authority. In view of these provisions of the statute it is impossible to escape from the conviction that the burden of the tax rests upon the freight transported, or upon the consignor or consignee of the freight (imposed because the freight is transported), and that the company authorized to collect the tax and required to pay it into the State Treasury is, in effect, only a tax-gatherer. The practical operation of the law has been well illustrated by another[1] when commenting upon a statute of the State of Delaware very similar to the one now under consideration. He said, "The position of the carrier under this law is substantially that of one to whom public taxes are farmed out — who undertakes by contract to advance to the government a required revenue with power by suit or distress to collect a like amount out of those upon whom the tax is laid. The only imaginable difference is, that, in the case of taxes farmed out, the obligation to account to the government is voluntarily assumed by contract, and not imposed by law, as upon the carrier under this Act; also, that different means are provided for raising the tax out of those ultimately chargeable with it."

Considering it, then, as manifest that the tax demanded by the Act is imposed, not upon the company, but upon the freight carried, and because carried, we proceed to inquire whether, so far as it affects commodities transported through the State, or from points without the State to points within it, or from points within the State to points without it, the Act is a regulation of interstate commerce. Beyond all

[1] Chancellor Bates in *Clarke* v. *Philadelphia, Wilmington, and Baltimore Railroad Co.*

question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one State to another 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. A power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the State to 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. In his work on the Constitution, § 1057, Judge Story asserts that the sense in which the word commerce is used in that instrument includes not only traffic, but intercourse and navigation. And in the *Passenger Cases*, 7 Howard, 416, it was said: "Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight." Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the States it must have been principally by land when the Constitution was adopted.

Then, why is not a tax upon freight transported from State to State a regulation of interstate transportation, and, therefore, a regulation of commerce among the States? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the State, and in taking them out? The present case is the best possible illustration. The Legislature of Pennsylvania has in effect declared that every ton of freight taken up within the State and carried out, or taken up in other States and brought within her limits, shall pay a specified tax. The payment of that tax is a condition upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines. It would hardly be maintained, we think, that had the State established custom-houses on her borders, wherever a railroad or canal comes to the State line, and demanded at these houses a duty for allowing merchandise to enter or to leave the State upon one of those rail-

roads or canals, such an imposition would not have been a regulation of commerce with her sister States. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand. The goods of no citizen of New York, New Jersey, Ohio, or of any other State, may be placed upon a canal, railroad, or steamboat within the State for transportation any distance, either into or out of the State, without being subjected to the burden. Nor can it make any difference that the legislative purpose was to raise money for the support of the State government, and not to regulate transportation. It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate trade. We are not at this moment inquiring further than whether taxing goods carried because they are carried is a regulation of carriage. 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 domain 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. Doubtless a State may regulate its internal commerce as it pleases. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the State.

We may notice here a position taken by the defendants in error, and stoutly defended in the argument, that the tax levied, instead of being a regulation of commerce, is compensation for the use of the works of internal improvement constructed under the authority of the State and by virtue of franchises granted by the State. . . .

All this, however, is abstract and apart from the case before us. That the Act of 1864 was not intended to assert a claim for the use of the public works, or a claim for a part of the tolls, is too apparent to escape observation. The tax was imposed upon freight carried by steamboat companies, whether incorporated by the State or not, and whether exercising privileges granted by the State or not. It reaches freight passing up and down the Delaware and the Ohio rivers carried by companies who derive no rights from grants of Pennsylvania, who are exercising no part of her eminent domain; and, as we have noticed heretofore, the tax is not proportioned to services rendered, or to the use made of canals or railways. It is the same whether the transportation be long or short. It must therefore be considered an exaction, in right of alleged sovereignty, from freight transported, or the right of transportation out of, or into, or through the State — a burden upon interstate intercourse.

If, then, this is a tax upon freight carried between States, and a tax because of its transportation, and if such a tax is in effect a regulation of interstate commerce, the conclusion seems to be inevitable that it is

in conflict with the Constitution of the United States. It is not necessary to the present case to go at large into the much-debated question whether the power given to Congress by the Constitution to regulate commerce among the States is exclusive. In the earlier decisions of this court it was said to have been so entirely vested in Congress that no part of it can be exercised by a State. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 283. It has, indeed, often been argued, and sometimes intimated, by the court that, so far as Congress has not legislated on the subject, the States may legislate respecting interstate commerce. Yet, if they can, why may they not add regulations to commerce with foreign nations beyond those made by Congress, if not inconsistent with them, for the power over both foreign and interstate commerce is conferred upon the Federal Legislature by the same words. And certainly it has never yet been decided by this court that the power to regulate interstate, as well as foreign commerce, is not exclusively in Congress. Cases that have sustained State laws, alleged to be regulations of commerce among the States, have been such as related to bridges or dams across streams wholly within a State, police or health laws, or subjects of a kindred nature, not strictly commercial regulations. The subjects were such, as in *Gilman* v. *Philadelphia*, 3 Wall. 713, it was said "can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively." However this may be, the rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. *Cooley* v. *Port Wardens*, 12 How. 299; *Gilman* v. *Philadelphia*, *supra*; *Crandall* v. *The State of Nevada*, 6 Wall. 42. Surely transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed The produce of Western States may thus be effectually excluded from Eastern markets, for though it might bear the imposition of a single tax, it would be crushed under the load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the States was conferred upon the Federal government. . . . [The court here consider *Almy* v. *California*, 24 How. 169 (see *supra*, p. 1924); *Woodruff* v. *Parham*, 8 Wall. 123 (s. c. *supra*, p. 1922); and *Crandall* v. *Nevada*, 6 Wall. 35 (s. c. *supra*, p. 1364). As to this last case the opinion goes on thus:]

A majority of the court, it is true, declined to rest the decision upon

the ground that the tax was a regulation of interstate commerce, and therefore beyond the power of the State to impose, but all the judges agreed that the State law was unconstitutional and void. The Chief Justice and Mr. Justice Clifford thought the judgment should have been placed exclusively on the ground that the Act of the State Legislature was inconsistent with the power conferred upon Congress to regulate commerce among the several States, and it does not appear that the other judges held that it was not thus inconsistent. In any view of the case, however, it decides that a State cannot tax persons for passing through, or out of it. Interstate transportation of passengers is beyond the reach of a State legislature. And 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.

But while holding this, we recognize fully the power of each State to tax at its discretion its own internal commerce, and the franchises, property, or business of its own corporations, so that interstate intercourse, trade, or commerce, be not embarrassed or restricted. That must remain free.

The conclusion of the whole is that, in our opinion, the Act of the Legislature of Pennsylvania of August 25th, 1864, so far as it applies to articles carried through the State, or articles taken up in the State and carried out of it, or articles taken up without the State and brought into it, is unconstitutional and void.

Judgment reversed, and the record is remitted for further proceedings in accordance with this opinion.

Mr. Justice Swayne (with whom concurred Mr. Justice Davis), dissenting.

I dissent from the opinion just read. In my judgment, the tax is imposed upon the business of those required to pay it. The tonnage is only the mode of ascertaining the extent of the business. That no discrimination is made between freight carried wholly within the State, and that brought into or carried through or out of it, sets this, as I think, in a clear light, and is conclusive on the subject.[1]

[1] Compare *R. R. Co.* v. *Husen*, 95 U. S. 465.

In *Farris* v. *Henderson*, 33 Pac. Rep. 380 (Oklahoma Territory, July, 1893), a local statute for the inspection of livestock and hides, and the seizure and sale of such as is unbranded, applicable to creatures merely being driven across the country, is declared invalid. The court (Dale, J.) said: "The law in question is an unauthorized inter-

In *State Tax on Railway Gross Receipts* (*Reading R. R. Co.* v. *Pa.*), 15 Wall. 284 (1872), Mr. Justice Strong delivered the opinion of the court.

The question is whether the Act of the Legislature of Pennsylvania passed February 23, 1866, under which a tax was levied upon the Philadelphia & Reading Railroad Company of three-quarters of one per cent upon the gross receipts of the company, during the six months ending December 31, 1867, is in conflict with the third clause of the eighth section, article first, of the Constitution of the United States, which confers upon Congress power to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes;" or whether it is in conflict with the second clause of the tenth section of the same article, which prohibits the States, "without the consent of Congress, from laying any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws." It was claimed in the State courts that the Act is unconstitutional so far as it taxes that portion of the gross receipts of companies which are derived from transportation from the State to another State, or into the State from another, and the Supreme Court of the State having decided adversely to the claim, the case has been brought here for review.

We have recently decided in another case between the parties to the present suit, that freight transported from State to State is not subject to State taxation, because thus transported. Such a burden we regard as an invasion of the domain of Federal power, a regulation of interstate commerce, which Congress only can make. If then a tax upon the gross receipts of a railroad, or a canal company, derived in part from the carriage of goods from one State to another, is to be regarded as a tax upon interstate transportation, the question before us is already decided. The answer which must be given to it depends upon

ference with commerce between States. The right of a State or Territory to legislate for the purpose of protection against disease, to make necessary police regulations, or to enact inspection laws which have for their purpose the general good of a State or the public, and which operate upon all alike, is unquestioned. But such right does not carry with it the power to collect tolls upon the commerce of a sister State, while such commerce is in transit through a State. . . . The driving of stock from the South through Beaver or other counties of Oklahoma to the markets on the north of this Territory is the same kind of commerce in vogue between States at the time the right to regulate the same was by the States expressly delegated to Congress. The same reasons which then existed for taking the power from the States, to prevent States from imposing vexatious restrictions upon commerce between States, prevails at the present time. If the necessity exists for the exercise of the power of regulating commerce between States, Congress alone has the power to act in the matter. The driving of cattle or other stock from the breeding grounds of Texas across this Territory to the Northern States, for the purpose of grazing and marketing them, is in its nature national commerce, and will admit of one uniform system of regulation. Such being the case, Congress alone has the power to put into operation a plan which will be uniform in its operation, and act upon all alike. . . . The law upon which the action in the court below was based is void because the legislature had no power to enact such a measure." — Ed.

the prior question, whether a tax upon gross receipts of a transportation company is a tax upon commerce, so far as that commerce consists in moving goods or passengers across State lines. No doubt every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution. We think it may safely be asserted that the States have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural persons, and to the same extent. We think also that such taxation may be laid upon a valuation, or may be an excise, and that in exacting an excise tax from their corporations, the States are not obliged to impose a fixed sum upon the franchises or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise. No mode of effecting this, and no forms of expression which have not a meaning beyond this can be regarded as violating the Constitution. A power to tax to this extent may be essential to the healthy existence of the State governments, and the Federal Constitution ought not to be so construed as to impair, much less destroy, anything that is necessary to their efficient existence. But, on the other hand, the rightful powers of the national government must be defended against invasion from any quarter, and if it be, as we have seen, that a tax on goods and commodities transported into a State, or out of it, or a tax upon the owner of such goods for the right thus to transport them, is a regulation of interstate commerce, such as is exclusively within the province of Congress, it is, as we have shown in the former case, inhibited by the Constitution.

Is, then, the tax, imposed by the Act of February 23, 1866, a tax upon freight transported into, or out of, the State, or upon the owner of freight, for the right of thus transporting it? Certainly it is not directly. Very manifestly it is a tax upon the railroad company, measured in amount by the extent of its business, or the degree to which its franchise is exercised. That its ultimate effect may be to increase the cost of transportation must be admitted. So it must be admitted that a tax upon any article of personal property, that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument, such as a stage-coach, a railroad car, or a canal, or steamboat, its tendency is to increase the cost of transportation. Still it is not a tax upon transportation, or upon commerce, and it has never been seriously doubted that such a tax may be laid. A tax upon landlords as such affects rents, and generally increases them, but it would be a misnomer to call it a tax upon tenants. A tax upon the occupation of a physician or an attorney, measured by the income of his profession, or upon a banker, graduated according to the amount of his discounts or deposits, will

hardly be claimed to be a tax on his patients, clients, or customers, though the burden ultimately falls upon them. It is not their money which is taken by the government. The law exacts nothing from them. But when, as in the other case between these parties, a company is made an instrument by the laws to collect the tax from transporters, when the statute plainly contemplates that the contribution is to come from them, it may properly be said they are the persons charged. Such is not this case. The tax is laid upon the gross receipts of the company; laid upon a fund which has become the property of the company, mingled with its other property, and possibly expended in improvements or put out at interest. The statute does not look beyond the corporation to those who may have contributed to its treasury. The tax is not levied, and, indeed such a tax cannot be, until the expiration of each half-year, and until the money received for freights, and from other sources of income, has actually come into the company's hands. Then it has lost its distinctive character as freight earned, by having become incorporated into the general mass of the company's property. While it must be conceded that a tax upon interstate transportation is invalid, there seems to be no stronger reason for denying the power of a State to tax the fruits of such transportation after they have become intermingled with the general property of the carrier, than there is for denying her power to tax goods which have been imported, after their original packages have been broken, and after they have been mixed with the mass of personal property in the country. That such a tax is not unwarranted is plain. Thus, in *Brown* v. *Maryland*, 12 Wheat. 419–441, where it was ruled that a State tax cannot be levied, by the requisition of a license, upon importers of foreign goods by the bale or package, or upon other persons selling the same by bale or package, Chief Justice Marshall, considering the dividing line between the prohibition upon the States against taxing imports and their general power to tax persons and property within their limits, said 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." This distinction in the liabilities of property in its different stages has ever since been recognized. *Waring* v. *The Mayor*, 8 Wall. 122; *Pervear* v. *The Commonwealth*, 5 Id. 479. It is most important to the States that it should be. And yet if the States may tax at pleasure imported goods, so soon as the importer has broken the original packages, and made the first sale, it is obvious the tax will obstruct importation quite as much as would an equal impost upon the unbroken packages before they have gone into the markets. And this is so, though no discrimination be made.

There certainly is a line which separates that power of the Federal government to regulate commerce among the States, which is exclusive, from the authority of the States to tax persons' property, business, or

occupations, within their limits. This line is sometimes difficult to define with distinctness. It is so in the present case; but we think it may safely be laid down that the gross receipts of railroad or canal companies, after they have reached the treasury of the carriers, though they may have been derived in part from transportation of freight between States, have become subject to legitimate taxation. It is not denied that net earnings of such corporations are taxable by State authority without any inquiry after their sources, and it is difficult to state any well-founded distinction between the lawfulness of a tax upon them and that of a tax upon gross receipts, or between the effects they work upon commerce, except perhaps in degree. They may both come from charges made for transporting freight or passengers between the States, or out of exactions from the freight itself. Net earnings are a part of the gross receipts.

There is another view of this case to which brief reference may be made. It is not to be questioned that the States may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of proximate value, or, if not, at least of the extent of enjoyment. If the tax be, in fact, laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise. In both cases, the necessity of higher charges to meet the exaction is the same.

Influenced by these considerations, we hold that the Act of the Legislature of the State imposing a tax upon the plaintiffs in error equal to three-quarters of one per cent of their gross receipts is not invalid because in conflict with the power of Congress to regulate commerce among the States. And under the decision made in *Woodruff* v. *Parham*, 8 Wall. 123, it is not invalid because it lays an impost or duty on imports or exports. *Judgment affirmed.*

Mr. Justice Miller (with whom concurred Justices Field and Hunt), dissenting.

The principles announced in the case of the tax on the ton of freight, and the argument by which those principles are supported, meet my full approval. They lie at the foundation of our present Federal Constitution. The burdens which States, possessed of safe and commodious harbors, imposed by way of taxes called imposts upon the transit of merchandise through those ports to their destination for consumption in other States, were the cause as much as any one class of grievances of the formation of that Constitution; and the reluctance of the little State of Rhode Island to give up the tax which she thus levied on the commerce of her sister States through the harbor of Newport, then the largest importing place in the Union, was the reason that she refused for nearly two years to ratify that instrument.

The clauses of the Constitution which forbid the States to levy duties

on imports, and which gave to Congress the right to regulate commerce, were designed to remedy that evil, and have always been supposed to be sufficient for that purpose. The one is the complement of the other, and something more. The first forbids the States to levy the tax on goods imported from abroad. The second places the entire control of commerce, with the exception of such as may be begun and completed within a single State, under the control of Congress. That commerce which is carried on with foreigners, or with the Indian tribes, or between citizens of different States, is under the jurisdiction of the general government.

The opinion which affirms the tax of so much per ton on freight carried from one State to another to be a tax upon transportation, and therefore a regulation of the commerce among the several States forbidden by the Constitution, receives the approbation of all the members of this court except two. And it is there declared that any tax upon the freight so transported, or upon the carrier on account of such transportation, is within the prohibition.

Is the tax in the present case also within the evil intended to be remedied by the commerce clause of the Constitution?

It seems to me that to hold that the tax on freight is within it, and that on gross receipts arising from such transportation is not, is "to keep the word of promise to the ear and break it to the hope." If the State of Pennsylvania, availing herself of her central position across the great line of necessary commercial intercourse between the East and the West, and of the fact that all the ways of land and water carriage must go through her territory, is determined to support her government and pay off her debt by a tax on this commerce it is of small moment that we say she cannot tax the goods so transported, but may tax every dollar paid for such transportation. Her tax by the ton being declared void, she has only to effect her purpose by increasing correspondingly her tax on gross receipts. In either event the tax is one for the privilege of transportation within her borders; in either case the tax is one on transportation.

That the tax on gross receipts comes not only ultimately, and in some remote way, but directly out of the freight transported, it is hardly worth while to argue. The railroad company makes precisely the same calculation in making its business profitable in relation to the cost and expenses of transportation, and the price to be demanded for it, in regard to this tax, that it does in reference to the tax on the ton of freight, and it imposes this additional burden for the benefit of the State in fixing the price of transportation.

The tax does not depend on the profits of the companies. It is the same whether the profits or the losses preponderate in a given year. A road may do a large carrying trade at a loss, but the State says, nevertheless, "for every dollar that you receive for transportation I claim one cent or half a cent."

It is conceded that railroads may be taxed as other corporations are

taxed on their capital stock, on their property, real and personal, and in any other way that does not impose necessarily a burden on transportation between one State and another. But a railroad or canal company differs from corporations for banking, insurance, or manufacturing purposes in this, that while their business is only remotely, or incidentally, connected with commerce, the business of roads and canals, namely, transportation of persons and property, is itself commerce. So much of said commerce as is exclusively within the State is subject to its regulations by taxation or otherwise, but that which carries goods from or to another State is exempted by the Constitution from its control.

I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution, or toll, for the privilege of having their goods transported through that State by the ordinary channels of commerce. And that this was the purpose of the framers of our Constitution I have no doubt; and I have just as little doubt that the full recognition of this principle is essential to the harmonious future of this country now, as it was then. The internal commerce of that day was of small importance, and the foreign was considered as of great consequence. But both were placed beyond the power of the States to control. The interstate commerce to-day far exceeds in value that which is foreign, and it is of immense importance that it should not be shackled by restrictions imposed by any State in order to place on others the burden of supporting its own government, as was done in the days of the helpless Confederation.

I think the tax on gross receipts is a violation of the Federal Constitution, and therefore void.

In *Osborne* v. *Mobile*, 16 Wall. 479 (1872), on error to the Supreme Court of the State of Alabama.

Osborne was the agent, at Mobile, Alabama, of the Southern Express Company, incorporated by the State of Georgia, and as such transacted a general forwarding and express business within and extending beyond the limits of Alabama.

An ordinance of the city of Mobile was then in force, requiring that every express company or railroad company doing business in that city, and having a business extending beyond the limits of the State, should pay an annual license of $500, which should be deemed a first-grade license; that every express or railroad company doing business within the limits of the State should take out a license called a second-grade license, and pay therefor $100; and that every such company doing business within the city should take out a third-grade license, paying therefor $50. It subjected any person or incorporated company who should violate any of its provisions to a fine not exceeding $50 for each day of such violation.

On the 10th of February, 1869, Osborne was fined by the mayor of

Mobile for violating that ordinance in conducting the business of his agency without having paid the $500 and obtained the license required. He appealed to the Circuit Court of the State, which affirmed the judgment of the mayor. He then appealed to the Supreme Court of Alabama, and that court affirmed the judgment of the Circuit Court. A writ of error brought the case here.

The question was, whether the ordinance, in requiring payment for a license to transact in Mobile a business extending beyond the limits of the State of Alabama, was repugnant to the provision of the Constitution, vesting in the Congress of the United States the power "to regulate commerce among the several States."

Messrs. B. R. Curtis and *Clarence Seward*, for the plaintiff in error; *Mr. P. Phillips, contra.*

THE CHIEF JUSTICE delivered the opinion of the court.

In several cases decided at this term we have had occasion to consider questions of State taxation as affected by this clause of the Constitution. In one (*Case of the State Freight Tax*, 15 Wallace, 232), we held that the State could not constitutionally impose and collect a tax upon the tonnage of freight taken up within its limits and carried beyond them, or taken up beyond its limits and brought within them; that is to say, in other words, upon interstate transportation. In another (*Case of the State Tax on Railway Gross Receipts*, Id. 284), we held that a tax upon the gross receipts for transportation by railroad and canal companies, chartered by the State, is not obnoxious to the objection of repugnancy to the constitutional provision.

The tax on tonnage was held to be unconstitutional because it was in effect a restriction upon interstate commerce, which by the Constitution was designed to be entirely free. The tax on gross receipts was held not to be repugnant to the Constitution, because imposed on the railroad companies in the nature of a general income tax, and incapable of being transferred as a burden upon the property carried from one State to another.

The difficulty of drawing the line between constitutional and unconstitutional taxation by the State was acknowledged, and has always been acknowledged, by this court; but that there is such a line is clear, and the court can best discharge its duty by determining in each case on which side the tax complained of is. It is as important to leave the rightful powers of the State in respect to taxation unimpaired as to maintain the powers of the Federal government in their integrity.

In the second of the cases recently decided, the whole court agreed that a tax on business carried on within the State and without discrimination between its citizens and the citizens of other States, might be constitutionally imposed and collected.

The case now before us seems to come within this principle.

The Southern Express Company was a Georgia corporation carrying on business in Mobile. There was no discrimination in the taxation of

Alabama between it and the corporations and citizens of that State. The tax for license was the same by whomsoever the business was transacted. There is nothing in the case, therefore, which brings it within the case of *Ward* v. *Maryland*, 12 Wallace, 423. It seems rather to be governed by the principles settled in *Woodruff* v. *Parham*, 8 Id. 123.

Indeed, no objection to the license tax was taken at the bar upon the ground of discrimination. Its validity was assailed for the reason that it imposed a burden upon interstate commerce, and was, therefore, repugnant to the clause of the Constitution which confers upon Congress the power to regulate commerce among the several States.

It is to be observed that Congress has never undertaken to exercise this power in any manner inconsistent with the municipal ordinance under consideration, and there are several cases in which the court has asserted the right of the State to legislate, in the absence of legislation by Congress, upon subjects over which the Constitution has clothed that body with legislative authority. *License Cases*, 5 Howard, 504; *Willson* v. *Blackbird Creek Marsh Co.*, 2 Peters, 245; *Cooley* v. *Board of Wardens*, 12 Howard, 315.

But it is not necessary to resort to the principles maintained in these cases for the decision of the case now before us. It comes directly within the rules laid down in the case relating to the tax upon the gross receipts of railroads. In that case we said: "It is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution." We admitted that "the ultimate effect" of the tax on the gross receipts might "be to increase the cost of transportation," but we held that the right to tax gross receipts, though derived in part from interstate transportation, was within the general "authority of the States to tax persons, property, business, or occupations within their limits."

The license tax in the present case was upon a business carried on within the city of Mobile. The business licensed included transportation beyond the limits of the State, or rather the making of contracts, within the State, for such transportation beyond it. It was with reference to this feature of the business that the tax was, in part, imposed; but it was no more a tax upon interstate commerce than a general tax on drayage would be because the licensed drayman might sometimes be employed in hauling goods to vessels to be transported beyond the limits of the State.

We think it would be going too far so to narrow the limits of State taxation.

The judgment of the Supreme Court of Alabama is, therefore,

Affirmed.[1]

[1] In *R. R. Co.* v. *Fuller*, 17 Wall. 560 (1873), in holding valid a statute of Iowa, the court (SWAYNE, J.) said: "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

In *R. R. Co.* v. *Maryland*, 21 Wall. 456 (1874), on error to the Maryland Court of Appeals, it appeared that a statute of Maryland granted to the Baltimore and Ohio Railroad Company the right to make a branch or lateral road from Baltimore to Washington City, and of employing machinery and carriages thereon, for the transportation of freight and passengers. And it was further enacted, "That the company shall be entitled to charge and take for conveying each person the whole distance between the cities of Baltimore and Washington, not exceeding two dollars and fifty cents, and in proportion for every shorter distance. That the said company shall pay to the treasurer of the Western Shore of Maryland, on the first Monday in January and July in each and every year, for the use of the State, one fifth of the whole amount which may be received for the transportation of passengers on said railroad by said company during the six months last preceding."

In holding this statute valid, the court (Bradley, J.), said: "Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land. This, when the Constitution was adopted, was entirely performed on common roads, and in vehicles drawn by animal power. No one at that day imagined that the roads and bridges of the country (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair, and management, to State regulation and control. They were all made

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. . . .

"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." — Ed.

either by the States or under their authority. The power of the State to impose or authorize such tolls, as it saw fit, was unquestioned. No one then supposed that the wagons of the country, which were the vehicles of this commerce, or the horses by which they were drawn, were subject to national regulation. The movement of persons and merchandise, so long as it was as free to one person as to another, to the citizens of other States as to the citizens of the State in which it was performed, was not regarded as unconstitutionally restricted and trammelled by tolls exacted on bridges or turnpikes, whether belonging to the State or to private persons. And when, in process of time, canals were constructed, no amount of tolls which was exacted thereon by the State or the companies that owned them, was ever regarded as an infringement of the Constitution. When constructed by the State itself, they might be the source of revenues largely exceeding the outlay without exciting even the question of constitutionality. So when, by the improvements and discoveries of mechanical science, railroads came to be built and furnished with all the apparatus of rapid and all-absorbing transportation, no one imagined that the State, if itself owner of the work, might not exact any amount whatever of toll or fare or freight, or authorize its citizens or corporations, if owners, to do the same. Had the State built the road in question it might, to this day, unchallenged and unchallengeable, have charged two dollars and fifty cents for carrying a passenger between Baltimore and Washington. So might the railroad company, under authority from the State, if it saw fit to do so. These are positions which must be conceded. No one has ever doubted them.

"This unlimited right of the State to charge, or to authorize others to charge, toll, freight, or fare for transportation on its roads, canals, and railroads, arises from the simple fact that they are its own works, or constructed under its authority. It gives them being. It has a right to exact compensation for their use. It has a discretion as to the amount of that compensation. That discretion is a legislative — a sovereign — discretion, and in its very nature is unrestricted and uncontrolled. The security of the public against any abuse of this discretion resides in the responsibility to the public of those who, for the time being, are officially invested with it. In this respect it is like all other legislative power when not controlled by specific constitutional provisions, and the courts cannot presume that it will be exercised detrimentally.

"So long, therefore, as it is conceded (as it seems to us it must be) that the power to charge for transportation, and the amount of the charge, are absolutely within the control of the State, how can it matter what is done with the money, whether it goes to the State or to the stock-holders of a private corporation? As before said, the State could have built the road itself and charged any rate it chose, and could thus have filled the coffers of its treasury without being questioned therefor. How does the case differ, in a constitutional point of

view, when it authorizes its private citizens to build the road and reserves for its own use a portion of the earnings? We are unable to see any distinction between the two cases. In our judgment there is no solid distinction. If the State, as a consideration of the franchise, had stipulated that it should have all the passenger money, and that the corporation should have only the freight for the transportation of merchandise, and the corporation had agreed to those terms, it would have been the same thing. It is simply the exercise by the State of absolute control over its own property and prerogatives.

"The exercise of power on the part of a State is very different from the imposition of a tax or duty upon the movements or operations of commerce between the States. Such an imposition, whether relating to persons or goods, we have decided the States cannot make, because it would be a regulation of commerce between the States in a matter in which uniformity is essential to the rights of all, and, therefore, requiring the exclusive legislation of Congress. *Crandall* v. *Nevada*, 6 Wallace, 42; *Case of Freight Tax*, 16 Id. 232, 279. It is a tax because of the transportation, and is, therefore, virtually a tax on the transportation, and not in any sense a compensation therefor, or for the franchises enjoyed by the corporation that performs it.

"It is often difficult to draw the line between the power of the State and the prohibitions of the Constitution. Whilst it is commonly said that the State has absolute control over the corporations of its own creation, and may impose upon them such conditions as it pleases; and like control over its own territory, highways, and bridges, and may impose such exactions for their use as it sees fit; on the other hand, it is conceded that it cannot regulate or impede interstate commerce, nor discriminate between its own citizens and those of other States prejudicially to the latter. The problem is to reconcile the two propositions; and as the latter arises from the provisions of the Constitution of the United States, and is, therefore, paramount, the question is practically reduced to this: What amounts to a regulation of commerce between the States, or to a discrimination against the citizens of other States? This is often difficult to determine. In view, however, of the very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises, and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional Acts. It is not within the category of such Acts. It may, incidentally, affect transportation, it is true; but so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *diverso intuitu*, and in the exercise of an undoubted power. The State is conceded to possess the power to tax its corporations; and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers. So, the State has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro*; and yet that bonus will necessarily affect the charge upon the public

which the donee of the franchise will be obliged to impose. The stipulated payment in this case, indeed, is nothing more nor less than a bonus; and so long as the rates of transportation are entirely discretionary with the States, such a stipulation is clearly within their reserved powers.

"Of course, the question will be asked, and pertinently asked, Has the public no remedy against exorbitant fares and freights exacted by State lines of transportation? We cannot entirely shut our eyes to the argument *ab inconvenienti*. But it may also be asked, Has the public any remedy against exorbitant fares and freights exacted by steamship lines at sea? Maritime transportation is almost as exclusively monopolized by them as land transportation is by the railroads. In their case the only relief found is in the existence or fear of competition. The same kind of relief should avail in reference to land transportation.

"Whether, in addition to this, Congress, under the power to establish post-roads, to regulate commerce with foreign nations, and among the several States, and to provide for the common defence and general welfare, has authority to establish and facilitate the means of communication between the different parts of the country, and thus to counteract the apprehended impediments referred to, is a question which has exercised the profoundest minds of the country. This power was formerly exercised in the construction of the Cumberland Road [1] and other similar works. It has more recently been exercised, though mostly on national territory, in the establishment of railroad communication with the Pacific coast. But it is to be hoped that no occasion will ever arise to call for any general exercise of such a power, if it exists. It can hardly be supposed that individual States, as far as they have reserved, or still possess, the power to interfere, will be so regardless of their own interest as to allow an obstructive policy to prevail. If, however, State institutions should so combine or become so consolidated and powerful as, under cover of irrevocable franchises already granted, to acquire absolute control over the transportation of the country, and should exercise it injuriously to the public interest, every constitutional power of Congress would undoubtedly be invoked for relief. Some of the States are so situated as to put it in their power, or that of their transportation lines, to interpose formidable obstacles to the free movement of the commerce of the country. Should any such system of exactions be established in these States, as materially to impede the passage of produce, merchandise, or travel, from one part of the country to another, it is hardly to be supposed that the case is a *casus omissus* in the Constitution. Commercially, this is but one country, and intercourse between all its parts should be as free as due compensation to the carrier interest will allow. This is demanded by the 'general welfare,' and is dictated by the spirit of the Constitution at least. Any

[1] For cases relating to the "Cumberland Road," constructed by the United States, and afterwards turned over to the States through which it ran, see *Searight* v. *Stokes*, 3 How. 151. *Neal et al.* v. *Ohio*, Ib. 720, and *Achison* v. *Huddleson*, 12 How. 293. — Ed.

local interference with it will demand from the national legislature the exercise of all the just powers with which it is clothed.

"But whether the power to afford relief from onerous exactions for transportation does, or does not, exist in the general government, 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. And, in the case before us, we are of opinion that these powers have not been transcended. *Judgment affirmed.*" [1]

Mr. Justice Miller, dissenting: I am of opinion that the statute of Maryland requiring the railroad company to pay into the treasury of the State one-fifth of the amount received by it from passengers on the branch of the road between Baltimore and Washington, confined as it is exclusively to passengers on that branch of the road, was intended to raise a revenue for the State from all persons coming to Washington by rail, and had that effect for twenty-five years, and that the statute is, therefore, void within the principle laid down by this court in *Crandall* v. *Nevada*, 6 Wallace, 35.

WELTON *v.* THE STATE OF MISSOURI.

Supreme Court of the United States. 1875.

[91 *U. S.* 275.] [2]

Mr. James S. Botsford and *Mr. S. M. Smith*, for the plaintiff in error; *Mr. John A. Hockaday*, Attorney-General of Missouri, and *Mr. A. H. Buckner*, *contra*.

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 who-

[1] Compare *Ashley* v. *Ryan*, 153 U. S. 436 (1894); *Wabash &c. Ry. Co.* v. *Ill.*, 118 U. S. 557 (1886); s. c. *infra*, p. 2045. — Ed.

[2] The statement of facts is omitted. — Ed.

ever 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 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.

In the case of *Brown* v. *Maryland*, 12 Wheat. 425, 444, the question arose, whether an Act of the Legislature of Maryland, requiring importers of foreign goods to pay the State a license tax before selling them in the form and condition in which they were imported, was valid and constitutional. . . . Treating the exaction of the license tax from the importer as a tax on the goods imported, the court held that the Act of Maryland was in conflict with the Constitution; with the clause prohibiting a State, without the consent of Congress, from laying any impost or duty on imports or exports; and with the clause investing Congress with the power to regulate commerce with foreign nations.

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 between 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. "It was regulated," says Chief Justice Marshall, in delivering the opinion in *Brown* v. *Maryland*, "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 became 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." 12 Wheat. 446.

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."

[*Judgment reversed.*] [1]

HENDERSON ET AL. *v.* MAYOR OF THE CITY OF NEW YORK ET AL.
COMMISSIONERS OF IMMIGRATION *v.* NORTH GERMAN LLOYD.

SUPREME COURT OF THE UNITED STATES. 1875.

[92 *U. S.* 259.]

THESE cases come here by appeal, — the former from the Circuit Court of the United States for the Southern District of New York, the latter from the Circuit Court of the United States for the District of Louisiana.

In the case from New York, which is a suit in equity against the mayor of the city of New York and the Commissioners of Emigration, the bill alleges that the complainants are subjects of Great Britain, and owners of the steamship "Ethiopia;" that their vessel arrived at the port of New York from Glasgow, Scotland, on the 24th of June, 1875,

[1] In *State* v. *Lee*, 18 So. East. Rep. 713 (No. Ca. 1893), where "peddling" was taxed without defining it, the court (CLARK, J.) defined it as not covering selling by sample, but only the selling by an itinerant of what is itself carried about. — ED.

having on board a number of emigrant passengers, and, among others, three persons whose names are specified, who came from a foreign country, intending to pass through the State of New York, and settle and reside in other States of the Union and in Canada; that, by the statutes of the State of New York, the master of every vessel arriving at the port of New York from a foreign port is required, within twenty-four hours after his arrival, to report in writing to the mayor of New York the name, birthplace, last residence, and occupation of every passenger who is not a citizen of the United States; that the statute then directs the mayor, by indorsement on this report, to require the owner or consignee of the vessel to give a bond for every passenger so reported, in a penalty of $300, with two sureties, each to be a resident and freeholder of the State, 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 that the owner or consignee may commute such bond, and be relieved from giving it, by paying for each passenger, within twenty-four hours after his or her landing, the sum of one dollar and fifty cents, fifty cents whereof is to be paid to other counties in the State, and the residue to the Commissioners of Emigration for their general purposes, and particularly to be used in erecting wharves and buildings, and in paying salaries and clerk hire.

That if he does not, within twenty-four hours after landing such passengers, either give the bond or pay the commutation tax for each passenger, he is liable to a penalty of $500 for every such passenger, which is made a lien on, and may be enforced against, the vessel, at the suit of the Commissioners of Emigration.

The master of the "Ethiopia" made the report required by the Act: whereupon the complainants, in order to test the validity of the provisions of the Acts requiring the bond or the commutation thereof, filed their bill, which the court, on the demurrer of the defendants, dismissed. The complainants thereupon appealed to this court.

Mr. James Emott, for the appellants; *Mr. Francis Kernan* and *Mr. John E. Develin*, *contra.*

In *Commissioners of Immigration* v. *North German Lloyd*, which was an action to prevent the appellants who were the respondents from requiring bonds or commutation thereof from all passengers, the court below granted the injunction.

Messrs. Samuel R. & C. L. Walker, for the appellants; *Mr. W. S. Benedict*, *contra.*

Mr. Justice Miller delivered the opinion of the court. [All the earlier part of the opinion is found *supra*, pp. 738–742. It then proceeds as follows:]

"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 *Cooley* 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 *Cooley* 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."[1] 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

[1] This quotation is inaccurate in an important particular. The original reads: "Admit *only* of one uniform system." See *Cooley* v. *Board of Wardens*, 12 How. 319, *supra*, p. 1887. The same mistake is to be found elsewhere, *e. g.* in 15 Wall., at p. 280, *supra*, p. 1943, per STRONG, J., for the court; and 91 U. S., at p. 280, per FIELD, J., for the court. See *supra*, p. 1959. — ED.

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]

[1] In *Chy Lung* v. *Freeman et al.* 92 U. S. 275 (1875), on error to the Supreme Court of California, a similar case to that in the text, and immediately following it in the reports, MR. JUSTICE MILLER delivered the opinion of the court. . . . The statute of California, unlike those of New York and Louisiana, does not require a bond for all passengers landing from a foreign country, but only for classes of passengers specifically described, among which are "lewd and debauched women;" to which class it is alleged plaintiff belongs.

The plaintiff, with some twenty other women, on the arrival of the steamer "Japan" from China, was singled out by the Commissioner of Immigration, an officer of the State of California, as belonging to that class, and the master of the vessel required to give the bond prescribed by law before he permitted them to land. This he refused to do, and detained them on board. They sued out a writ of *habeas corpus*, which by regular proceedings resulted in their committal, by order of the Supreme Court of the State, to the custody of the sheriff of the county and city of San Francisco, to await the return of the "Japan," which had left the port pending the progress of the case; the order being to remand them to that vessel on her return, to be removed from the State.

All of plaintiff's companions were released from the custody of the sheriff on a writ of *habeas corpus* issued by Mr. Justice Field of this court. But plaintiff by a writ of error brings the judgment of the Supreme Court of California to this court, for the purpose, as we suppose, of testing the constitutionality of the Act under which she is held a prisoner. . . . It is a most extraordinary statute. It provides that the Commissioner of Immigration is "to satisfy himself whether or not any passenger who shall arrive in the State by vessels from any foreign port or place (who is not a citizen of the United States) is lunatic, idiotic, deaf, dumb, blind, crippled, or infirm, and is not accompanied by relatives who are able and willing to support him, or is likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease (existing either at the time of sailing from the port of departure or at the time of his arrival in the State) a public charge, or likely soon to become so, or is a

convicted criminal, or a lewd or debauched woman;" and no such person shall be permitted to land from the vessel, unless the master or owner or consignee shall give a separate bond in each case, conditioned to save harmless every county, city, and town of the State against any expense incurred for the relief, support, or care of such person for two years thereafter.

The commissioner is authorized to charge the sum of seventy-five cents for every examination of a passenger made by him; which sum he may collect of the master, owner, or consignee, or of the vessel by attachment. The bonds are to be prepared by the commissioner, and two sureties are required to each bond; and, for preparing the bond, the commissioner is allowed to charge and collect a fee of three dollars; and for each oath administered to a surety, concerning his sufficiency as such, he may charge one dollar. It is expressly provided that there shall be a separate bond for each passenger; that there shall be two sureties on each bond, and that the same sureties must not be on more than one bond; and they must in all cases be residents of the State.

If the ship-master or owner prefers, he may commute for these bonds by paying such a sum of money as the commissioner may in each case think proper to exact; and, after retaining twenty per cent of the commutation-money for his services, the commissioner is required once a month to deposit the balance with the treasurer of the State. See c. 1, art. 7, of the Political Code of California, as modified by sect. 70 of the amendments of 1873, 1874.

It is hardly possible to conceive a statute more skilfully framed, to place in the hands of a single man the power to prevent entirely vessels engaged in a foreign trade, say with China, from carrying passengers, or to compel them to submit to systematic extortion of the grossest kind.

The commissioner has but to go aboard a vessel filled with passengers ignorant of our language and our laws, and without trial or hearing or evidence, but from the external appearances of persons with whose former habits he is unfamiliar, to point with his finger to twenty, as in this case, or a hundred if he chooses, and say to the master, "These are idiots, these are paupers, these are convicted criminals, these are lewd women, and these others are debauched women. I have here a hundred blank forms of bonds, printed. I require you to fill me up and sign each of these for $500 in gold, and that you furnish me two hundred different men, residents of this State, and of sufficient means, as sureties on these bonds. I charge you five dollars in each case for preparing the bond and swearing your sureties; and I charge you seventy-five cents each for examining these passengers, and all others you have on board. If you don't do this, you are forbidden to land your passengers under a heavy penalty. But I have the power to commute with you for all this for any sum I may choose to take in cash. I am open to an offer; for you must remember that twenty per cent of all I can get out of you goes into my own pocket, and the remainder into the treasury of California."

If, as we have endeavored to show in the opinion in the preceding cases, we are at liberty to look to the effect of a statute for the test of its constitutionality, the argument need go no further.

But we have thus far only considered the effect of the statute on the owner of the vessel. As regards the passengers, sec. 2963 declares that consuls, ministers, agents, or other public functionaries, of any foreign government, arriving in this State in their official capacity, are exempt from the provisions of this chapter.

All other passengers are subject to the order of the Commissioner of Immigration.

Individual foreigners, however distinguished at home for their social, their literary, or their political character, are helpless in the presence of this potent commissioner. Such a person may offer to furnish any amount of surety on his own bond, or deposit any sum of money; but the law of California takes no note of him It is the master, owner, or consignee of the vessel alone whose bond can be accepted; and so a silly, an obstinate, or a wicked commissioner may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend. While the occurrence of the hypothetical case just stated may be highly improbable, we venture the assertion, that, if citizens of our own government were treated by any foreign nation as subjects of the emperor of China have been actually treated under this

law, no administration could withstand the call for a demand on such government for redress.

Or, if this plaintiff and her twenty companions had been subjects of the Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the Federal government? If that government has forbidden the States to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?

The Constitution of the United States is no such instrument. The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.

We are not called upon by this statute to decide for or against the right of a State, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a State statute, limited to provisions necessary and appropriate to that object alone, shall, in a proper controversy, come before us, it will be time enough to decide that question. The statute of California goes so far beyond what is necessary, or even appropriate, for this purpose, as to be wholly without any sound definition of the right under which it is supposed to be justified. Its manifest purpose, as we have already said, is, not to obtain indemnity, but money.

The amount to be taken is left in every case to the discretion of an officer, whose cupidity is stimulated by a reward of one-fifth of all he can obtain.

The money, when paid, does not go to any fund for the benefit of immigrants, but is paid into the general treasury of the State, and devoted to the use of all her indigent citizens. The blind, or the deaf, or the dumb passenger is subject to contribution, whether he be a rich man or a pauper. The patriot, seeking our shores after an unsuccessful struggle against despotism in Europe or Asia, may be kept out because there his resistance has been adjudged a crime. The woman whose error has been repaired by a happy marriage and numerous children, and whose loving husband brings her with his wealth to a new home, may be told she must pay a round sum before she can land, because it is alleged that she was débauched by her husband before marriage. Whether a young woman's manners are such as to justify the commissioner in calling her lewd may be made to depend on the sum she will pay for the privilege of landing in San Francisco.

It is idle to pursue the criticism. In any view which we can take of this statute, it is in conflict with the Constitution of the United States, and therefore void.

In *People* v. *Compagnie Gén. Trans.*, 107 U. S. 59 (1882), on error to the Circuit Court of the United States for the Southern District of New York, MR. JUSTICE MILLER, for the court, said: "The tax in this case is demanded under sect. 1 of a statute of New York, passed May 31, 1881, entitled 'An Act to raise money for the execution of the inspection laws of the State of New York.' The section reads thus: 'SECT. 1. There

shall be levied and collected a duty of one dollar for each and every alien passenger who shall come by vessel from a foreign port to the port of New York for whom a tax has not heretofore been paid, the same to be paid to the chamberlain of the city of New York by the master, owner, agent, or consignee of every such vessel within twenty-four hours after the entry thereof into the port of New York.' . . .

"The argument mainly relied on in the present case is that the new statute of New York, passed after her former statutes had been declared void in *Passenger Cases*, 7 How. 283, and in the recent case of *Henderson* v. *Mayor of New York*, is in aid of the inspection laws of the State. This argument is supposed to derive support from another statute passed three days earlier, entitled 'An Act for the inspection of alien emigrants and their effects by the Commissioners of Emigration.' This Act empowers and directs the Commissioners of Emigration 'to inspect the persons and effects of all persons arriving by vessel at the port of New York from any foreign country, as far as may be necessary, to ascertain who among them are habitual criminals, or pauper lunatics, idiots, or imbeciles, or deaf, dumb, blind, infirm, or orphan persons, without means or capacity to support themselves and subject to become a public charge, and whether their persons or effects are affected with any infectious or contagious disease, and whether their effects contain any criminal implements or contrivances.' Subsequent sections direct how such characters, if found, shall be dealt with by the board. Other sections of the Act of May 31 direct the chamberlain of the city to pay over to the Commissioners of Emigration all such sums of money as may be necessary for the execution of the inspection laws of the State of New York, and the net produce of all duties received by him under that Act, after the necessary payments to the Commissioners of Emigration, to the treasury of the United States.

"These two statutes, construed together, it is argued, are inspection laws within the meaning of art. 1, sect. 10, cl. 2, of the Constitution of the United States, to wit: '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.'

"What laws may be properly classed as inspection laws under this provision of the Constitution must be determined largely by the nature of the inspection laws of the States at the time the Constitution was framed. In the opinion of this court in the case of *Turner* v. *Maryland*, delivered by Mr. Justice Blatchford contemporaneously with the one in the present case, there is an elaborate examination of those statutes, many of which are cited, *ante* [107 U. S.], pp. 51–54. Similar citations are found in a foot-note to the report of *Gibbons* v. *Ogden*, 9 Wheat. 1, 119.

"We feel quite safe in saying that neither at the time of the formation of the Constitution nor since has any inspection law included anything but personal property as a subject of its operation. Nor has it ever been held that the words 'imports and exports' are used in that instrument as applicable to free human beings by any competent judicial authority. We know of nothing which can be exported from one country or imported into another that is not in some sense property, — property in regard to which some one is owner, and is either the importer or the exporter. This cannot apply to a free man. Of him it is never said he imports himself, or his wife or his children.

"The language of sect. 9, art. 1, of the Constitution, which is relied on by counsel, does not establish a different construction: '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.' There has never been any doubt that this clause had exclusive reference to persons of the African race. The two words 'migration' and 'importation' refer to the different conditions of this race as regards freedom and slavery. When the free black man came here, he migrated; when the slave came, he was imported. The latter was property, and was imported by his owner as other property, and a duty could be im-

NEILSON *v.* GARZA.

CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS. *March Term*, 1876.

[2 *Wood's Circuit Court Reports*, 287.]

IN equity. Heard upon pleadings and evidence for final decree.

Messrs. Stephen Powers and *Nestor Maxan*, for complainant; *Mr. J. R. Cox*, for defendant.

BRADLEY, CIRCUIT JUSTICE. The complainant in this case resides in Matamoras, Mexico, and is largely engaged in the business of importing hides from that city to Brownsville, in Texas, and sending the same thence *via* the port of Brazos Santiago, in Texas, to New York.

posed on him as an import. We conclude that free human beings are not imports or exports, within the meaning of the Constitution.

"In addition to what is said above, it is apparent that the object of these New York enactments goes far beyond any correct view of the purpose of an inspection law. The commissioners are 'to inspect all persons arriving from any foreign country to ascertain who among them are habitual criminals, or pauper lunatics, idiots, or imbeciles, . . . or orphan persons, without means or capacity to support themselves and subject to become a public charge.'

"It may safely be said that these are matters incapable of being satisfactorily ascertained by inspection. What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test. When testimony or evidence is to be taken and examined, it is not inspection in any sense whatever.

"Another section provides for the custody, the support, and the treatment for disease of these persons, and the retransportation of criminals. Are these inspection laws? Is the ascertainment of the guilt of a crime to be made by inspection?

"In fact, these statutes differ from those heretofore held void only in calling them in their caption 'inspection laws,' and in providing for payment of any surplus, after the support of paupers, criminals, and diseased persons, into the treasury of the United States, — a surplus which, in this enlarged view of what are the expenses of an inspection law, it is safe to say will never exist.

"A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title.

"Since the decision of this case in the Circuit Court, Congress has undertaken to do what this court has repeatedly said it alone had the power to do. By the Act of August 3, 1882, c. 376, entitled 'An Act to regulate immigration,' a duty of fifty cents is to be collected, for every passenger not a citizen of the United States who shall come to any port within the United States by steam or sail vessel from a foreign country, from the master of said vessel by the collector of customs. The money so collected is to be paid into the treasury of the United States, and to constitute a fund to be called the immigrant fund, for the care of immigrants arriving in the United States, and the relief of such as are in distress. The Secretary of the Treasury is charged with the duty of executing the provisions of the Act and with supervision over the business of immigration. No more of the fund so raised is to be expended in any port than is collected there. This legislation covers the same ground as the New York statute, and they cannot coexist." *Judgment affirmed.*

See also *Head Money Cases*, 112 U. S. 580 (1884); s. c. *supra*, p. 758.

As to inspection laws, compare *Turner* v. *Md.*, 107 U. S. 38 (1882); s. c. *infra*, p. 2120, n. — ED.

The defendant is inspector of hides and animals for Cameron County, Texas, at Brownsville, appointed and acting under an Act of the Legislature of Texas, approved October 14, 1871, and a further Act, approved March 23, 1874, entitled for "the encouragement of stock raising and the protection of stock raisers." By virtue of his said office, the defendant claims and exercises the right to inspect the hides imported as aforesaid by the complainant, and to exact and receive, and does exact and receive therefor, in accordance with said law, fees at the rate of from six to ten cents per hide, according to the number inspected.

The complainant contends that this exaction is in reality an impost or duty on the importation or exportation of said hides, and that it is contrary to those clauses of the Constitution of the United States which declare that Congress shall have power "to regulate commerce with foreign nations and among the several States;" 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." It is not pretended that Congress has granted any consent in the case; and the complainant insists that Congress, in making the importation of hides free from duty, has regulated the subject, and no State regulation can have any force or effect, but all such regulations are void.

If the State law of Texas, which is complained of, is really an inspection law, it is valid and binding unless it interferes with the power of Congress to regulate commerce, and if it does thus interfere, it may still be valid and binding until revised and altered by Congress.

The right to make inspection laws is not granted to Congress, but is reserved to the States; but it is subject to the paramount right of Congress to regulate commerce with foreign nations, and among the several States; and if any State, as a means of carrying out and executing its inspection laws, imposes any duty or impost on imports or exports, such impost or duty is void if it exceeds what is absolutely necessary for executing such inspection laws. How the question, whether a duty is excessive or not, is to be decided, may be doubtful. As that question is passed upon by the State legislature, when the duty is imposed, it would hardly be seemly to submit it to the consideration of a jury in every case that arises. This might give rise to great diversity of judgment, the result of which would be to make the law constitutional one day, and in one case, and unconstitutional another day, in another case. As the article of the Constitution which prescribes the limit goes on to provide that "all such laws shall be subject to the revision and control of Congress," it seems to me that Congress is the proper tribunal to decide the question, whether a charge or duty is or is not excessive.

If, therefore, the fee allowed in this case by the State law is to be regarded as in effect an impost or duty on imports or exports, still if the law is really an inspection law, the duty must stand until Congress shall see fit to alter it.

Then we are brought back to the question whether the law is really an inspection law. If it is, we cannot interfere with it on account of supposed excessiveness of fees. If it is not, the exaction is clearly unconstitutional and void, being an unauthorized interference with the free importation of goods. The complainant contends that it is not an inspection law; that inspection laws only apply legitimately to the domestic products of the country, intended for exportation; and that no inspection is actually required in this particular case, but a mere examination to see if the hides are marked, and who imported them, etc., duties which belong to the entry of goods, and not their inspection.

No doubt the primary and most usual object of inspection is to prepare goods for exportation in order to preserve the credit of our exports in foreign markets. Chief Justice Marshall, in *Gibbons* v. *Ogden*, says: "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." 9 Wheat. 203; Story on the Const. § 1017.

But in *Brown* v. *Maryland*, he adds, speaking of the time when inspection takes place: "Inspection laws, so far as they act upon articles for exportation, are generally executed on land before the article is put on board a vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection is a tax which is frequently, if not always, paid for service performed on land." 12 Wheat. 419; Story on the Const. § 1017. So that, according to Chief Justice Marshall, imported as well as exported goods may be subject to inspection; and they may be inspected as well to fit them for domestic use as for exportation. All housekeepers who are consumers of flour know what a protection it is to be able to rely on the inspection mark for a fine or superior article.

Bouvier defines inspection as the examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce. Law Dict., *verb.* Inspection. The removal or destruction of unsound articles is undoubtedly, says Chief Justice Marshall, an exercise of that power. *Brown* v. *Maryland*, *supra*, Story on the Const. § 1024. "The object of the inspection laws," says Justice Sutherland, "is to protect the community, so far as they apply to domestic sales, from frauds and impositions; and in relation to articles designed for exportation, to preserve the character and reputation of the State in foreign markets." *Clintsman* v. *Northrop*, 8 Cow. 46.

It thus appears that the scope of inspection laws is very large, and is not confined to articles of domestic produce or manufacture, or to articles intended for exportation, but applies to articles imported, and those intended for domestic use as well.

An examination of some of the actual inspection laws of the different States shows that this is the fact: Thus, in Alabama, the city authorities of Mobile are authorized to appoint inspectors, and to adopt regulations (to be approved by the Governor) for the inspection of staves, tobacco, pitch, tar, turpentine, rosin, fish, flour, and oil, within

the limits of the city. Many of these articles must be articles of import. In Massachusetts, fish intended for exportation are to be inspected, whether inspected previously in another State or not. *Pearson* v. *Purkett*, 15 Pick. 264.

In Kentucky, under the inspection laws of that State, imported salt cannot be sold in the State until it has been inspected, and three cents inspection fees are chargeable for each barrel inspected. The inspection laws of North Carolina are very full, and, amongst other things, provisions and forage imported from out of the State, such as beef, pork, fish, flour, butter in firkins, cheese in boxes, hay or fodder, bacon in hogsheads, etc., must be inspected before they can be sold, on pain of $100 penalty, and a scale of inspection laws is fixed by law.

It is true the constitutionality of these laws has not been tested, but they show what range inspection laws have taken, and what is generally regarded as within their scope.

Now, the law in question is a general law of the State of Texas; it purports to be an inspection law, to encourage stock raising and to protect stock raisers; it makes each county of the State, except certain counties named, an inspector's district, for the inspection of hides and animals; and creates the office of inspector, to be elected by the voters of the county; it requires of him a bond and oath of office; it requires him to keep a book of records of his inspections; it requires him to examine and inspect all hides or animals known or reported to him as sold, or as leaving or going out of the county for sale or shipment; and all animals driven or sold in his district for slaughter to packeries or butcheries; it directs the method of inspecting, branding and recording animals and hides; it requires him to prevent the sale or removal out of the county of hides or animals upon which the brands cannot be ascertained, unless identified by proof, etc.; it gives him power to seize and condemn unbranded animals or hides. Various other regulations are imposed in the Act. By the sixteenth section, it is provided that any person may ship from any part of the State any hides or animals imported into the State from Mexico, and shall not be required to have the same inspected: provided, he has first obtained the certificate of the inspector or deputy inspector of the county into which the same were imported, certifying the date of the importation thereof, the name of the importer and of the owner, and of the person in charge of the same, the name of the place where the same were imported, together with the number of hides and animals so imported, and a description of their marks and brands (if any there be) by which the same may be identified. By the 17th section, it is declared that inspectors shall be allowed to charge and collect the same fees for the services which they are authorized to perform by the terms of section 16 as are allowed in other cases thereafter provided. The fees referred to are those allowed for inspection, which are, as before stated, from six to ten cents per hide, according to the number inspected.

Now, it is contended that the examination and certificate required

by the 16th section, in order to be allowed to export out of the State hides imported from Mexico, is not an inspection, but is expressly denominated otherwise. "Shall not be required to have the same inspected," are the words, it is true. But the thing which is required, though not such an inspection as is usual and customary in other cases, is, nevertheless, an actual inspection. The exporter must obtain the certificate of the inspector, or his deputy, of the county into which the hides were imported, certifying (note what things are to be certified) the date of the importation, the name of the importer and of the owner and of the person in charge, name of the place where imported, number of hides and animals imported, and description of their marks and brands, if any there be, by which they can be identified.

What is this but inspection? The object is to subject the hides or animals to the examination of the official inspector, that he may note everything about them, serving to their identification, ownership, etc.

I do not say that such an inspection as this is necessary or expedient; but it is inspection; and at such a place as Brownsville, it may, for aught I know, be a necessary police regulation to prevent frauds and clandestine removal and exportation of property belonging to the people of Texas.

The fee or duty enacted may be excessive; but if so, Congress can regulate that. Our only concern with the case is to know whether the acts required by the State law, and performed by the defendant on and about the hides, are fairly characterized as inspection or not. If they are, that ends the case here. We think the law is an inspection law; that the part of it in question is not foreign to that character; and that the acts of the defendant for which the fees exacted by him were charged were fairly performed under said inspection law; and that the fees are valid charges until they shall be altered by Congress.

The bill is therefore dismissed with costs.

In *Sherlock et al.* v. *Alling*, 93 U. S. 99 (1876), on error to the Supreme Court of Indiana, the administrator of a person killed by a collision on the Ohio River, within the jurisdiction of Indiana, brought an action against the owners of the vessel in which he was a passenger, to recover for his death, as being caused by this negligence. The action was brought under a statute of Indiana. In affirming judgment for the administrator, the court (Field, J.) said: "It is contended that the statute of Indiana creates a new liability, and could not, therefore, be applied to cases where the injuries complained of were caused by marine torts, without interfering with the exclusive regulation of commerce vested in Congress. The position of the defendants, as we understand it, is, that as by both the common and maritime law the right of action for personal torts dies with the person injured, the statute which allows actions for such torts, when resulting in the death of the person injured, to be brought by the personal representatives of the deceased, enlarges the liability of parties for such torts, and that

such enlarged liability, if applied to cases of marine torts, would constitute a new burden upon commerce.

"In supposed support of this position numerous decisions of this court are cited by counsel, to the effect that the States cannot by legislation place burdens upon commerce with foreign nations or among the several States. The decisions go to that extent, and their soundness is not questioned. But, upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on. . . . [The court here referred to *The Passenger Cases*, *supra*, p. 1865; *The Wheeling Bridge Case*, *supra*, p. 1889; *Sinnot* v. *Davenport*, *supra*, p. 1900; *Brown* v. *Md.*, *supra*, p. 1826; *State Tonnage Tax Cases*, *supra*, p. 1327; and *Welton* v. *Mo.*, *supra*, p. 1957.]

"In the present case no such operation can be ascribed to the statute of Indiana. That statute imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the State for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the State, whether on land or on water. General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.

"It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the

instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital, and other dues they shall be subjected; what rules they shall obey in passing each other; and what provision their owners shall make for the health, safety, and comfort of their crews. Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details, to guard against accident and consequent loss of life.

"The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of State authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit. In our judgment, the statute of Indiana falls under this class. Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress. *United States* v. *Bevans*, 3 Wheat. 337. . . ."

PEIK *v.* CHICAGO AND NORTHWESTERN RAILWAY COMPANY. LAWRENCE *v.* SAME.

SUPREME COURT OF THE UNITED STATES. 1876.

[94 *U. S.* 164.]

APPEALS from the Circuit Court of the United States for the Western District of Wisconsin.

The appellants in the first case, non-residents of the State of Wisconsin, and owners of first-mortgage bonds of the Chicago and North-

western Railway Company, filed their bill to restrain the company from obeying, and Paul, Osborn, and Hoyt, railroad commissioners, and Sloan, Attorney-General of Wisconsin, from enforcing, c. 273, Laws of 1874, of that State, which limits the rate of charges for transporting passengers and freights on all the railroads in the State. . . .

The bill in the second case was filed by stock-holders of the company, and is substantially the same as that in the first case.

Chapter 273 classifies railroads in the State, fixes the limit of fare for the transportation of any person, classifies freights and the maximum rates therefor, and prescribes certain penalties and forfeitures for receiving any greater rate or compensation for carrying freight or passengers than the Act provides. It appoints railroad commissioners, and prescribes their duties and powers. The eighteenth section is in the following words: "Nothing contained in this Act shall be taken as in any manner abridging or controlling the rates for freight charged by any railroad company in this State for carrying freight which comes from beyond the boundaries of the State, and to be carried across or through the State; but said railroad companies shall possess the same power and right to charge such rates for carrying such freight as they possessed before the passage of this Act."

The defendants in each case demurred to the bill of complaint therein filed. The demurrers were sustained, and the defendants brought the cases here.

Mr. W. M. Evarts, *Mr. C. B. Lawrence*, *Mr. B. C. Cook*, *Mr. John W. Cary*, and *Mr. E. W. Stoughton*, for the appellants; *Mr. I. C. Sloan*, and *Mr. L. S. Dixon*, *contra*.

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

These suits present the single question of the power of the Legislature of Wisconsin to provide by law for a maximum of charge to be made by the Chicago and Northwestern Railway Company for fare and freight upon the transportation of persons and property carried within the State, or taken up outside the State and brought within it, or taken up inside and carried without. That company was by its charter authorized "to demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it shall deem reasonable." Charter of the Wisconsin and Superior Railroad Co., sect. 6. Other forms of expression are used in charters granted by Wisconsin to other companies, which by consolidation have become merged in the present corporation; but they are all the same in effect. None go beyond this.

The Constitution of the State in force when each of the several Acts of incorporation was passed, provides that all Acts for the creation of corporations within the State "may be altered or repealed by the legislature at any time after their passage." Art. 11, sect. 1.

It was conceded upon the argument that this reserved power of the Constitution gave the legislature "the same power over the business and property of corporations that it has over individuals," or, as is ex-

pressed by one of the counsel, "nothing more could have been intended than to leave the stock-holders in corporations in such a position that the legislature could place them on the same footing with natural persons before the law, and disable them from permanently evading the burdens on all others engaged in similar vocations, by appealing to the letter of their charter. Their object was not to open the door to oppression, but to secure simple equality between citizens of the State, whether working singly or in corporate associations." And, in another place, the same learned counsel says: "The privilege, then, of charging whatever rates it may deem proper is a franchise, which may be taken away under the reserved power, but the right to charge a reasonable compensation would remain as a right under the general law governing natural persons, and not as a special franchise or privilege."

Without stopping to inquire whether this is the extent of the operation of this important constitutional reservation, it is sufficient to say that it does, without any doubt, have that effect. In *Munn* v. *Illinois*, 94 U. S. 113, and *Chicago, Burlington, & Quincy Railroad Co.* v. *Iowa*, 94 U. S. 155, we decided that the State may limit the amount of charges by railroad companies for fares and freights, unless restrained by some contract in the charter, even though their income may have been pledged as security for the payment of obligations incurred upon the faith of the charter. So far this case is disposed of by those decisions.

It remains only to consider a few questions raised here which were not involved in the cases that have already been decided. . . .

3. As to the effect of the statute as a regulation of interstate commerce. The law is confined to State commerce, or such interstate commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without. . . . [The omitted passage has nothing to do with the subject of this chapter.]

5. As to the claim that the courts must decide what is reasonable, and not the legislature. This is not new to this case. It has been fully considered in *Munn* v. *Illinois*. Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change. . . .

This disposes of the case. No other questions need be considered. If the question ever arises whether the company can be compelled to continue its business at the prices fixed, it will be time enough for us to

pass upon it when it reaches here in due course of proceeding. It is not here now. *Decrees affirmed.*[1]

Mr. Justice Field and Mr. Justice Strong dissented.

POUND *v.* TURCK.

Supreme Court of the United States. 1877.

[95 *U. S.* 459.]

Error to the Circuit Court of the United States for the Western District of Wisconsin.

The facts are stated in the opinion of the court.

Mr. Matt. H. Carpenter for the plaintiffs in error; *Mr. William F. Vilas*, *contra*.

Mr. Justice Miller delivered the opinion of the court.

This suit, brought by Turck and Borland, assignees in bankruptcy of French, Leonard, & Co., is founded upon allegations that the bankrupts, being lumbermen engaged in that business on the Chippewa River, in Wisconsin, were seriously damaged by the delay of a raft of lumber, shingles, and pickets, in said river, and by the breaking of the raft; all of which was attributable to obstructions placed in said river by Pound, Halbert, & Co., the plaintiffs in error, who were defendants below. The defendants pleaded the general issue, and a verdict was rendered against them, on which the judgment was founded to which this writ of error is taken.

The bill of exceptions is a very imperfect one; . . . [it] shows, however, that there was evidence tending to prove that the dam and boom which constituted the principal obstruction in the river, to which the loss of plaintiffs' assignees was due, were built under authority of an Act of the Wisconsin Legislature; to wit, c. 235, Session Laws of 1857, approved March 5 of that year.

This statute is by its last section declared to be a public Act, which shall be favorably construed in all courts.

[1] In *C. B. & Q. R. R. Co.* v. *Iowa*, 94 U. S. 155, 163, the court (Waite, C. J.), in sustaining a similar statute, said: "The objection that the statute complained of is void because it amounts to a regulation of commerce among the States, has been sufficiently considered in the case of *Munn* v. *Illinois*. This road, like the warehouse in that case, is situated within the limits of a single State. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in State as well as in interstate commerce, and, until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected."

In *Covington, &c. Bridge Co.* v. *Ky.*, 154 U. S. 204, 214 (1894), the court (Brown, J.), after stating the decision in the last-named case, adds: "In short, the case was treated as one of internal commerce only." — Ed.

Sect. 7 of the Act authorizes "the erection of one or more dams at a given point across said river, and the building and maintaining of a boom or booms, with sufficient piers, and in such manner and form, and with such strength, as will stop and hold all logs and other things which may float in said river, which boom or booms shall be so arranged as to permit the passage of boats at all times; and at times of running lumber, a sufficient space shall be kept open in some convenient place for the passage of rafts, and the said dam or dams shall be built with suitable slides for the running of lumber in rafts over the same, and the said dam or dams and boom or booms shall be so constructed as not to obstruct the running of lumber rafts in said river." Private Laws of Wisconsin of 1857, p. 538. . . .

It authorized the construction of dams entirely across the stream, and it authorized booms, with sufficient piers, across the stream to stop and hold all logs and other things which may float in said river. It is a waste of words to attempt to prove that this would create a material obstruction to the navigation of the river by every species of water-craft. The fact that directions are given to facilitate the passage of these dams and piers by boats and rafts only shows that the evil caused by the obstructions was to be mitigated as far as possible consistently with their erection, and not that they were so to be built as to present no material obstruction to navigation.

Taking all the instructions together, and in connection with the prayer of the defendants refused by the court, we are of opinion that the jury must have understood that if the structures of defendants were a material obstruction to the general navigation of the river, the statute of the State afforded him no defence, though they were built in strict conformity to its provisions. We are confirmed in the belief that we have correctly construed the language of the court by the argument of counsel in support of the charge, which asserts the want of power in the State to pass the Act here relied on. This was unquestionably the opinion of the court as given to the jury, and its soundness is the principal matter to be considered by us.

This want of power is supposed to rest on the repugnance of the statute to that provision of the Constitution which confers upon Congress the authority "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The proposition is not a new one in this court, and cannot be sustained as applicable to the case before us without overruling many well-considered decisions, no one of which has ever been overturned, though the doctrine announced has been occasionally questioned.

The Chippewa River is a small stream lying wholly within the State of Wisconsin, but emptying its waters into the Mississippi.

Without the aid of the Constitution of Wisconsin, or the decision of its Supreme Court, or the third section of the enabling Act of 1846, by which Congress authorized the formation of a State government, we may concede that the stream, though small, is a navigable river of the

United States, and protected by all the Acts of Congress and provisions of the Constitution applicable to such waters.

The principle established by the decisions to which we have referred is, that, in regard to the powers conferred by the commerce clause of the Constitution, there are some which by their essential nature are exclusive in Congress, and which the States can exercise under no circumstances; while there are others which from their nature may be exercised by the States until Congress shall see proper to cover the same ground by such legislation as that body may deem appropriate to the subject. Of this class are pilotage and other port regulations, *Cooley* v. *Board of Wardens*, 12 How. 299; bridges across navigable streams, *Gilman* v. *Philadelphia;* and, as specially applicable to the case before us, to erect dams across navigable streams, *Willson* v. *Blackbird Creek Marsh Co.,* 2 Pet. 245. This general doctrine was very fully examined and sustained in *Gilman* v. *Philadelphia*, 3 Wall. 713, and again in *Crandall* v. *State of Nevada*, 6 Id. 35.

As we have already said, the *Blackbird Creek Case* is directly applicable to the one before us; and as it has never been overruled, but, on the contrary, though much criticised, has always been sustained, it is alone sufficient to control this one. . . . [Here follows a statement of this case and of *Gilman* v. *Phil.*] The present case falls directly within the principle established by these cases, and aptly illustrates its wisdom. There are within the State of Wisconsin, and perhaps other States, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water-carriage is as outlets to saw-logs, sawed lumber, coal, salt, &c. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, &c., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the State may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislatures.

It is obvious from these remarks that the court, in its charge to the jury and in refusing the prayer of plaintiff, did not give to the Act of the Legislature of Wisconsin the effect to which it was entitled as a defence in the action. . . .

For the error in the charge of the court in that matter the judgment will be reversed and a new trial awarded. *So ordered.*

Mr. Justice Clifford concurred in the judgment of the court, but adhered to the views expressed in his dissenting opinion in *Gilman* v. *Philadelphia*, 3 Wall. 732.

HALL *v.* DECUIR.

SUPREME COURT OF THE UNITED STATES. 1877.

[95 *U. S.* 485.]

ERROR to the Supreme Court of the State of Louisiana.

By the thirteenth article of the Constitution of Louisiana it is provided that "all persons shall enjoy equal rights and privileges upon any conveyance of a public character." By an Act of the General Assembly entitled "An Act to enforce the thirteenth article of the Constitution of this State, and to regulate the licenses mentioned in said thirteenth article," approved February 23, 1869, it was enacted as follows: [The passages quoted are given below in a note.][1]

Benson, the defendant below, was the master and owner of the "Governor Allen," 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, in the State of Louisiana, and Vicksburg, in the State of Mississippi, touching at the intermediate landings both within and without Louisiana, as occasion required. The defendant in error, plaintiff below, a person of color, took passage upon the boat, on her trip up the river from New Orleans, for Hermitage, a landing-place within Louisiana, and being refused accommodations, on account of her color, in the cabin specially set apart for white persons, brought this action in the Eighth District Court for the Parish of New Orleans, under the provisions of the Act above recited, to recover damages for her mental and physical suffering on that account. Benson, by way of defence, insisted, among other things, that the statute was inoperative and void as to him, in respect to the matter complained of, because, as to his business, it was an attempt to "regulate commerce among the States," and, there-

[1] "SECTION 1. All persons engaged within this State, in the business of common carriers of passengers, shall have the right to refuse to admit any person to their railroad cars, street cars, steamboats, or other water-crafts, stage-coaches, omnibuses, or other vehicles, or to expel any person therefrom after admission, when such person shall, on demand, refuse or neglect to pay the customary fare, or when such person shall be of infamous character, or shall be guilty, after admission to the conveyance of the carrier, of gross, vulgar, or disorderly conduct, or who shall commit any act tending to injure the business of the carrier, prescribed for the management of his business, after such rules and regulations shall have been made known: *Provided*, said rules and regulations make no discrimination on account of race or color; and shall have the right to refuse any person admission to such conveyance where there is not room or suitable accommodations; and, except in cases above enumerated, all persons engaged in the business of common carriers of passengers are forbidden to refuse admission to their conveyance, or to expel therefrom any person whomsoever."

"SECT. 4. For a violation of any of the provisions of the first and second sections of this Act, the party injured shall have a right of action to recover any damage, exemplary as well as actual, which he may sustain, before any court of competent jurisdiction." Acts of 1869, p. 37; Rev. Stat. 1870, p. 93.

fore, in conflict with art. 1, sect. 8, par. 3, of the Constitution of the United States. The District Court of the parish held that the statute made it imperative upon Benson to admit Mrs. DeCuir to the privileges of the cabin for white persons, and that it was not a regulation of commerce among the States, and, therefore, not void. After trial, judgment was given against Benson for $1,000; from which he appealed to the Supreme Court of the State, where the rulings of the District Court were sustained.

The decision of the Supreme Court is here for re-examination under sect. 709 of the Revised Statutes. Benson having died, Hall, his administratrix, was substituted in this court.

Mr. R. H. Marr, for the plaintiff in error; *Mr. E. K. Washington, contra.*

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

For the purposes of this case, we must treat the Act of Louisiana of February 23, 1869, as requiring those engaged in interstate commerce to give all persons travelling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that Act in the courts below, and it is conclusive upon us as the construction of a State law by the State courts. It is with this provision of the statute alone that we have to deal. We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the States.

There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several States. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it; for, as has been often said, "legislation may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution." *Sherlock* v. *Alling*, 93 U. S. 103; *State Tax on Railway Gross Receipts*, 15 Wall. 284. Thus, in *Munn* v. *Illinois*, 94 U. S. 113, it was decided that a State might regulate the charges of public warehouses, and in *Chicago, Burlington, & Quincy Railroad Co.* v. *Iowa*, Id. 155, of railroads situate entirely within the State, even though those engaged in commerce among the States might sometimes use the warehouses or the railroads in the prosecution of their business. So, too, it has been held that States may authorize the construction of dams and bridges across navigable streams situate entirely within their respective jurisdictions. *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Pound* v. *Turck*, 95 U. S. 459; *Gilman* v. *Philadelphia*, 3 Wall. 713. The same is true of turnpikes and ferries. By such statutes the States regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions, and over which they have exclusive governmental control, except when employed in foreign or interstate commerce. As

they can only be used in the State, their regulation for all purposes may properly be assumed by the State, until Congress acts in reference to their foreign or interstate relations. When Congress does act, the State laws are superseded only to the extent that they affect commerce outside the State as it comes within the State. It has also been held that health and inspection laws may be passed by the States, *Gibbons* v. *Ogden*, 9 Wheat. 1; and that Congress may permit the States to regulate pilots and pilotage until it shall itself legislate upon the subject, *Cooley* v. *Board of Wardens*, *&c.*, 12 How. 299. The line which separates the powers of the States from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved.

But we think it may safely be said that State legislation which seeks 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. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the

river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. 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.

This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade. As was said by Mr. Justice Field, speaking for the court in *Welton* v. *The State of Missouri*, 91 U. S. 282, "inaction [by Congress] . . . is equivalent to a declaration that interstate commerce shall remain free and untrammelled." Applying that principle to the circumstances of this case, Congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the State court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute, to the extent that it requires those engaged in the transportation of passengers among the States to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good require such legislation, it must come from Congress, and not from the States.

We confine our decision to the statute in its effect upon foreign and interstate commerce, expressing no opinion as to its validity in any other respect.

Judgment will be reversed and the cause remanded, with instructions to reverse the judgment of the district court, and direct such further proceedings in conformity with this opinion as may appear to be necessary; and it is *So ordered.*

[The concurring opinion of CLIFFORD, J., is omitted.]

PENSACOLA TELEGRAPH COMPANY *v.* WESTERN UNION TELEGRAPH COMPANY.

SUPREME COURT OF THE UNITED STATES. 1877.

[96 *U. S.* 1.][1]

APPEAL from the Circuit Court of the United States for the Northern District of Florida.

The plaintiff was incorporated by the Legislature of Florida on Dec. 11, 1866, with "the sole and exclusive privilege and right of establishing and maintaining lines of electric telegraph in the counties of Escambia and Santa Rosa, either from different points within said counties, or connecting with lines coming into said counties, or either of them, from any point in this or any other State." . . .

In February, 1874, the Legislature of Florida empowered a railroad company to construct and operate a telegraph line from the Bay of Pensacola along its own lines and other lines to the State of Alabama, with powers to connect and consolidate with other telegraph companies and to sell its rights and franchises. This was within the territory of the exclusive grant to the plaintiff. The defendants, claiming under this railroad company, began building their line of telegraph, when the plaintiff filed a bill to enjoin them. The bill was dismissed below, and this appeal was taken.

On July 24, 1866, Congress had enacted that telegraph companies now or hereafter organized, might construct and operate lines of telegraph "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. . . .

"SECT. 2. And be it further enacted, that telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General." . . .

The telegraph companies were required by § 4 to file with the Post-

[1] The statement of facts is shortened. — ED.

master-General their acceptance of the restraints and obligations of this Act before exercising any of the powers and privileges given by it. The defendants in June, 1867, adopted a resolution for such acceptance, which was duly filed as required by the Act.

Mr. Charles W. Jones, for the appellant; *Mr. Perry Belmont*, *contra*.

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

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 departments in Washington are kept in close communication with all their 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 Stat. 489, 772; 13 Stat. 365; 14 Stat. 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, § 2. That was not, however, the case of a corporation engaged in interstate commerce; and enough was said by the court to show, that, if it had been, very different questions would have been presented. . . .

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 arrange-

ment with the owner of the land, this defendant corporation cannot be excluded by the present complainant. *Decree affirmed.*[1]

[The dissenting opinions of JUSTICES FIELD and HUNT are omitted.]

Mr. JUSTICE HARLAN did not sit in this case or take any part in deciding it.

IN *Cook* v. *Pennsylvania*, 97 U. S. 566 (1878), on error to the Supreme Court of Pennsylvania, the court (MILLER, J.,) said: —

The Act of the Legislature of Pennsylvania, of May 20, 1853 (Pamphlet Laws, 683), declares that "The State duty to be paid on sales by auction in the counties of Philadelphia and Allegheny shall be on all domestic articles and groceries, one half of one per cent; on foreign drugs, glass, earthenware, hides, marble-work, and dye-woods, three-quarters of one per cent."

By the sixth section of the Act of April 9, 1859, the law was modified, as follows: "Said auctioneers shall pay into the treasury of the Commonwealth a tax or duty of one-fourth of one per cent on all sales of loans or stocks, and shall also pay into the treasury aforesaid a tax or duty, as required by existing laws, on all other sales to be made as aforesaid, except on groceries, goods, wares, and merchandise of American growth or manufacture, real estate, shipping, or live-stock; and it shall be the duty of the auctioneer having charge of such sales to collect and pay over to the State treasurer the said duty or tax, and give a true and correct account of the same quarterly, under oath or affirmation, in the form now required by law." Pamphlet Laws, 436.

[1] In *Tel. Co.* v. *Texas*, 105 U. S. 460 (1881), on error to the Supreme Court of Texas, the court (WAITE, C. J.) said: "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. . . .

"[The Company's] 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. . . .

"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." — ED.

The effect of this legislation is, that by the first statute a discrimination of one-fourth of one per cent is made against foreign goods sold at auction; and by the last statute, while all sales of foreign or imported goods are taxed, those arising from groceries, goods, wares, and merchandise of American growth or manufacture, are exempt from such tax. It appears that the law also required these auctioneers to take out a license, to make report of such sales, and to pay into the treasury the taxes on the sales.

The defendant refused to pay the tax for which he was liable under this law, for the sale of goods which had been imported, and which he had sold for the importers in the original packages. In the suit, in which judgment was rendered against him in the Supreme Court of Pennsylvania, he defended himself on the ground that these statutes were void, because forbidden by sects. 8 and 10 of Art. 1 of the Constitution of the United States.

The clauses referred to are those which give to Congress power to regulate commerce with foreign nations, and forbid a State, without the consent of Congress, to levy any imposts or duties on imports. The case stated shows that the goods sold by defendant were imported goods, and that they were sold by him in the packages in which they were originally imported. It is conceded by the Attorney-General of the State, that if the statute we have recited is a tax on these imports, it is justly obnoxious to the objection taken to it.

But it is argued that the authority of the auctioneer to make any sales is derived from the State, and that the State can, therefore, impose upon him a tax for the privilege conferred, and that the mode adopted by the statute of measuring that tax is within the power of the State. That being a tax on him for the right or privilege to sell at auction, it is not a tax on the article sold, but the amount of the sales made by him is made the measure of the tax on that privilege. In support of this view, it is said that the importer could himself have made sale of his goods without subjecting the sale to the tax. The argument is fallacious, because without an auctioneer's license he could not have sold at auction even his own goods. If he had procured, or could have procured, a license, he would then have been subject by the statute to the tax, for it makes no exception. By the express language of the statute, the auctioneer is to collect this tax, and pay it into the treasury. From whom is he to collect it if not from the owner of the goods? If the tax was intended to be levied on the auctioneer, he would not have been required first to collect it and then pay it over. It was, then, a tax on the privilege of selling foreign goods at auction, for such goods could only be sold at auction by paying the tax on the amount of the sales.

The question as thus stated has long ago and frequently been decided by this court. . . . [Here follows a statement of *The Passenger Cases*, *supra*, p. 1865, *Crandall* v. *Nevada*, *supra*, p. 1364, *The State Freight Tax*, *supra*, p. 1938, *Henderson* v. *The Mayor*, *supra*, p. 1961, and *Welton* v. *Mo.*, *supra*, p. 1957.]

The tax on sales made by an auctioneer is a tax on the goods sold, within the terms of this last decision, and, indeed, within all the cases cited; and when applied to foreign goods sold in the original packages of the importer, before they have become incorporated into the general property of the country, the law imposing such tax is void as laying a duty on imports.

In *Woodruff* v. *Parham,* 8 Wall. 123, and *Hinson* v. *Lott*, Id. 148, it was held that a tax laid by a law of the State in such a manner as to discriminate unfavorably against goods which were the product or manufacture of another State, was a regulation of commerce between the States, forbidden by the Constitution of the United States. The doctrine is reasserted in the case of *Welton* v. *State of Missouri, supra.* The Congress of the United States is granted the power to regulate commerce with foreign nations in precisely the same language as it is that among the States. If a tax assessed by a State injuriously discriminating against the products of a State of the Union is forbidden by the Constitution, a similar tax against goods imported from a foreign State is equally forbidden.

A careful reader of the history of the times which immediately preceded the assembling of the convention that framed the American Constitution cannot fail to discover that the need of some equitable and just regulation of commerce was among the most influential causes which led to its meeting. States having fine harbors imposed unlimited tax on all goods reaching the Continent through their ports. The ports of Boston and New York were far behind Newport, in the State of Rhode Island, in the value of their imports; and that small State was paying all the expenses of her government by the duties levied on the goods landed at her principal port. And so reluctant was she to give up this advantage, that she refused for nearly three years after the other twelve original States had ratified the Constitution, to give it her assent.

In granting to Congress the right to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, and in forbidding the States without the consent of that body to levy any tax on imports, the framers of the Constitution believed that they had sufficiently guarded against the dangers of any taxation by the States which would interfere with the freest interchange of commodities among the people of the different States, and by the people of the States with citizens and subjects of foreign governments.

The numerous cases in which this court has been called on to declare void statutes of the States which in various ways have sought to violate this salutary restriction, show the necessity and value of the constitutional provision. If certain States could exercise the unlimited power of taxing all the merchandise which passes from the port of New York through those States to the consumers in the great West, or could tax — as has been done until recently — every person who sought the seaboard through the railroads within their jurisdiction, the Constitution would

have failed to effect one of the most important purposes for which it was adopted.

A striking instance of the evil and its cure is to be seen in the recent history of the States now composing the German empire. A few years ago they were independent States, which, though lying contiguous, speaking a common language, and belonging to a common race, were yet without a common government. The number and variety of their systems of taxation and lines of territorial division necessitating customs officials at every step the traveller took, or merchandise was transported, became so intolerable, that a commercial, though not a political union was organized, called the German Zollverein. The great value of this became so apparent, and the community of interest so strongly felt in regard to commerce and traffic, that the first appropriate occasion was used by these numerous principalities to organize the common political government now known as the German Empire.

While there is, perhaps, no special obligation on this court to defend the wisdom of the Constitution of the United States, there is the duty to ascertain the purpose of its provisions, and to give them full effect when called on by a proper case to do so.

The judgment of the Supreme Court of Pennsylvania will be reversed, and the case remanded for further proceedings, in conformity with this opinion; and it is *So ordered.*[1]

[1] In *Machine Co.* v. *Gage*, 100 U. S. 676 (1879), on error to the Supreme Court of Tennessee, SWAYNE, J., for the Court, said: "The Howe Machine Company is a corporation of the State of Connecticut. It manufactured sewing-machines at Bridgeport, in that State, and had an agency at Nashville, in the State of Tennessee. From the latter place, an agent was sent into Sumner County to sell machines there. A tax was demanded from him for a pedler's license to make such sales He denied the validity of the law under which the tax was claimed, but, according to a law of the State, paid the amount demanded by the defendant, as clerk of the county court. The company, who brought this suit to recover it back, was defeated in the lower court, and the judgment was affirmed by the Supreme Court of the State.

"The Constitution of Tennessee (art 11, sect. 30) declares that 'no article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees.'

"'Sales by pedlers of articles manufactured or made up in this State, and scientific or religious books, are exempt from taxation.' Code of Tennessee, sect. 546.

"'All articles manufactured of the produce of the State' are exempt from assessment or taxation. Acts of 1875, c. 98, sect. 10.

"'All pedlers of sewing-machines and selling by sample' shall pay a tax of ten dollars. Code, sect. 553 *a*, subsect 43.

"By a subsequent Act of the legislature, this tax was increased to fifteen dollars.

"The sewing-machines here in question were made in Connecticut. The Supreme Court of the State held, in this case, 'that the law taxing the pedlers of such machines, levied the tax upon all pedlers of sewing-machines, without regard to the place of growth or produce of material or of manufacture.'

"We are bound to regard this construction as correct, and to give it the same effect as if it were a part of the statute. *Leffingwell* v. *Warren*, 2 Black, 599.

"The question presented for our consideration is not difficult of solution. A brief reference, however, to some of the adjudications of this court, bearing with more or less directness upon the subject, may not be without interest. . . . [Here follow short,

TRADE-MARK CASES.

U. S. *v.* STEFFENS; U. S. *v.* WITTEMANN; U. S. *v.* JOHNSON.

UNITED STATES SUPREME COURT. 1879.

[100 *U. S.* 82.][1]

The Attorney-General, for the United States; *Mr. George Hoadly, contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

The three cases whose titles stand at the head of this opinion are criminal prosecutions for violations of what is known as the trade-mark legislation of Congress. The first two are indictments in the Southern District of New York, and the last is an information in the Southern District of Ohio. In all of them the judges of the circuit courts in which they are pending have certified to a difference of opinion on what is substantially the same question; namely, are the Acts of Congress on the subject of trade-marks founded on any rightful authority in the Constitution of the United States?

The entire legislation of Congress in regard to trade-marks is of very recent origin. It is first seen in sects. 77 to 84, inclusive, of the Act of July 8, 1870, entitled "An Act to revise, consolidate, and amend the statutes relating to patents and copyrights." 16 Stat. 198. The part of this Act relating to trade-marks is embodied in chap. 2, tit. 60, sects. 4937 to 4947, of the Revised Statutes.

It is sufficient at present to say that they provide for the registration in the Patent Office of any device in the nature of a trade-mark to which any person has by usage established an exclusive right, or which the person so registering intends to appropriate by that Act to his exclusive use; and they make the wrongful use of a trade-mark, so registered, by any other person, without the owner's permission, a cause of action in a civil suit for damages. Six years later we have the Act of Aug. 14, 1876 (19 Stat. 141), punishing by fine and imprisonment the fraudulent use, sale, and counterfeiting of trade-marks registered in

disconnected summaries of fourteen cases in the Supreme Court of the United States; and then the opinion proceeds as follows:]

"In all cases of this class to which the one before us belongs, it is a test question whether there is any discrimination in favor of the State or of the citizens of the State which enacted the law. Wherever there is, such discrimination is fatal. Other considerations may lead to the same result.

"In the case before us, the statute in question, as construed by the Supreme Court of the State, makes no such discrimination. It applies alike to sewing-machines manufactured in the State and out of it. The exaction is not an unusual or unreasonable one. The State, putting all such machines upon the same footing with respect to the tax complained of, had an unquestionable right to impose the burden. *Woodruff* v. *Parham*, *Hinson* v. *Lott*, *Ward* v. *State of Maryland*, *Welton* v. *State of Missouri*, *supra*.

"*Judgment affirmed.*"

[1] The statement of facts is omitted. — ED.

pursuance of the statutes of the United States, on which the informations and indictments are founded in the cases before us. . . .

As the property in trade-marks and the right to their exclusive use rest on the laws of the States, and, like the great body of the rights of person and of property, depend on them for security and protection, the power of Congress to legislate on the subject, to establish the conditions on which these rights shall be enjoyed and exercised, the period of their duration, and the legal remedies for their enforcement, if such power exist at all, must be found in the Constitution of the United States, which is the source of all the powers that Congress can lawfully exercise.

In the argument of these cases this seems to be conceded, and the advocates for the validity of the Acts of Congress on this subject point to two clauses of the Constitution, in one or in both of which, as they assert, sufficient warrant may be found for this legislation. The first of these is the eighth clause of sect. 8 of the first article, . . . "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." . . . The other clause of the Constitution supposed to confer the requisite authority on Congress is the third of the same section, which, read in connection with the granting clause, is as follows: "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The argument is that the use of a trade-mark — that which alone gives it any value — is to identify a particular class or quality of goods as the manufacture, produce, or property of the person who puts them in the general market for sale; that the sale of the article so distinguished is commerce; that the trade-mark is, therefore, a useful and valuable aid or instrument of commerce, and its regulation by virtue of the clause belongs to Congress, and that the Act in question is a lawful exercise of this power.

Every species of property which is the subject of commerce, or which is used or even essential in commerce, is not brought by this clause within the control of Congress. The barrels and casks, the bottles and boxes in which alone certain articles of commerce are kept for safety and by which their contents are transferred from the seller to the buyer, do not thereby become subjects of Congressional legislation more than other property. *Nathan* v. *Louisiana*, 8 How. 73. In *Paul* v. *Virginia*, 8 Wall. 168, this court held that a policy of insurance made by a corporation of one State on property situated in another, was not an article of commerce, and did not come within the purview of the clause we are considering. "They are not," says the court, "commodities to be shipped or forwarded from one State to another, and then put up for sale." On the other hand, in *Almy* v. *State of California*, 24 How. 169, it was held that a stamp duty imposed by the Legislature of California on bills of lading for gold and silver transported from any place in that State to another out of the State, was forbidden by the Constitution

of the United States, because such instruments being a necessity to the transaction of commerce, the duty was a tax upon exports.

The question, therefore, whether the trade-mark bears such a relation to commerce in general terms as to bring it within Congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the present case, we propose to leave undecided. We adopt this course because when this court is called on in the course of the administration of the law to consider whether an Act of Congress, or of any other department of the government, is within the constitutional authority of that department, a due respect for a co-ordinate branch of the government requires that we shall decide that it has transcended its powers only when that is so plain that we cannot avoid the duty. In such cases it is manifestly the dictate of wisdom and judicial propriety to decide no more than is necessary to the case in hand. That such has been the uniform course of this court in regard to statutes passed by Congress will readily appear to any one who will consider the vast amount of argument presented to us assailing them as unconstitutional, and he will count, as he may do on his fingers, the instances in which this court has declared an Act of Congress void for want of constitutional power.

Governed by this view of our duty, we proceed to remark that a glance at the commerce clause of the Constitution discloses at once what has been often the subject of comment in this court and out of it, that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes. While bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress.

When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress. We find no recognition of this principle in the chapter on trade-marks in the Revised Statutes. . . .

It is therefore manifest that no such distinction is found in the Act, but that its broad purpose was to establish a universal system of trade-mark registration, for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without regard to the

character of the trade to which it was to be applied or the residence of the owner, with the solitary exception that those who resided in foreign countries which extended no such privileges to us were excluded from them here.

It has been suggested that if Congress has the power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in *United States* v. *Reese*, 92 U. S. 214. In that case Congress had passed a statute punishing election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. This court was of the opinion that, as regarded the section of the statute then under consideration, Congress could only punish such denial when it was on account of race, color, or previous condition of servitude.

It was urged, however, that the general description of the offence included the more limited one, and that the section was valid where such was in fact the cause of denial. But the court said, through the Chief Justice: "We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, Whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the Act of Congress, and in others under State law. Cooley, Const. Lim. 178, 179; *Commonwealth* v. *Hitchings*, 5 Gray (Mass.), 482.

In what we have here said we wish to be understood as leaving untouched the whole question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect.

While we have, in our references in this opinion to the trade-mark legislation of Congress, had mainly in view the Act of 1870, and the civil remedy which that Act provides, it was because the criminal offences described in the Act of 1876 are, by their express terms, solely referable to frauds, counterfeits, and unlawful use of trade-marks which were registered under the provisions of the former Act. If that Act is unconstitutional, so that the registration under it confers no lawful right, then the criminal enactment intended to protect that right falls with it.

The questions in each of these cases being an inquiry whether these statutes can be upheld in whole or in part as valid and constitutional, must be answered in the negative; and it will be

So certified to the proper circuit courts.[1]

In *County of Mobile* v. *Kimball*, 102 U. S. 691 (1880), Mr. Justice Field delivered the opinion of the court.

The several positions taken by the appellant for the reversal of the decree of the Circuit Court may be resolved into these four: 1st, That the Act of the Legislature of Alabama of February 16, 1867, "to provide for the improvement of the river, bay, and harbor of Mobile," is invalid, in that it conflicts with the commercial power vested in Congress; 2d, that if the Act be not, for this reason, invalid, the expenses for the work authorized by it could not, under the Constitution of the State then in force, be imposed upon the county of Mobile, the work being for the benefit of the whole State; 3d, that the right of the complainants to relief is barred by a previous adjudication in the courts of the State against their claim; and, 4th, that the case presented by the bill is not one for the cognizance of a court of equity. Each of these positions merits special consideration.

1. The Act of February 16, 1867, created a board of commissioners for the improvement of the river, harbor, and bay of Mobile, and required the president of the commissioners of revenue of Mobile County to issue bonds to the amount of $1,000,000, and deliver them, when called for, to the board, to meet the expenses of the work directed. The board was authorized to apply the bonds, or their proceeds, to the cleaning out, deepening, and widening of the river, harbor, and bay of Mobile, or any part thereof, or to the construction of an artificial harbor in addition to such improvement.

In June, 1872, the board of commissioners entered into a contract with the complainants, Kimball and Slaughter, to dredge and cut a channel through a designated bar in the bay, of specified width, depth,

[1] In 1881, Congress passed a similar statute, which was limited to interstate and foreign commerce. 21 Stat. 502; 1 Suppl. Rev. St. U. S. 322. — Ed.

and distance, at a named price per cubic yard of material excavated and removed, and to receive in payment the bonds of the county, issued under the Act mentioned, at the rate of 82½ cents on the dollar. In pursuance of this contract, the work agreed upon was at once undertaken by the complainants, and was completed by them in March, 1873, and accepted by the board through its authorized engineer. The amount due to them was paid, with the exception of seventeen bonds. The board gave them a certificate that they were entitled to that number of bonds, and, after some delay, delivered eleven to them. It is to obtain a delivery of the remaining six, or payment of their value, that the present suit is brought.

The objection that the law of the State, in authorizing the improvement of the harbor of Mobile, trenches upon the commercial power of Congress, assumes an exclusion of State authority from all subjects in relation to which that power may be exercised, not warranted by the adjudications of this court, notwithstanding the strong expressions used by some of its judges. That power is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several States, and to adopt measures to promote its growth and insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the States connecting with them, falls within the power. The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation.

Of the class of subjects local in their nature, or intended as mere aids to commerce, which are best provided for by special regulations,

may be mentioned harbor pilotage, buoys, and beacons to guide mariners to the proper channel in which to direct their vessels.

The rules to govern harbor pilotage must depend in a great degree upon the peculiarities of the ports where they are to be enforced. It has been found by experience that skill and efficiency on the part of local pilots is best secured by leaving this subject principally to the control of the States. Their authority to act upon the matter and regulate the whole subject, in the absence of legislation by Congress, has been recognized by this court in repeated instances. In *Cooley* v. *Board of Wardens of the Port of Philadelphia*, the court refers to the Act of Congress of 1789, declaring that pilots should continue to be regulated by such laws as the States might respectively thereafter enact for that purpose, and observes that "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." 12 How. 299, 320.

Buoys and beacons are important aids, and sometimes are essential to the safe navigation of vessels, in indicating the channel to be followed at the entrance of harbors and in rivers, and their establishment by Congress is undoubtedly within its commercial power. But it would be extending that power to the exclusion of State authority to an unreasonable degree to hold that whilst it remained unexercised upon this subject, it would be unlawful for the State to provide the buoys and beacons required for the safe navigation of its harbors and rivers, and in case of their destruction by storms or otherwise it could not temporarily supply their places until Congress could act in the matter and provide for their re-establishment. That power which every State possesses, sometimes termed its police power, by which it legislates for the protection of the lives, health, and property of its people, would justify measures of this kind.

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 noth-

ing shall be done with 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.

The improvement of harbors, bays, and navigable rivers within the States falls within this last category of cases. The control of Congress over them is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power. Such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvement. The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign nations; and to promote the growth of that internal commerce and insure its safety they have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels, and improve them generally, if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the general government. Legislation of the States for the purposes and within the limits mentioned do not infringe upon the commercial power of Congress; and so we hold that the Act of the State of Alabama of February 16, 1867, to provide for the "improvement of the river, bay, and harbor of Mobile," is not invalid.

There have been, it is true, expressions by individual judges of this court, going to the length that the mere grant of the commercial power, anterior to any action of Congress under it, is exclusive of all State authority; but there has been no adjudication of the court to that effect. In the opinion of the court in *Gibbons* v. *Ogden*, the first and leading case upon the construction of the commercial clause of the Constitution, and which opinion is recognized as one of the ablest of the great Chief Justice then presiding, there are several expressions which would indicate, and his general reasoning would tend to the same conclusion, that in his judgment the grant of the commercial power was of itself sufficient to exclude all action of the States; and it is upon them that the advocates of the exclusive theory chiefly rely; and yet he takes care to observe that the question was not involved in the decision required by that case. . . .

But in 1851, in the case of *Cooley* v. *Board of Wardens of the Port of Philadelphia*, to which we have already referred, the attention of the court appears to have been for the first time drawn to the varying and different regulations required by the different subjects upon which Congress may legislate under the commercial power; and from this consideration the conclusion was reached, that, as some of these subjects are national in their nature, admitting[1] of one uniform plan or system of regulation, whilst others, being local in their nature or operation, can be best regulated by the States, the exclusiveness of the

[1] "Admitting only," was the expression used in the case here cited. The difference is important. See *supra*, p. 1963, n. — Ed.

power in any case is to be determined more by the nature of the subject upon which it is to operate than by the terms of the grant, which, though general, are not accompanied by any express prohibition to the exercise of the power by the States. The decision was confined to the validity of regulations by the States of harbor pilotage; but the reasoning of the court suggested as satisfactory a solution as perhaps could be obtained of the question which had so long divided the judges. The views expressed in the opinion delivered are followed in *Gilman* v. *Philadelphia*, 3 Wall. 713, and are mentioned with approval in *Crandall* v. *State of Nevada*, 6 Id. 35. In the first of these cases the court, after stating that some subjects of commerce call for uniform rules and national legislation, and that others can "be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively," says, "whether the power in any given case is vested exclusively in the general government depends upon the nature of the subject to be regulated." This doctrine was subsequently recognized in the case of *Welton* v. *State of Missouri* (91 U. S. 275), in *Henderson* v. *Mayor of New York* (92 Id. 259), and in numerous other cases; and it may be considered as expressing the final judgment of the court.

Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind the distinction between commerce as strictly defined, and its local aids or instruments, or measures taken for its improvement. Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce.

2. The second objection of the appellant to the decree of the Circuit Court is equally as untenable as the first. . . . *Decree affirmed.*[1]

[1] See *Packet Co.* v. *Catlettsburg*, 105 U. S. 559. — Ed.

ESCANABA COMPANY *v.* CHICAGO.

SUPREME COURT OF THE UNITED STATES. 1882.

[107 *U. S.* 678.]

APPEAL from the Circuit Court of the United States for the Northern District of Illinois. The case is fully stated in the opinion of the court.

Mr. Alexander T. Britton, *Mr. Jehiel H. McGowan*, and *Mr. Homer Cook*, for the appellant; *Mr. Frederick S. Winston*, *Jr.*, for the appellee.

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 the 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 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 minutes, 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. At the hours specified there is three times — so the record shows — the usual number of pedestrians going and returning that there is during other hours of [the day]. The limitation of ten minutes for the passage of the draws by vessels seems to have been eminently wise and proper for the protection of the interests of all parties. Ten minutes is ample time for any vessel to pass the draw of a bridge, and the allowance of more time would subject foot-passengers, teams, and other vehicles to great inconvenience and delays.

The complainant principally objects to this ten minutes' limitation, and to the assignment of the morning and evening hour to pedestrians and vehicles. It insists that the navigation of the river and its branches should not be thus delayed; and that the rights of commerce by vessels are paramount to the rights of commerce by any other way.

But in this view the complainant is in error. The rights of each class are to be enjoyed without invasion of the equal rights of others. Some concession must be made on every side for the convenience and the harmonious pursuit of different occupations. Independently of any constitutional restrictions, nothing would seem more just and reasonable, or better designed to meet the wants of the population of an immense city, consistently with the interests of commerce, than the ten minutes' rule, and the assignment of the morning and evening hours which the city ordinance has prescribed.

The power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when by themselves or their connection with other waters they form a continuous channel for commerce among the States or with foreign countries. *The Daniel Ball*, 10 Wall. 557. Such is the case with the Chicago River and its branches. The common-law test of the navigability of waters, that they are subject to the ebb and flow of the tide, grew out of the fact that in England there are no waters navigable in fact, or to any great extent, which are not also affected by the tide. That test has long since been discarded in this

country. Vessels larger than any which existed in England, when that test was established, now navigate rivers and inland lakes for more than a thousand miles beyond the reach of any tide. That test only becomes important when considering the rights of riparian owners to the bed of the stream, as in some States it governs in that matter.

The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation.

But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and that of the Federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest period, and approved in repeated cases, the most notable of which are *Willson* v. *The Blackbird Creek Marsh Co.*, 2 Pet. 245, decided in 1829, and *Gilman* v. *Philadelphia*, 3 Wall. 713, decided in 1865. . . . [Here follows a statement of these two cases, and of *Pound* v. *Turck*, *supra*, p. 1978.]

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. . . . [Here follows a quotation from *Co. of Mobile* v. *Kimball, supra,* p. 1999.]

Bridges over navigable streams, which are entirely within the limits of a State, are of the latter [local] 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.

It is, however, contended here that Congress has interfered, and by its legislation expressed its opinion as to the navigation of Chicago River and its branches; that it has done so by Acts recognizing the Ordinance of 1787, and by appropriations for the improvement of the harbor of Chicago.

The Ordinance of 1787 for the government of the territory of the United States northwest of the Ohio River, contained in its fourth article a clause declaring that, "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between them, shall be common highways and forever free, as well to the inhabitants of the said Territory as to the citizens of the United States and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor."

The Ordinance was passed July 13, 1787, one year and nearly eight months before the Constitution took effect; and although it appears to have been treated afterwards as in force in the Territory, except as modified by Congress, and by the Act of May 7, 1800, c. 41, creating the Territory of Indiana, and by the Act of Feb. 3, 1809, c. 13, creating the Territory of Illinois, the rights and privileges granted by the Ordinance are expressly secured to the inhabitants of those Territories; and although the Act of April 18, 1818, c. 67, enabling the people of Illinois Territory to form a Constitution and State government, and the Resolution of Congress of Dec. 3, 1818, declaring the admission of the State into the Union, refer to the principles of the Ordinance according to which the Constitution was to be formed, its provisions could not control the authority and powers of the State after her admission. Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same

footing with them. The language of the Resolution admitting her is "on an equal footing with the original States in all respects whatever." 3 Stat. 536. Equality of constitutional right and power is the condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Blackbird Creek, and Pennsylvania over the Schuylkill River. *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Permoli* v. *First Municipality*, Id. 589; *Strader* v. *Graham*, 10 Id. 82.

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 entertained 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.

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 this decree must accordingly be *Affirmed.*[1]

[1] In *Miller* v. *Mayor of N. Y. et al.*, 109 U. S. 385 (1883), on an appeal from the Circuit Court of the United States for the Southern District of New York, from a decree dismissing the plaintiff's bill for an abatement as a nuisance of the great "Brooklyn Bridge" across the East River from the city of New York, it appeared that the bridge had been authorized by statutes of New York of 1867 and 1869, and by an Act of Congress of 1869. In affirming the decree, the court (FIELD, J.) said: "The bridge, being constructed in accordance with the legislation of both the State and Federal governments, must be deemed a lawful structure. It cannot, after such legislation, be treated as a public nuisance; and however much it may interfere with the public right of navigation in the East River, and thereby affect the profits or business of private persons, it cannot, on that ground, be the subject of complaint before the courts. The plaintiff is not deprived of his property nor of the enjoyment of it; nor does he from that cause suffer any damage different in character from the rest of the public. He alleges that his business of a warehouse-keeper on the banks of the river above the bridge will be in some degree lessened by the delay attending the passage under it of vessels with high masts. The inconvenience and possible loss of business from this cause are not different from that which others on the banks of the river above the bridge may suffer. Every public improvement, whilst adding to the convenience of the people at large, affects more or less injuriously the interests of some. A new channel of commerce opened, turning trade into it from other courses, may affect the business

and interests of persons who live on the old routes. A new mode of transportation may render of little value old conveyances. Every railway in a new country interferes with the business of stage coaches and side way taverns; and it would not be more absurd for their owners to complain of, and object to, its construction than for parties on the banks of the East River to complain of and object to the improvement which connects the two great cities on the harbor of New York.

"Several cases have been before this court relating to bridges over navigable waters of the United States, in which questions were raised as to the authority by which the bridges could be constructed, the extent to which they could be permitted to obstruct the free navigation of the waters, and the right of private parties to interfere with their construction or continuance. In these cases all the questions presented in the case at bar have been considered and determined, and what we hereafter say in this opinion will be little more than a condensation of what was there declared. The power vested in Congress to regulate commerce with foreign nations and among the several States includes the control of the navigable waters of the United States so far as may be necessary to insure their free navigation; and by 'navigable waters of the United States' are meant such as are navigable in fact, and which by themselves or their connection with other waters form a continuous channel for commerce with foreign countries or among the States. *The Daniel Ball*, 10 Wall. 557. East River is such a navigable water. It enters the harbor of New York and connects it with Long Island Sound. Whatever, therefore, may be necessary to preserve or improve its navigation the general government may direct; and to that end it can determine what shall and what shall not be deemed an interference with, or an obstruction to, such navigation."

In *Cardwell* v. *American Bridge Co.*, 113 U. S. 205 (1885), under an Act of the Legislature of California, a bridge had been built across the American River, below the town of Folsom, in that State. That river was navigable for small steamboats and barges for thirty miles from its mouth at the Sacramento River, up to the town of Folsom, and thus furnished a navigable outlet to other States and countries. The plaintiff, a land-owner on the river below Folsom and above the bridge, owned a steamboat and other vessels, and was seriously impeded, as he alleged, in his commercial operations. He filed a bill praying for an injunction against maintaining the bridge without a draw. It had no draw, and its height above extreme low water was fourteen feet, and above extreme high water five feet. The defendant demurred. On an appeal from a decree dismissing the bill, in affirming the decree, the court (FIELD, J.) said: "The questions thus presented are neither new nor difficult of solution. Except in one particular, they have been considered and determined in many cases, of which the most important are *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518, 564; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Pound* v. *Turck*, 95 U. S. 459; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, and *Miller* v. *Mayor of New York*, 109 U. S. 385. In these cases the control of Congress over navigable waters within the States so as to preserve their free navigation under the commercial clause of the Constitution, the power of the States within which they lie to authorize the construction of bridges over them until Congress intervenes and supersedes their authority, and the right of private parties to interfere with their construction or continuance, have been fully considered, and we are entirely satisfied with the soundness of the conclusions reached. They recognize the full power of the States to regulate within their limits matters of internal police, which embraces, among other things, the construction, repair, and maintenance of roads and bridges, and the establishment of ferries; that the States are more likely to appreciate the importance of these means of internal communication and to provide for their proper management, than a government at a distance; and that, as to bridges over navigable streams, their power is subordinate to that of Congress, as an Act of the latter body is, by the Constitution, made the supreme law of the land; but that until Congress acts on the subject their power is plenary. When Congress acts directly with reference to the bridges authorized by the State, its will must control so far as may be necessary to secure the free navigation of the streams. . . .

"These cases illustrate the general doctrine, now fully recognized, that the com-

mercial power of Congress is exclusive of State authority only when the subjects upon which it is exerted are national in their character, and admit and require uniformity of regulations affecting alike all the States; and that when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the States may provide for their regulation and management, until Congress intervenes and supersedes their action.

"The complainant, however, contends that Congress has intervened and expressed its will on this subject by a clause in the Act of September 9, 1850 (9 Stat. 452), admitting California as a State into the Union. [This clause is substantially the same as that in the Ordinance of 1787, discussed in *Escanaba Co.* v. *Chicago*, *supra*, p. 2002. The court comments upon that case and *Pound* v. *Turck*, *supra*, p. 1978, and proceeds as follows:]

"The clause, therefore, in the Act admitting California, quoted above, upon which the complainant relies, must be considered, according to these decisions, as in no way impairing the power which the State could exercise over the subject if the clause had no existence. But independently of this consideration, we do not think the clause itself requires the construction which the court below placed upon it, and which counsel urges so earnestly for our consideration. That court held that the clause contains two provisions, — one, that the navigable waters shall be a common highway to the inhabitants of the State as well as to citizens of the United States; and the other, that they shall be forever free from any tax, impost, or duty therefor; that these provisions are separate and distinct, and that one is not an adjunct or amplification of the other. Possibly some support is given to that view by language used in the opinion in *Escanaba Co.* v. *Chicago*. In that case all the bridges over the Chicago River had draws for the passage of vessels, and we there held that a bridge constructed with a draw could not be regarded within the Ordinance of 1787 as an obstruction to the navigation of the stream. We were not required to express any further opinion as to the meaning of the ordinance. But upon the mature and careful consideration which we have given in this case to the language of the clause in the Act admitting California, we are of opinion that, if we treat the clause as divisible into two provisions, they must be construed together as having but one object, namely, to insure a highway equally open to all without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation; and that the clause contemplated no other restriction upon the power of the State in authorizing the construction of bridges over them whenever such construction would promote the convenience of the public. The Act admitting California declares that she is 'admitted into the Union on an equal footing with the original States in all respects whatever.' She was not, therefore, shorn by the clause as to navigable waters within her limits of any of the powers which the original States possessed over such waters within their limits. *Decree affirmed.*"

In *Huse* v. *Glover*, 119 U. S. 543, 548 (1886), the State of Illinois had improved the navigation of the Illinois River by constructing a lock and dam, and proceeded to charge tolls for the use of them. In sustaining the right of the State to do this, the court (FIELD, J.) 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. The opening of a new highway, or the improvement of an old one, the building of a railroad, and many other works, in which the public is interested, may materially diminish business in certain quarters and increase it in others; yet, for the loss resulting, the sufferers have no legal ground of complaint. How the highways of a State, whether on land or by water, shall be best improved for the public good is a matter for State determination, subject always to the right of Congress to interpose in the cases mentioned. *Spooner* v. *McConnell*, 1 McLean, 337; *Kellogg* v. *Union Co.*, 12 Conn. 7; *Thames Bank* v. *Lovell*, 18 Conn. 500; s. c. 46 Am. Dec. 332; *McReynolds* v. *Smallhouse*, 8 Bush, 447."

In a similar case, *Sands* v. *Manistee River Imp. Co.*, 123 U. S. 288, 295 (1887), the court (FIELD, J.) said: "The Manistee River is wholly within the limits of Michigan. The State, therefore, can authorize any improvement which in its judgment will enhance its value as a means of transportation from one part of the State to another. The internal commerce of a State — that is, the commerce which is confined wholly 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 this commerce and render it safe, the States may provide for the removal of obstructions from their rivers and harbors, and deepen their channels, and improve them in other ways, if, as is said in *County of Mobile* v. *Kimball*, the free navigation of those waters, as permitted under the laws of the United States, is not impaired, or any system for the improvement of their navigation provided by the general government is not defeated. 102 U. S. 691, 699. And to meet the cost of such improvements, the States may levy a general tax or lay a toll upon all who use the rivers and harbors as improved. The improvements are, in that respect, like wharves and docks constructed to facilitate commerce in loading and unloading vessels. *Huse* v. *Glover*, 119 U. S. 543, 548. Regulations of tolls or charges in such cases are mere matters of administration, under the entire control of the State."

In *Harman* v. *Chicago*, 147 U. S. 396 (1893), on error to the Supreme Court of Illinois, there was an action against the city of Chicago, Illinois, to recover the sum of three hundred dollars paid by the plaintiff on compulsion, and under protest, for licenses for twelve steam tugs of which he was the manager and owner.

On the trial of the case the issues were found for the defendant; thereupon an appeal was taken to the appellate court for the First District of the State of Illinois, and there without argument the judgment was affirmed, and then an appeal was taken by the plaintiff to the Supreme Court of the State. Upon a hearing before that court the judgment to the court below was reversed, and the ordinance of the city declared to be invalid; but upon petition a rehearing was granted, and the case was reargued. After such reargument the judgment previously rendered by the court was set aside, and the judgment of the appellate court was affirmed. The plaintiff thereupon brought the case to this court upon a writ of error. *Mr. C. E. Kremer* and *Mr. D. J. Schuyler*, for plaintiff in error; *Mr. John S. Miller*, for defendant in error.

MR. JUSTICE FIELD, after stating the case, 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." . . . [The court here states the form and effect of the coasting license, and quotes from *Gibbons* v. *Ogden*, *supra*, p. 1800, and *Foster* v. *Davenport*, 22 How. 244.]

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. . . . [Here follows a statement of *Moran* v. *N. O.*, *supra*, p. 1904 n., with quotations.]

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 and 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. [Here follows a reference to *Foster* v. *Davenport*, *ubi supra*, and a statement, with quotations, of *Huse* v. *Glover*, 119 U. S. 543. The opinion then proceeds:]

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. . . . No legislation of Congress was,

GLOUCESTER FERRY COMPANY *v.* PENNSYLVANIA.

SUPREME COURT OF THE UNITED STATES. 1885.

[114 *U. S.* 196.]

IN March, 1865, the Gloucester Ferry Company, the plaintiff in error here, was incorporated by the Legislature of New Jersey to establish a steamboat ferry from the town of Gloucester, in that State, to the city of Philadelphia, in Pennsylvania, with a capital stock of $50,000, divided into shares of $50 each. During that year it established, and has ever since maintained, a ferry between those places, across the river Delaware, leasing or owning steam ferry-boats for that purpose. At each place it has a slip or dock on which passengers and freight are received and landed; the one in Gloucester it owns, the one in Philadelphia it leases. Its entire business consists in ferrying passengers and freight across the river between those places. It has never transacted any other business. It does not own, and has never owned, any property, real or personal, in the city of Philadelphia other than the lease of the slip or dock mentioned. All its other property consists of certain real estate in the county of Camden, New Jersey, needed for its business, and steamboats engaged in ferriage. These boats are registered at the port of Camden, New Jersey. It has never owned any boats registered at a port of Pennsylvania, and its boats are never allowed to remain in that State except so long as may be necessary to discharge and receive passengers and freight.

In July, 1880, the Auditor-General and the Treasurer of the State of Pennsylvania stated an account against the company of taxes on its capital stock, based upon its appraised value, for the years 1865 to 1879, both inclusive, finding the amount of $2,593.96 to be due the Commonwealth. From this finding an appeal was taken to the Court of Common Pleas of Philadelphia, and was there heard upon a case stated, in which it was stipulated that, if the court were of opinion that the company was liable for the tax, judgment against it in favor of the Commonwealth should be entered for the above amount; but if the court were of opinion that the company was not liable, judgment should be entered in its favor.

A statute of Pennsylvania, passed June 7, 1879, "to provide revenue by taxation," in its fourth section enacted as follows: [In substance that all corporations, domestic or foreign, doing business or employing capital in Pennsylvania, with certain exceptions, shall be taxed at cer-

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. *Judgment reversed.*

Compare s. c. below, 140 Ill. 374. — ED.

tain specified rates.] It was under the authority of this Act that the taxes in question were stated against the company by the Auditor-General and the State Treasurer.

The Court of Common Pleas held that the taxes could not be lawfully levied, for there was no other business carried on by the company in Pennsylvania except the landing and receiving of passengers and freight, which is a part of the commerce of the country, and protected by the Constitution from the imposition of burdens by State legislation. It, therefore, gave judgment in favor of the company. The case being carried on a writ of error to the Supreme Court of the State, the judgment was reversed and judgment ordered in favor of the Commonwealth for the amount mentioned. To review this latter judgment, the case was brought here.

Mr. John G. Johnson and *Mr. Morton P. Henry*, for plaintiff in error; *Mr. Robert Snodgrass*, Deputy Attorney-General of Pennsylvania, for defendant in error.

Mr. Justice Field delivered the opinion of the court. He stated the facts as above recited, and continued: —

The Supreme Court of the State, in giving its decision in this case, stated that the single question presented for consideration was whether the company did business within the State of Pennsylvania during the period for which the taxes were imposed; and it held that it did do business there because it landed and received passengers and freight at its wharf in Philadelphia, observing that its whole income was derived from the transportation of freight and passengers from its wharf at Gloucester to its wharf at Philadelphia, and from its wharf at Philadelphia to its wharf at Gloucester; that at each of these points its main business, namely, the receipt and landing of freight and passengers, was transacted; that for such business it was dependent as much upon the one place as upon the other; that, as it could hold the wharf at Gloucester, which it owned in fee, only by purchase by virtue of the statutory will of the Legislature of New Jersey, so it could hold by lease the one in Philadelphia only by the implied consent of the legislature of the Commonwealth; and that, therefore, it "was dependent equally, not only for its business, but its power to do that business, upon both States, and might, therefore, be taxed by both." 98 Penn. St. 105, 116.

As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, 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.

It matters not that the transportation is made in ferry-boats, which pass between the States every hour of the day. The means of transportation of persons and freight between the States does not change the character of the business as one of commerce, nor does the time within which the distance between the States may be traversed. Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character, and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by State legislation. Otherwise, there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products, and against those of other States. It was from apprehension of such conflicting and discriminating State legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the States was vested in Congress.

Nor does it make any difference whether such commerce is carried on by individuals or by 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 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 by corporations.

At the present day, nearly all enterprises of a commercial character, requiring for their successful management large expenditures of money, are conducted by corporations. The usual means of transportation on the public waters, where expedition is desired, are vessels propelled by steam; and the ownership of a line of such vessels generally requires an expenditure exceeding the resources of single individuals. Except in rare instances, it is only by associated capital furnished by persons united in corporations, that the requisite means are provided for such expenditures.

As to the second reason given for the decision below, that the company could not lease its wharf in Philadelphia except by the implied consent of the legislature of the Commonwealth, and thus is dependent upon the Commonwealth to do its business, and therefore can be taxed there, it may be answered that no foreign or interstate commerce can be carried on with the citizens of a State without the use of a wharf, or other place within its limits on which passengers and freight can be landed and received, and the existence of power in a State to impose a tax upon the capital of all corporations engaged in foreign or interstate commerce for the use of such places would be inconsistent with and entirely subversive of the power vested in Congress over such commerce. Nearly all the lines of steamships and of sailing vessels between the United States and England, France, Germany, and other countries of Europe, and between the United States and South America, are owned by corporations; and if by reason of landing or receiving passengers and freight at wharves, or other places in a State, they can be taxed by the State on their capital stock on the ground that they are thereby doing business within her limits, the taxes which may be imposed may embarrass, impede, and even destroy such commerce with the citizens of the State. If such a tax can be levied at all, its amount will rest in the discretion of the State. It is idle to say that the interests of the State would prevent oppressive taxation. Those engaged in foreign and interstate commerce are not bound to trust to its moderation in that respect; they require security. And they may rely on the power of Congress to prevent any interference by the State until the act of commerce, the transportation of passengers and freight, is completed. The only interference of the State with the landing and receiving of passengers and freight, which is permissible, is confined to such measures as will prevent confusion among the vessels, and collision between them, insure their safety and convenience, and facilitate the discharge or receipt of their passengers and freight, which fall under the general head of port regulations, of which we shall presently speak. . . .

It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to State taxation, provided always it be within the jurisdiction of the State. As said by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 429, "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 proposition may almost be pronounced self-evident." . . .

In the recent case of *Commonwealth of Pennsylvania* v. *Standard Oil Co.*, 101 Penn. St. 119, the liability of foreign corporations doing business within that State is elaborately considered by its Supreme Court. The corporation was doing business there, and it was contended on the part of the Commonwealth that the tax should be imposed upon all of the capital stock of the company; while on the other side it was urged that only so much of the stock was intended, by the statute, to be taxed as was represented by property of the company invested and used in the State. In giving its decision the court said that it had been repeatedly decided and was settled law that a tax upon the capital stock of a company is a tax upon its property and assets (citing to that effect a large number of decisions); that it was undoubtedly competent for the legislature to lay a franchise or license tax upon foreign corporations for the privilege of doing business within the State, but that the tax in that case was in no sense a license tax; that the State had never granted a license to the Standard Oil Company to do business there, but merely taxed its property, that is, its capital stock, to the extent that it brought such property within its borders in the transaction of its business; that the position of the Commonwealth, that a foreign corporation entering the State to do business brought its entire capital, was ingenious but unsound; that it was a fundamental principle that, in order to be taxed, the person must have a domicil in the State, and the thing must have a *situs* therein; that persons and property *in transitu* could not be taxed; that the domicil of a corporation was in the State of its origin and it could not emigrate to another sovereignty; that the domicil of the Standard Oil Company was in Ohio, and when it sent its agents into the State to transact business it no more entered the State in point of fact than any other foreign corporation, firm, or individual who sent an agent there to open an office or branch house, nor brought its capital there constructively; that it would be as reasonable to assume that a business firm in Ohio brought its entire capital there because it sent its agent to establish a branch of its business, as to hold that the Standard Oil Company, by employing certain persons in the State to transact a portion of its business, thereby brought all its property or capital stock within the jurisdiction of the State; that there was neither reason nor authority for such a proposition; that the company was taxable only to the extent that it brought its property within the State; and that its capital stock, as mentioned in the Act of the Legislature, must be construed to mean so much of the capital stock as was measured by the property actually brought within the State by the company in the transaction of its business. The justice who delivered the opinion of the court added, speaking for himself, that he conceded the power of the Commonwealth to exclude foreign corporations altogether from her

borders, or to impose a license tax so heavy as to amount to the same thing; but he denied, great and searching as her taxing power is, that she could tax either persons or property not within her jurisdiction. "A foreign corporation," he said, "has no domicil here, and can have none; hence it cannot be said to draw to itself the constructive possession of its property located elsewhere. There are a large number of foreign insurance companies doing business here under license from the State. Some of them have a very large capital. It is usually invested at the domicil of the company. If the position of the Commonwealth is correct, she can tax the entire property of the Royal Insurance Company, although the same is located almost wholly in England, or the assets of the New York Mutual, located in New York."

Under this decision there is no property held by the Gloucester Ferry Company, which can be the subject of taxation in Pennsylvania, except the lease of the wharf in that State. Whether that wharf is taxed to the owner or to the lessee it matters not, for no question here is involved in such taxation. It is admitted that it could be taxed by the State according to its appraised value. The ferry-boats of the company are registered at the port of Camden in New Jersey, and according to the decisions in *Hays* v. *The Pacific Mail Steamship Co.*, and in *Morgan* v. *Parham*, they can be taxed only at their home port. According to the decision in the Standard Oil Company case, and by the general law on the subject, the company has no domicil in Pennsylvania, and its capital stock representing its property is held outside of its limits. It is solely, therefore, for the business of the company in landing and receiving passengers at the wharf in Philadelphia that the tax is laid, and that business, as already said, is an essential part of the transportation between the States of New Jersey and Pennsylvania, which is itself interstate commerce. 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 an obstruction of, the power of Congress in the regulation of such commerce. This proposition is supported by many adjudications. . . . [Here the court comments upon *Gibbons* v. *Ogden*, *supra*, p. 1799, *Steamship Co.* v. *Port Wardens*, 6 Wall. 31, *The State Freight Tax*, 15 Wall. 232, and *Henderson* v. *Mayor of N. Y.*, *supra*, p. 1961.]

These cases would seem to be decisive of the character of the business which is the subject of taxation in the present case. Receiving and landing passengers and freight is incident to their transportation. Without both there could be no such thing as their transportation across the river Delaware. The transportation, as to passengers, is not completed until, as said in the Henderson case, they are disembarked at the pier

of the city to which they are carried; and, as to freight, until it is landed upon such pier. And all restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States.

The cases where a tax or toll upon vessels is allowed to meet the expenses incurred in improving the navigation of waters traversed by them, as by the removal of rocks, the construction of dams and locks to increase the depth of water and thus extend the line of navigation, or the construction of canals around falls, rest upon a different principle. The tax in such cases is considered merely as compensation for the additional facilities thus provided in the navigation of the waters. *Kellogg* v. *Union Co.*, 12 Conn. 7; *Thames Bank* v. *Lovell*, 18 Conn. 500; *McReynolds* v. *Smallhouse*, 8 Bush. 447.

Upon similar grounds, what are termed harbor dues or port charges, exacted by the State from vessels in its harbors, or from their owners, for other than sanitary purposes, are sustained. We say for other than sanitary purposes; for the power to prescribe regulations to protect the health of the community, and prevent the spread of disease, is incident to all local municipal authority, however much such regulations may interfere with the movements of commerce. But, independently of such measures, the State may prescribe regulations for the government of vessels whilst in its harbors; it may provide for their anchorage or mooring, so as to prevent confusion and collision; it may designate the wharves at which they shall discharge and receive their passengers and cargoes, and require their removal from the wharves when not thus engaged, so as to make room for other vessels. It may appoint officers to see that the regulations are carried out, and impose penalties for refusing to obey the directions of such officers; and it may impose a tax upon vessels sufficient to meet the expenses attendant upon the execution of the regulations. The authority for establishing regulations of this character is found in the right and duty of the supreme power of the State to provide for the safety, convenient use, and undisturbed enjoyment of property within its limits; and charges incurred in enforcing the regulations may properly be considered as compensation for the facilities thus furnished to the vessels. *Vanderbilt* v. *Adams*, 7 Cowen, 349, 351. Should such regulations interfere with the exercise of the commercial power of Congress, they may at any time be superseded by its action. It was not intended, however, by the grant to Congress to supersede or interfere with the power of the States to establish police regulations for the better protection and enjoyment of property. Sometimes, indeed, as remarked by Mr. Cooley, the line of distinction between what constitutes an interference with commerce and what is a legitimate police regulation is exceedingly dim and shadowy, and he adds: "It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions

if it shall be deemed advisable, and that to whatever extent ground shall be covered by those directions, the exercise of State power is excluded. Congress may establish police regulations as well as the States, confining their operations to the subjects over which it is given control by the Constitution; but as the general police power can better be exercised under the provisions of the local authority, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the National Congress, the regulations which are made by Congress do not often exclude the establishment of others by the State covering very many particulars." Cooley's Constitutional Limitations, 732.

The power of the States to regulate matters of internal police includes the establishment of ferries as well as the construction of roads and bridges. In *Gibbons* v. *Ogden,* Chief Justice Marshall said that laws respecting ferries, as well as inspection laws, quarantine laws, health laws, and laws regulating the internal commerce of the States, are component parts of an immense mass of legislation, embracing everything within the limits of a State not surrendered to the general government; but in this language he plainly refers to ferries entirely within the State, and not to ferries transporting passengers and freight between the States and a foreign country; for the power vested in Congress, he says, comprehends every species of commercial intercourse between the United States and foreign countries. No sort of trade, he adds, can be carried on between this country and another to which the power does not extend; and what is true of foreign commerce is also true of commerce between States over the waters separating them. Ferries between one of the States and a foreign country cannot be deemed, therefore, beyond the control of Congress under the commercial power. They are necessarily governed by its legislation on the importation and exportation of merchandise and the immigration of foreigners, that is, are subject to its regulation in that respect; and if they are not beyond the control of the commercial power of Congress, neither are ferries over waters separating States. Congress has passed various laws respecting such international and interstate ferries, the validity of which is not open to question. It has provided that vessels used exclusively as ferry-boats, carrying passengers, baggage, and merchandise, shall not be required to enter and clear, nor shall their masters be required to present manifests, or to pay entrance or clearance fees, or fees for receiving or certifying manifests; "but they shall, upon arrival in the United States, be required to report such baggage and merchandise to the proper officer of the customs, according to law," Rev. Stat. § 2792; that the lights for ferry-boats shall be regulated by such rules as the Board of Supervising Inspectors of Steam Vessels shall prescribe, Rev. Stat. § 4233, Rule 7; that any foreign railroad company or corporation, whose road enters the United States by means of a ferry or tug-boat, may own such boat, and that it shall be subject to no other or different restrictions or regulations in

such employment than if owned by a citizen of the United States, Rev. Stat. § 4370; that the hull and boilers of every ferry-boat propelled by steam shall be inspected, and provisions of law for the better security of life, which may be applicable to them, shall, by regulations of the supervising inspectors, be required to be complied with before a certificate of inspection be granted; and that they shall not be navigated without a licensed engineer and a licensed pilot, Rev. Stat. § 4426.

It is true that, from the earliest period in the history of the government, the States have authorized and regulated ferries, not only over waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects the States can more advantageously manage such interstate ferries than the general government; and that the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety, comfort, and convenience of the public. Still the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the States bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the States of taxes or other burdens upon the commerce between them. Freedom from such impositions does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of propety, either on water or land, are not an interference with the freedom of transportation between the States secured under the commercial power of Congress. *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Packet Co.* v. *St. Louis*, 100 U. S. 423; *Vicksburg* v. *Tobin*, 100 U. S. 430; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691. That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property. How conflicting legislation of the two States on the subject of ferries on waters dividing them is to be met and treated, is not a question before us for consideration. Pennsylvania has never attempted to exercise its power of establishing and regulating ferries across the Delaware River. Any one, so far as her laws are concerned, is free, as we are informed, to establish such ferries as he may choose. No license fee is exacted from ferry-keepers. She merely exercises the right to designate the places of landing, as she does the places of landing for all vessels engaged in commerce. The question, therefore, respecting the tax in the present case, is not complicated by any action of that State concerning ferries. However great her power, no legislation on her part can impose a tax on that portion of interstate commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on.

It follows that upon the case stated the tax imposed upon the ferry company was illegal and void.

The judgment of the Supreme Court of the State of Pennsylvania must, therefore, be reversed, and the cause remanded for further proceedings in conformity with this opinion.[1]

BROWN ET AL. *v.* HOUSTON ET AL.

SUPREME COURT OF THE UNITED STATES. 1885.

[114 *U. S.* 622.]

THIS was a suit in the nature of a bill in equity to restrain the defendants, who were defendants in error here, from collecting a tax, imposed upon personal property by the authorities of the State of Louisiana. The facts which make the case are stated in the opinion of the court.

Mr. Charles W. Hornor, for plaintiffs in error; no argument or brief, for defendants in error.

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

[1] In *Tugwell et al.* v. *Eagle Pass. Ferry Co.* 74 Texas, 480, 494 (1889), in sustaining the right of the State to grant a ferry franchise on the Rio Grande River between Texas and Mexico, the court (GAINES, J.), considers *Glouc. Ferry Co.* v. *Pa.* and also *Conway* v. *Taylor's Ex'r*, *supra*, p. 1906, and adds: "If the establishment of a ferry over a river separating two States is not an interference with interstate commerce, the establishment of one over a boundary between the State and a foreign country is not an interference with foreign commerce." — ED.

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. . . .

The defendant answered with a general denial, but admitting the assessment of the tax and the intention to sell the property for payment thereof.

The plaintiffs, to sustain the allegations of their petition, produced two witnesses. George F. Rootes testified that he was the general agent and manager of the business of Brown & Jones in New Orleans; that when the assessment complained of was made, the firm had paid the State taxes due upon their capital stock, and had paid State and city licenses to do business for that year; that, at the time of the assessment of the tax in question, the coal upon which it was levied was in the hands of Brown & Jones, as agents for the plaintiffs, for sale, having just arrived from Pittsburg, Pennsylvania, by flat-boats, and was on said boats in which it arrived and afloat in the Mississippi River; that it was held by Brown & Jones to be sold for account of the plaintiffs by the boat load, and that since then more than half of it had been exported from this country on foreign steamships and the balance sold into the interior of the State for plantation use by the flat-boat load. Samuel S. Brown, one of the plaintiffs, testified that the plaintiffs were the owners of the coal in question; that it was mined in plaintiffs' mine in Allegheny County, Pennsylvania; that a tax of two or more mills was paid on it in Pennsylvania as State tax thereon, in the year 1880, being the tax of 1880; that a tax was also paid on it to the County of Allegheny for the year 1880; that it was shipped from Pittsburg, Pennsylvania, in 1880, and was received in New Orleans in its original condition and in its original packages, and still owned by the plaintiffs. No other proof was offered in the case.

The Louisiana statute of April 9, 1880, Act No. 77, under which the assessment was made, provided as follows: —

"Section 1. That for the calendar year 1880, and for each and every succeeding calendar year, there are hereby levied annual taxes, amounting in the aggregate to six mills on the dollar of the assessed valuation hereafter to be made of all property situated within the State of Louis-

iana, except such as is expressly exempted from taxation by the (State) Constitution."

The exemptions from taxation under the Constitution of Louisiana do not affect the question.

Upon the case as thus made the District Court of the parish dissolved the injunction and dismissed the suit. On appeal to the Supreme Court of Louisiana, this judgment was affirmed, and the case is now here by writ of error to the judgment of the Supreme Court. . . .

The constitutional questions here presented were argued in the Supreme Court of Louisiana, and in what manner the subject was viewed by that court may be seen by the following extracts from its opinion, *Brown* v. *Houston*, 33 La. Ann. 843, filed as part of the judgment. The court said : —

" First. This Act [Act No. 77 of 1880] does not in its terms discriminate against the products of other States or the property of the citizens of other States, but subjects all property liable to taxation found within the State, whether of its own citizens or citizens of other States, whether imported from other States or produced here, to the same rate of taxation. . . .

" Second. The coal in question was taxed in common with all other property found within the State. We held in the case of *City of New Orleans* v. *Eclipse Towboat Co.*, recently decided by us, but not reported,[1] that the clause in the Federal Constitution giving to Congress the power to regulate commerce with foreign nations and among the States had no immediate relation to or necessary connection with the taxing power of a State. Every tax upon property, it is true, may affect more or less the operations of commerce, by diminishing the profits to be derived from the subjects of commerce, but it does not for that reason amount to a regulation of commerce within the meaning of the Federal Constitution, and such is the doctrine laid down by the Supreme Court of the United States. *State Tax on Railway Gross Receipts*, 15 Wall. 284, at page 293. . . .

" Third. This tax cannot be regarded as a duty or impost levied by the State on imports. To give such a construction to it, and to recognize the alleged prohibition contended for, would create an exemption for all goods and merchandise and property of every kind and description brought into the State for sale or use, and by such construction destroy a main source of revenue to the State. As we had occasion to show in the case referred to, the word ' imports ' used in the Constitution has been construed to apply not to property brought or imported from other States of the Union, but solely to imports from foreign countries. *Woodruff* v. *Parham*, 8 Wall. 123 ; *Pervear* v. *Commonwealth*, 5 Wall. 475, 479. . . ."

In approaching the consideration of the case we will first take up the

[1] Note by the Court. — The judgment in this case was reversed by this court in *Moran* v. *New Orleans*, 112 U. S. 69, 75.

last objection raised by the plaintiff in error, namely, that the tax was a duty on imports and exports. . . .

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 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. This has frequently been laid down as law in the judgments of this court. In *Welton* v. *State of Missouri*, 91 U. S. 282, Mr. Justice Field, speaking for the court, said: "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." . . . To the same purport, and on the same subject generally, see *Gibbons* v. *Ogden*, 9 Wheat. 1, 209; *License Cases*, 5 How. 504, 575, 592, 594, 600, 605; *Passenger Cases*, 7 How. 282, 407, 414, 419, 445, 462–464; *Crandall*

v. *Nevada*, 6 Wall. 35, 41–49; *Paul* v. *Virginia*, 8 Wall. 168, 182–184; *Ward* v. *Maryland*, 12 Wall. 418, 430–431; *State Tax on Railway Receipts*, 15 Wall. 284, 293; *The Lottawanna*, 21 Wall. 558, 581; *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Sherlock* v. *Alling*, 93 U. S. 99; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Guy* v. *Baltimore*, 100 U. S. 434; *Tiernan* v. *Rinker*, 102 U. S. 123; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 701; and see *Moran* v. *New Orleans*, 112 U. S. 69. . . . 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 grain-fields 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 State cannot pass a law which shall interfere with the unrestricted freedom of commerce between the States. . . .

The judgment of the Supreme Court of Louisiana is *Affirmed.*

WALLING *v.* MICHIGAN.

SUPREME COURT OF THE UNITED STATES. 1886.

[116 *U. S.* 446.]

IN 1875 the Legislature of the State of Michigan passed an Act relating to the sale of liquors in that State to be shipped into the State by persons not residing therein, known as Act No. 226 of the Session Laws of 1875, of which the following is a copy: —

"An Act to impose a tax on the business of selling spirituous and intoxicating, malt, brewed, and fermented liquors in the State of Michigan to be shipped from without this State." . . .

In addition to the foregoing Act there was another independent law in operation in Michigan in 1883, being an Act passed May 31, 1879, entitled "An Act to provide for the taxation of the business of manufacturing and selling spirituous and intoxicating, malt, brewed, or fermented liquors," and to repeal a previous Act for the same purpose, passed in 1875. Sess. Laws of 1879, 293. The Act of 1879 was amended by an Act passed May 19, 1881. Howell's Annotated Statutes, § 1281." . . .

It was not contended that this Act altered or affected the Act of 1875, on which the prosecution against Walling was based, except so far as it might have the effect of removing the discrimination against the citizens or products of other States, which would be produced by the Act of 1875 standing alone. The counsel for the State contended that the effect of the Act of 1881 was, not only to annul any such discrimination, but to create a discrimination against the citizens and products of Michigan in favor of the citizens and products of other States. Whether this was so is a question discussed in the opinion.

In June, 1883, Walling, the plaintiff in error, was prosecuted under the Act of 1875, No. 226, being charged in one count of the complaint with selling at wholesale without license, and in another count with soliciting and taking orders for the sale, without license, and at wholesale, of spirituous and intoxicating liquors, to be shipped from out of the State, to wit, from Chicago, in the State of Illinois, into the State of Michigan, and furnished and supplied to citizens and residents of said State by Cavanaugh & Co., a firm doing business in Chicago, not residents of Michigan, and not having its principal place of business therein. The prosecution was instituted in the Police Court of Grand Rapids, and Walling was convicted and sentenced to pay a fine, and to be imprisoned in default of payment. He appealed to the County Circuit Court, in which the case was tried by a jury, who, under the charge of the court, rendered a verdict of guilty. Exceptions being taken, the case was carried to the Supreme Court of Michigan, which adjudged that there was no error in the proceedings, and directed judgment to be

entered against the respondent. The decision of the Supreme Court was brought here by writ of error. . . .

Mr. O. W. Powers, for plaintiff in error; *Mr. J. J. Van Riper,* Attorney-General of the State of Michigan, for defendant in error.

Mr. Justice Bradley delivered the opinion of the court. After stating the facts in the language reported above, he continued: —

The single question, now before us for consideration, is, whether the statute of 1875 is repugnant to the Constitution of the United States. Taken by itself, and without having reference to the Act of 1881, it is very difficult to find a plausible reason for holding that it is not repugnant to the Constitution. It certainly does impose a tax or duty on persons who, not having their principal place of business within the State, engage in the business of selling, or of soliciting the sale of, certain described liquors, to be shipped into the State. If this is not a discriminating tax levelled against persons for selling goods brought into the State from other States or countries, it is difficult to conceive of a tax that would be discriminating. It is clearly within the decision of *Welton* v. *Missouri,* 91 U. S. 275, where we held a law of the State of Missouri to be void which laid a pedler's license tax upon persons going from place to place to sell patent and other medicines, goods, wares, or merchandise, not the growth, product, or manufacture of that State, and which did not lay a like tax upon the sale of similar articles, the growth, product, or manufacture of Missouri. The same principle is announced in *Hinson* v. *Lott,* 8 Wall. 148; *Ward* v. *Maryland,* 12 Wall. 418; *Guy* v. *Baltimore,* 100 U. S. 434, 438; *County of Mobile* v. *Kimball,* 102 U. S. 691, 697; *Webber* v. *Virginia,* 103 U. S. 344.

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 power conferred by the Constitution upon the Congress of the United States.

We have so often held that the power given to Congress to regulate commerce with foreign nations, among the several States, and with the Indian tribes, is exclusive in all matters which require, or only admit of, general and uniform rules, and especially as regards any impediment or restriction upon such commerce, that we deem it necessary merely to refer to our previous decisions on the subject, the most important of which are collected in *Brown* v. *Houston,* 114 U. S. 622, 631, and need not be cited here. We have also repeatedly held that so long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that such commerce shall be free and untrammelled; and that any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom. *Welton* v. *Missouri,* 91 U. S. 275, 282; *County of Mobile* v. *Kimball,* 102 U. S. 691, 697; *Brown* v. *Houston,* 114 U. S. 622, 631. In Mr. Justice Johnson's concurring opinion in the case of *Gibbons* v. *Ogden,* 9 Wheaton, 1, 222, his whole argument (which is a very

able one) is based on the idea that the power to regulate commerce with foreign nations and among the several States was by the Constitution surrendered by the States to the United States, and therefore must necessarily be exclusive, and that where Congress has failed to restrict such commerce, it must necessarily be free. He says: "Of all the endless variety of branches of foreign commerce, now carried on to every quarter of the world, I know of no one that is permitted by Act of Congress, any otherwise than by not being forbidden." "The grant to Livingston and Fulton interferes with the freedom of intercourse among the States." The same sentiment was expressed by Mr. Justice Grier in his opinion in the *Passenger Cases*, 7 How. 283, 462, where he says: "And to what weight is that argument entitled, which assumes, that because it is the policy of Congress to leave this intercourse free, therefore it has not been regulated, and each State may put as many restrictions upon it as she pleases?" And one of the four propositions with which the opinion concludes is as follows, to wit: "4th. That Congress has regulated commerce and intercourse with foreign nations and between the several States, by willing that it shall be free, and it is, therefore, not left to the discretion of each State in the Union either to refuse a right of passage to persons or property through her territory, or to exact a duty for permission to exercise it."

The argument of these eminent judges, that where Congress has exclusive power to regulate commerce, its non-action is equivalent to a declaration that commerce shall be free (and we quote their opinions for no other purpose), seems to be irrefragable. Of course the broad conclusions to which they arrive, that the power is exclusive in all cases, are subject to the modifications established by subsequent decisions, such as *Cooley* v. *The Board of Wardens*, 12 How. 299, and others.

The law is well summarized in the opinion of this court delivered by Mr. Justice Field in *County of Mobile* v. *Kimball*, 102 U. S. 691, 697. . . . [Here follows a quotation from that case.]

Many State decisions might also be cited in which the same doctrine is announced. . . . [Here the court quotes from *Higgins* v. *Three Hundred Cases*, 130 Mass. 1, 31; *State* v. *Furbush*, 72 Me. 493, 495; *State* v. *North*, 27 Mo. 464, 471, 476.] See also *Norris* v. *Boston*, 4 Met. (Mass.) 282, 293; s. c. in error, among the *Passenger Cases*, 7 How. 283; *Oliver* v. *Washington Mills*, 11 Allen, 268; *Pierce* v. *The State*, 13 N. H. 536, 582; *McGuire* v. *Parker*, 32 La. Ann. 832; *Wiley* v. *Parmer*, 14 Ala. 627; *Scott* v. *Watkins*, 22 Ark. 556, 564; *State* v. *McGinnis*, 37 Ark. 362; *State* v. *Browning*, 62 Missouri, 591; *Daniel* v. *Richmond*, 78 Ky. 542.

In view of these authorities, especially the decisions of this court on the subject, we have no hesitation in saying that the Act of 1875, under which the prosecution against Walling was instituted, if it stood alone, without any concurrent law of Michigan imposing a like tax to that

which it imposes upon those engaged in selling or soliciting the sale of liquors the produce of that State, would be repugnant to that clause of the Constitution of the United States which confers upon Congress the power to regulate commerce among the several States.

The question then arises whether the Act of 1879, as amended by that of 1881, has removed the objection to the validity of the Act of 1875. We have carefully examined that Act, and have come to the conclusion that it has not done so. We will briefly state our reasons for this conclusion.

The counsel for the State suppose that the Act of 1881 imposes a heavier tax on Michigan dealers in liquors of domestic origin than that imposed by the Act of 1875 on those who deal in liquors coming from outside of the State, and, hence, that if there is any discrimination it is against the domestic and in favor of the foreign dealer or manufactured article. We do not think that this position is correct. Let us compare the two Acts.

Of course the Act of 1875 does not assume to tax non-resident persons or firms for doing business in another State. They are subject to taxation in the States where they are located. It is the business of selling for such non-resident parties, or soliciting orders for them for sale in Michigan of liquors imported into the State, that is the object of taxation under the law; and any person engaged in those employments, or either of them, is subject to the tax of three hundred dollars per annum. Now, is such a tax, or any tax imposed upon those who are engaged in the like employment for persons or firms located in Michigan, selling or soliciting orders for the sale of liquors manufactured in that State? Clearly not. The tax imposed by the Act of 1881 is a tax on the manufacturer or dealer. He is taxed in the city, township, or village in which his distillery or principal place of business is situated. He is subject to a single tax of five hundred dollars per annum. No tax is imposed on his clerks, his agents, or his drummers, who sell or solicit orders for him. They are merely his servants, and are not included in the law. It is he, and not they, whose business is the manufacture or sale of liquors, and who is subject to taxation under the law. Whereas the drummers and agents of the foreign manufacturer or dealer, located in Illinois or elsewhere, are all and each of them subject to the tax of three hundred dollars per annum. In the one case it is a single tax on the principal; in the other it is a tax, not on the principal, for he cannot be taxed in Michigan, but on each and all of his servants and agents selling or soliciting orders for him. The tax imposed by the Act of 1875 is not imposed on the same class of persons as is the tax imposed by the Act of 1881. That this must give an immense advantage to the product manufactured in Michigan, and to the manufacturers and dealers of that State, is perfectly manifest.

It is suggested by the learned judge who delivered the opinion of the Supreme Court of Michigan in this case, that the tax imposed by the

Act of 1875 is an exercise by the Legislature of Michigan of the police power of the State for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people. This would be a perfect justification of the Act if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the National Legislature. The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States Government created thereby. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650.

Another suggestion in the opinion referred to is, that, although the tax imposed by the Act of 1875 may be a regulation of the introduction of spirituous liquors from another State into the State of Michigan, yet that regulation is not prohibition, and that there is nothing in the Act that amounts to prohibition. The language of the court is: "The statute does not prohibit the introduction and sale of liquors made outside of the State. It simply taxes the person who carries on the business here by making sales in this State. It in no way interferes with the introduction of the liquors here. It tolerates and regulates, but seeks not to prohibit. I think in this case no question can be successfully made under the clause of the Constitution until the point has been reached where regulation ceases and prohibition begins." We are unable to adopt the views of that learned tribunal as here expressed. It is the power to "regulate" commerce among the several States which the Constitution in terms confers upon Congress; and this power, as we have seen, is exclusive in cases like the present, where the subject of regulation is one that admits and requires uniformity, and where any regulation affects the freedom of traffic among the States.

Another argument used by the Supreme Court of Michigan in favor of the validity of the tax is, that it is merely a tax on an occupation which, it is averred, the State has an undoubted right to impose, and reference is made to *Brown* v. *Maryland*, 12 Wheat. 419, 444; *Nathan* v. *Louisiana*, 8 How. 73, 80; *Pierce* v. *New Hampshire*, 5 How. 593; *Hinson* v. *Lott*, 8 Wall. 148; *Machine Co.* v. *Gage*, 100 U. S. 676. None of these cases, however, sustain the doctrine that an occupation can be taxed if the tax is so specialized as to operate as a discriminative burden against the introduction and sale of the products of another State, or against the citizens of another State.

We think that the Act in question operates as a regulation of commerce among the States in a matter within the exclusive power of Congress, and that it is for this reason repugnant to the Constitution of the United States, and void *Judgment reversed.*

The CHIEF JUSTICE did not sit in this case, nor take any part in the decision.

COE *v.* ERROL.

SUPREME COURT OF THE UNITED STATES. 1886.

[116 *U. S.* 517.]

IN September, 1881, Edward S. Coe filed a petition in the Supreme Court of New Hampshire for the county of Coös, against the town of Errol, for an abatement of taxes, and therein, amongst other things, alleged that on the 1st of April, 1880, he and others, residents of Maine and Massachusetts, owned a large number of spruce logs that had been drawn down the winter before from Wentworth's location, in New Hampshire, and placed in Clear Stream and on the banks thereof, in the town of Errol, county of Coös, New Hampshire, to be from thence floated down the Androscoggin River to the State of Maine, to be manufactured and sold; and that the selectmen of said Errol for that year appraised said logs for taxation at the price of $6,000, and assessed thereon State, county, town, and school taxes, in the whole to the amount of $120, and highway taxes to the amount of $60. A further allegation made the same complaint with regard to a lot of spruce logs belonging to Coe and another person, which had been cut in the State of Maine, and were on their way of being floated to Lewiston, Maine, to be manufactured, but were detained in the town of Errol by low water. Similar allegations were made with regard to logs cut the following year, 1880, and drawn from Wentworth's location, and part of them deposited on lands of John Akers, and part on land of George C. Demeritt, in said town of Errol, to be from thence taken to the State of Maine; and, also, with regard to other logs cut in Maine and floated down to Errol on their passage to Lewiston, in the State of Maine, and both which classes of logs were taxed by the selectmen of Errol in the year 1881. The petition also contained the following allegations, to wit: —

"Said Coe further says that said logs of both years, so in the Androscoggin River, have each year been taxed as stock in trade in said Lewiston, to said Coe and Pingree, and said Coe claims and represents that none of said logs were subject to taxation in said Errol for the reason that they were in transit to market from one State to another, and also because they had all been in other ways taxed.

"That said Androscoggin River, from its source to the outlet of the Umbagog Lake in the State of New Hampshire, through said State and through the State of Maine to said Lewiston, is now, and for a long time has been, to wit, for more than twenty years last past, a public highway for the floatage of timber from said lakes and rivers in Maine, and from the upper waters of said Androscoggin River and its tributaries in New Hampshire down said river to said Lewiston, and has been thus used by the petitioner and his associates in the lumber business for more than twenty years last past."

Without further pleading, the parties made an agreed case, the important part of which was as follows, to wit: —

"It is agreed that the facts set forth in the petition are all true except what is stated as to the taxation of the logs as stock in trade in Lewiston, Maine; and if that is regarded by the court as material, the case is to be discharged and stand for trial on that point. It is agreed that upon this petition the legality of the taxation is intended to be brought before the court for adjudication, and all formal objections to the proceedings in the town meeting, &c., and all other matters of form, are waived, and we submit the matter to the court for a legal adjudication as to whether or not any or all of the taxes shall be abated.

"And it is agreed that for many years the petitioner and his associates in the lumber business have cut large quantities of timber on their lands in Maine and floated them down the said lakes and rivers in Maine and down the Androscoggin River to the mills at said Lewiston; and timber thus cut has always lain over one season, being about a year, in the Androscoggin River, in this State, either in Errol, Dummer, or Milan; and the timber referred to in this petition as having been cut in Maine had lain over in Errol since the spring or summer before the taxation, according to the above custom." . . . [The case here sets forth the judgment of the Supreme Court of New Hampshire that the tax on logs cut in Maine be abated, and the tax on logs cut in New Hampshire be sustained. The petitioner filed a bill of exceptions, and the case came up on error.]

Mr. Henry Heywood, for plaintiff in error; *Mr. S. R. Bond*, for defendant in error.

Mr. Justice Bradley delivered the opinion of the court. After stating the facts in the language above reported, he continued:

The case is now before us for consideration upon writ of error to the Supreme Court of New Hampshire, and the same points that were urged before that court are set up here as grounds of error.

The question for us to consider, therefore, is, whether the products of a State (in this case timber cut in its forests) are liable to be taxed like other property within the State, though intended for exportation to another State, and partially prepared for that purpose by being deposited at a place of shipment, such products being owned by persons residing in another State.

We have no difficulty in disposing of the last condition of the question, namely, the fact (if it be a fact) that the property was owned by persons residing in another State; for, if not exempt from taxation for other reasons, it cannot be exempt by reason of being owned by non-residents of the State. We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the government of the United States. If the owner of personal property within a State resides in

another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary. The fact, therefore, that the owners of the logs in question were taxed for their value in Maine as a part of their general stock in trade, if such fact were proved, could have no influence in the decision of the case, and may be laid out of view.

We recur, then, to a consideration of the question freed from this limitation: Are the products of a State, though intended for exportation to another State, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?

Do 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.

This question does not present the predicament of goods in course of transportation through a State, though detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another State, or delivered to a carrier for such transportation. 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 for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepôt* for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State.

Of course they cannot be taxed *as* exports; that is to say, they cannot be taxed by reason or because of their exportation or intended exportation; for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution, which prohibits any State, without the consent of Congress, from laying any imposts or

duties on imports or exports; and, although it has been decided, *Woodruff* v. *Parham*, 8 Wall. 123, that this clause relates to imports from, and exports to, foreign countries, yet when such imposts or duties are laid on imports or exports from one State to another, it cannot be doubted that such an imposition would be a regulation of commerce among the States, and, therefore, void as an invasion of the exclusive power of Congress. See *Walling* v. *Michigan*, *ante* [116 U. S.], 446, decided at the present term, and cases cited in the opinion in that case. But if such goods are not taxed as exports, nor by reason of their exportation, or intended exportation, but are taxed as part of the general mass of property in the State, at the regular period of assessment for such property and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed? Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State? If assessed in an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding.

The point of time when State jurisdiction over the commodities of commerce begins and ends is not an easy matter to designate or define, and yet it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question. In regard to imports from foreign countries, it was settled in the case of *Brown* v. *Maryland*, 12 Wheat. 419, that the State cannot impose any tax or duty on such goods so long as they remain the property of the importer, and continue in the original form or packages in which they were imported; the right to sell without any restriction imposed by the State being a necessary incident of the right to import without such restriction. This rule was deemed to be the necessary result of the prohibitory clause of the Constitution, which declares that no State shall lay any imposts or duties on imports or exports. The law of Maryland, which was held to be repugnant to this clause, required the payment of a license tax by all importers before they were permitted to sell their goods. This law was also considered to be an infringement of the clause which gives to Congress the power to regulate commerce. This court, as before stated, has since held that goods transported from one State to another are not imports or exports within the meaning of the prohibitory clauses before referred to; and it has also held that such goods, having arrived at their place of destination, may be taxed in the State to which they are carried, if taxed in the same manner as other goods are taxed, and not by reason of their being brought into the State from another State, nor subjected in any way to unfavorable discrimination. *Woodruff* v. *Parham*, 8 Wall. 123; *Brown* v. *Houston*, 114 U. S. 622.

But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. It is true, it was said in the case of *The Daniel Ball*, 10 Wall. 557, 565: "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." But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing.

The application of these principles to the present case is obvious. The logs which were taxed, and the tax on which was not abated by the Supreme Court of New Hampshire, had not, when so taxed, been shipped or started on their final voyage or journey to the State of Maine. They had only been drawn down from Wentworth's location to Errol, the place from which they were to be transported to Lewiston in the State of Maine. There they were to remain until it should be convenient to

send them to their destination. They come precisely within the character of property which, according to the principles herein laid down, is taxable. But granting all this, it may still be pertinently asked, How can property thus situated, to wit, deposited or stored at the place of *entrepôt* for future exportation, be taxed in the regular way as part of the property of the State? The answer is plain. It can be taxed as all other property is taxed, in the place where it is found, if taxed, or assessed for taxation, in the usual manner in which such property is taxed; and not singled out to be assessed by itself in an unusual and exceptional manner because of its destination. If thus taxed, in the usual way that other similar property is taxed, and at the same rate, and subject to like conditions and regulations, the tax is valid. In other words, the right to tax the property being founded on the hypothesis that it is still a part of the general mass of property in the State, it must be treated in all respects as other property of the same kind is treated.

These conditions we understand to have been complied with in the present case. At all events there is no evidence to show that the taxes were not imposed in the regular and ordinary way. As the presumption, so far as mode and manner are concerned, is always in favor of, and not against, official acts, the want of evidence to the contrary must be regarded as evidence in favor of the regularity of the assessment in this case.

The judgment of the Supreme Court of New Hampshire is

Affirmed.

In *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34 (1886), on error to the Circuit Court of the United States for the Middle District of Tennessee, the court (Blatchford, J.), said: "By the decisions of the Supreme Court of Tennessee, cited in the opinion of the Circuit Court on the demurrer, it is held, that the legislature may declare the right to carry on any business or occupation to be a privilege, to be purchased from the State on such conditions as the statute law may prescribe, and that it is illegal to carry on such business without complying with those conditions. In this case, the payment of the tax imposed was a condition prescribed, without complying with which what was done by the plaintiff was made illegal. The tax was imposed as a condition precedent to the right of the plaintiff to run and use the thirty-six sleeping cars owned by it, as it ran and used them on railroads in Tennessee. The privilege tax is held by the Supreme Court of Tennessee to be a license tax, for the privilege of doing the thing for which the tax is imposed, it being unlawful to do the thing without paying the tax. What was done by the plaintiff in this case, in connection with the use of the thirty-six cars, if wholly a branch of interstate commerce, was made by the State of Tennessee unlawful unless the tax should be paid, and, to the extent of the tax, a burden was placed on such commerce; and, upon principle, the tax, if lawful,

might equally well have been large enough to practically stop altogether the particular species of commerce. . . .

"The tax was a unit, for the privilege of the transit of the passenger and all its accessories. No distinction was made in the tax between the right of transit, as a branch of commerce between the States, and the sleeping and other conveniences which appertained to a transit in the car. The tax was really one on the right of transit, though laid wholly on the owner of the car. So, too, the service rendered to the passenger was a unit. 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. As such vehicle of transit, the car, so far as it was engaged in interstate commerce, was not taxable by the State of Tennessee; because the plaintiff had no domicil in Tennessee, and was not subject to its jurisdiction for purposes of taxation; and the cars had no *situs* within the State for purposes of taxation; and the plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege. . . .

"It is urged that the decision of the Circuit Court in this case was inconsistent with the rulings in *Osborne* v. *Mobile*, 16 Wall. 479, and in *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365. It becomes necessary, therefore, to examine those cases.

"In *Osborne* v. *Mobile* . . . The tax on the Georgia Express Company was upheld as a tax 'upon a business carried on within the city of Mobile.' Osborne was a local agent, personally subject to the taxing jurisdiction of the State, as representing his principal, and the tax was on the general business he carried on, and the subject of the tax was not, as here, the act of interstate transportation. In *Osborne* v. *Mobile*, the court drew the distinction between the case before it and the *State Freight Tax Case*. The present case falls within the latter.

"In *Wiggins Ferry Co.* v. *East St. Louis*, the decision was that the State had power to impose a license fee, upon a ferry-keeper living in the State, for boats which he owned and used in conveying from the State passengers and goods across a navigable river to another State; and that the levying of a tax on such boats, or the exaction of a license fee in respect of them, by the State in which they had their *situs*, was not a regulation of commerce within the meaning of the Constitution. In the case at bar the plaintiff was not a Tennessee corporation, and had no domicil in Tennessee, and the sleeping cars in question, as before said, had not any *situs* in Tennessee for the purposes of taxation." . . . *Judgment affirmed.*

MORGAN'S STEAMSHIP COMPANY *v.* LOUISIANA BOARD OF HEALTH ET AL.

SUPREME COURT OF THE UNITED STATES. 1886.

[118 *U. S.* 455.]

THIS was 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 statute which authorizes the collection of these fees, approved July 1, 1882, is as follows: —

"SECT. 1. *Be it enacted by the General Assembly of the State of Louisiana,* That the resident physician of the Quarantine Station on the Mississippi River shall require for every inspection and granting certificate the following fees and charges: For every ship, thirty dollars ($30); for every bark, twenty dollars ($20); for every brig, ten dollars ($10); for every schooner, seven dollars and a half ($7.50); for every steamboat (towboats excepted), five dollars ($5); for every steamship, thirty dollars ($30).

"SECT. 2. *Be it further enacted, etc.,* That the Board of Health shall have an especial lien and privilege on the vessels so inspected for the amount of said fees and charges, and may collect the same, if unpaid, by suit before any court of competent jurisdiction, and in aid thereof shall be entitled to the writ of provisional seizure on said vessels." . . .

Mr. H. J. Leovy and *Mr. Joseph E. McDonald,* for plaintiff in error; *Mr. F. C. Zacharie* and *Mr. William M. Evarts,* for defendants in error.

MR. JUSTICE MILLER, after stating the case as above reported, delivered the opinion of the court.

The services for which these fees are to be collected are parts of a system of quarantine provided by the laws of Louisiana, for the protection of the State, and especially of New Orleans, an important commercial city, from infectious and contagious diseases which might be brought there by vessels coming through the Gulf of Mexico from all parts of the world, and up the Mississippi River to New Orleans.

This system of quarantine differs in no essential respect from similar systems in operation in all important seaports all over the world, where commerce and civilization prevail. The distance from the mouth of the

Mississippi River to New Orleans is about a hundred miles. A statute of Louisiana of 1855, organizing this system, created a Board of Health, to whom its administration was mainly confided, and it authorized this Board to select and establish a quarantine station on the Mississippi, not less than seventy-five miles below New Orleans. Money was appropriated to buy land, build hospitals, and furnish other necessary appliances for such an establishment. This and other statutes subsequently passed contained regulations for the examination of vessels ascending the river, and of their passengers, for the purpose of ascertaining the places whence these vessels came, their sanitary condition, and the healthy or diseased condition of their passengers. If any of these were such that the safety of the city of New Orleans or its inhabitants required it as a protection against disease, they could be ordered into quarantine by the proper health officer until the danger was removed, and, if necessary, the vessel might be ordered to undergo fumigation. If, on this examination, there was no danger to be apprehended from vessel or passengers, a certificate of that fact was given by the examining officer, and she was thereby authorized to proceed and land at her destination. If ordered to quarantine, after such detention and cleansing process as the quarantine authorities required, she was given a similar certificate and proceeded on her way. If the condition of any of the passengers was such that they could not be permitted to enter the city, they might be ordered into quarantine while the vessel proceeded without them. Whether these precautions were judicious or not this court cannot inquire. They are a part of and inherent in every system of quarantine.

If there is a city in the United States which has need of quarantine laws, it is New Orleans. Although situated over a hundred miles from the Gulf of Mexico, it is the largest city which partakes of its commerce, and more vessels of every character come to and depart from it than any city connected with that commerce. Partaking, as it does, of the liability to diseases of warm climates, and in the same danger as all other seaports of cholera and other contagious and infectious disorders, these are sources of anxiety to its inhabitants, and to all the interior population of the country who may be affected by their spread among them. Whatever may be the truth with regard to the contagious character of yellow fever and cholera, there can be no doubt of the general belief, and very little of the fact, that all the invasions of these epidemics in the great valley of the Mississippi River and its tributaries in times past have been supposed to have spread from New Orleans, and to have been carried by steamboats and other vessels engaged in commerce with that city. And the origin of these diseases is almost invariably attributed to vessels ascending the Mississippi River from the West Indies and South America, where yellow fever is epidemic almost every year, and from European countries whence our invasions of cholera uniformly come.

If there is any merit or success in guarding against these diseases by

modes of exclusion, of which the professional opinion of medical men in America is becoming more convinced of late years, the situation of the city of New Orleans for rendering this exclusion effective is one which invites in the strongest manner the effort. Though a seaport in fact, it is situated a hundred miles from the sea, and is only to be reached by vessels from foreign countries by this approach. A quarantine station, located as this one is under the Louisiana laws, with vigilant officers, can make sure of inspecting every vessel which comes to New Orleans from the great ocean in any direction. Safe and ample arrangements can be made for care and treatment of diseased passengers and for the comfort of their companions, as well as the cleansing and disinfecting of the vessels. The system of quarantine has here, therefore, as fair a trial of its efficacy as it could have anywhere, and the need of it is as great. None of these facts are denied. In all that is important to the present inquiry they cannot be denied. Nor is it denied that the enactment of quarantine laws is within the province of the States of this Union. Of all the elements of this quarantine system of the State of Louisiana, the only feature which is assailed as unconstitutional is that which requires that the vessels which are examined at the quarantine station, with respect to their sanitary condition and that of their passengers, shall pay the compensation which the law fixes for this service.

This compensation is called a tonnage tax, forbidden by the Constitution of the United States ; a regulation of commerce exclusively within the power of Congress ; and also a regulation which gives a preference to the port of New Orleans over ports of other States. These are grave allegations with regard to the exercise of a power which, in all countries and in all the ports of the United States, has been considered to be a part of, and incident to, the power to establish quarantine. We must examine into this proposition and see if anything in the Constitution sustains it. . . . In the present case we are of opinion that the fee complained of is not a tonnage tax, that, in fact, it is not a tax within the true meaning of that word as used in the Constitution, but is a compensation for a service rendered, as part of the quarantine system of all countries, to the vessel which receives the certificate that declares it free from further quarantine requirements.

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 commerce 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. 299; *Gilman* v. *Philadelphia*, 3 Wall. 713, 727; *Pound* v. *Turck*, 95 U. S. 459, 462; *Hall* v. *DeCuir*, 95 U. S. 485, 488; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559, 562; *Trans-*

portation 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. In one of the latest of the cases cited above, the town of Catlettsburg, on the Ohio River, had enacted that no vessel should, without permission of the wharfmaster, land at any other point on the bank of the river within the town than a space designated by the ordinance. This court said, "that, if this be a regulation of commerce under the power conferred on Congress by the Constitution, that body has signally failed to provide any such regulation. It belongs, also, manifestly to that class of rules which, like pilotage and some others, can be most wisely exercised by local authorities, and in regard to which no general rules applicable alike to all ports and landing places can be properly made. If a regulation of commerce at all, it comes within that class in which the States may prescribe rules until Congress assumes to do so."

For the period of nearly a century since the government was organized Congress has passed no quarantine law, nor any other law to protect the inhabitants of the United States against the invasion of contagious and infectious diseases from abroad; and yet during the early part of the present century, for many years the cities of the Atlantic coast, from Boston and New York to Charleston, were devastated by the yellow fever. In later times the cholera has made similar invasions; and the yellow fever has been unchecked in its fearful course in the Southern cities, New Orleans especially, for several generations. During all this time the Congress of the United States never attempted to exercise this or any other power to protect the people from the ravages of these dreadful diseases. No doubt they believed that the power to do this belonged to the States. Or, if it ever occurred to any of its members that Congress might do something in that way, they probably believed that what ought to be done could be better and more wisely done by the authorities of the States who were familiar with the matter.

But to be told now that the requirement of a vessel charged with contagion, or just from an infected city, to submit to examination and pay the cost of it is forbidden by the Constitution because only Congress can do that, is a strong reproach upon the wisdom of a hundred years past, or an overstrained construction of the Constitution.

It is said that the charge to the vessel for the officer's service in examining her is not a necessary part of quarantine system. It has always been held to be a part in all other countries, and in all quarantine stations in the United States. No reason is perceived for selecting this item from the general system and calling it a regulation of commerce, while the remainder is not. If the arrest of the vessel, the detention of its passengers, the cleansing process it is ordered to go through with,

are less important as regulations of commerce than the exaction of the examination fee, it is not easily to be seen.

We think the proposition untenable. . . . We see no error in the judgment of the Supreme Court of Louisiana, and it is *Affirmed.*

Mr. Justice Bradley dissented.

WABASH, etc. RAILWAY COMPANY *v.* ILLINOIS.

Supreme Court of the United States. 1886.

[118 *U. S.* 557.]

The case is stated in the opinion of the court. *Mr. H. S. Greene* and *Mr. W. C. Goudy*, for plaintiff in error; *Mr. George Hunt*, Attorney-General of Illinois, for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of Illinois. It was argued here at the last term of this court.

The case was tried in the court of original jurisdiction on an agreed statement of facts. This agreement is short, and is here inserted in full: "For the purposes of the trial of said cause, and to save the making of proof therein, it is hereby agreed on the part of the defendant that the allegations in the first count of the declaration are true, except that part of said count which avers that the same proportionate discrimination was made in the transportation of said property — oil-cake and corn — in the State of Illinois that was made between Peoria and the city of New York and Gilman and New York city, which averment is not admitted, because defendant claims that it is an inference from the fact that the rates charged in each case of said transportation of oil-cake and corn were through rates, but it is admitted that said averment is a proper one."

The first count in the declaration, which is referred to in this memorandum of agreement, charged that the Wabash, St. Louis & Pacific Railway Company had, in violation of a statute of the State of Illinois, been guilty of an unjust discrimination in its rates or charges of toll and compensation for the transportation of freight. The specific allegation is that the railroad company charged Elder & McKinney, for transporting twenty-six thousand pounds of goods and chattels from Peoria, in the State of Illinois, to New York city, the sum of thirty-nine dollars, being at the rate of fifteen cents per hundred pounds for said car-load; and that on the same day they agreed to carry and transport for Isaac Bailey and F. O. Swannell another car-load of goods and chattels from Gilman, in the State of Illinois, to said city of New York, for which they charged the sum of sixty-five dollars, being at the rate of twenty-five cents per hundred pounds. And it is alleged that the car-

load transported for Elder & McKinney was carried eighty-six miles farther in the State of Illinois than the other car-load of the same weight. This freight being of the same class in both instances, and carried over the same road, except as to the difference in the distance, it is obvious that a discrimination against Bailey & Swannell was made in the charges against them as compared with those against Elder & McKinney; and this is true whether we regard the charge for the whole distance from the terminal points in Illinois to New York city or the proportionate charge for the haul within the State of Illinois.

The language of the statute which is supposed to be violated by this transaction is to be found in ch. 114 Rev. Stat. Illinois, § 126. It is there enacted that if any railroad corporation shall charge, collect, or receive for the transportation of any passenger or freight of any description upon its railroad, for any distance within the State, the same or a greater amount of toll or compensation than is at the same time charged, collected, or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same road, all such discriminating rates, charges, collections, or receipts, whether made directly or by means of rebate, drawback, or other shift or evasion, shall be deemed and taken against any such railroad corporation as *prima facie* evidence of unjust discrimination prohibited by the provisions of this Act. The statute further provides a penalty of not over $5000 for that offence, and also that the party aggrieved shall have a right to recover three times the amount of damages sustained, with costs and attorneys' fees.

To this declaration the railroad company demurred. The demurrer was sustained by the lower court in Illinois, and judgment rendered for the defendant. This, however, was reversed by the Supreme Court of that State, and on the case being remanded the demurrer was overruled, and the defendant pleaded, among other things, that the rates of toll charged in the declaration were charged and collected for services rendered under an agreement and undertaking to transport freight from Gilman, in the State of Illinois, to New York city, in the State of New York, and that in such undertaking and agreement the portion of the services rendered or to be rendered within the State of Illinois was not apportioned separate from such entire service; that the action is founded solely upon the supposed authority of an Act of the Legislature of the State of Illinois, approved April 7, 1871; and that said Act does not control or affect or relate to undertakings to transport freight from the State of Illinois to the State of New York, which falls within the operation and is wholly controlled by the terms of the third clause of section 8 of Article I. of the Constitution of the United States, which the defendant sets up and relies upon as a complete defence and protection in said action. This question of whether the statute of Illinois, as applied to the case in hand, is in violation of the Constitution of the United States, as set forth in the plea, was also raised on the trial by a request of the defendant, the railroad company,

that the court should hold certain propositions of law on the same subject, which propositions are as follows: . . .

All of these propositions were denied by the court, and judgment rendered against the defendant, which judgment was affirmed by the Supreme Court on appeal.

The matter thus presented, as to the controlling influence of the Constitution of the United States over this legislation of the State of Illinois, raises the question which confers jurisdiction on this court. Although the precise point presented by this case may not have been heretofore decided by this court, the general subject of the power of the State legislatures to regulate taxes, fares, and tolls for passengers and transportation of freight over railroads within their limits has been very much considered recently: — *State Freight Tax Case*, 15 Wall. 232; *Munn* v. *Illinois*, 94 U. S. 113; *Chicago, Burlington, & Quincy Railroad* v. *Iowa*, 94 U. S. 155; *Peik* v. *Northwestern Railway*, 94 U. S. 164; *Stone* v. *Farmers' Loan and Trust Co.*, 116 U. S. 307; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 204; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34: — and the question how far such regulations, made by the States and under State authority, are valid or void, as they may affect the transportation of goods through more than one State, in one voyage, is not entirely new here. The Supreme Court of Illinois, in the case now before us, conceding that each of these contracts was in itself a unit, and that the pay received by the Illinois Railroad Company was the compensation for the entire transportation from the point of departure in the State of Illinois to the city of New York, holds, that while the statute of Illinois is inoperative upon that part of the contract which has reference to the transportation outside of the State, it is binding and effectual as to so much of the transportation as was within the limits of the State of Illinois, *The People* v. *The Wabash, St. Louis, & Pacific Railway*, 104 Ill. 476; and, undertaking for itself to apportion the rates charged over the whole route, decides that the contract and the receipt of the money for so much of it as was performed within the State of Illinois violate the statute of the State on that subject.

If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois Legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the con-

stitutional provision concerning commerce among the States. It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the State which is not subject to the constitutional provision, and the distinction between commerce among the States and the other class of commerce between the citizens of a single State, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other. *The Daniel Ball*, 10 Wall. 557; *Hall* v. *De Cuir*, 95 U. S. 485; *Telegraph Co.* v. *Texas*, 105 U. S. 460.

It might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the State. The Supreme Court of Illinois having in this case given an interpretation which makes it apply to what we understand to be commerce among the States, although the contract was made within the State of Illinois, and a part of its performance was within the same State, we are bound, in this court, to accept that construction. It becomes, therefore, necessary to inquire whether the charge exacted from the shippers in this case was a charge for interstate transportation, or was susceptible of a division which would allow so much of it to attach to commerce strictly within the State, and so much more to commerce in other States. The transportation which is the subject-matter of the contract being the point on which the decision of the case must rest, was it a transportation limited to the State of Illinois, or was it a transportation covering all the lines between Gilman in the one case and Peoria in the other in the State of Illinois, and the city of New York in the State of New York?

The Supreme Court of Illinois does not place its judgment in the present case on the ground that the transportation and the charge are exclusively State commerce, but, conceding that it may be a case of commerce among the States, or interstate commerce, which Congress would have the right to regulate if it had attempted to do so, argues that this statute of Illinois belongs to that class of commercial regulations which may be established by the laws of a State until Congress shall have exercised its power on that subject; and to this proposition a large part of the argument of the Attorney-General of the State before us is devoted, although he earnestly insists that the statute of Illinois which is the foundation of this action is not a regulation of commerce within the meaning of the Constitution of the United States. In support of its view of the subject the Supreme Court of Illinois cites the cases of *Munn* v. *Illinois*, *Chicago, Burlington, & Quincy Railroad* v. *Iowa*, and *Peik* v. *Northwestern Railway*, above referred to. It cannot be denied that the general language of the court in these cases, upon the power of Congress to regulate commerce, may be susceptible of the meaning which the Illinois court places upon it. . . .

[Here follow two paragraphs given *supra*, p. 752, beginning "We come now to consider."]

In the case of *The Chicago, Burlington, & Quincy Railroad* v. *Iowa*, 94 U. S. 155, 163, which directly related to railroad transportation, the language is as follows: —

"The objection, that the statute complained of is void, because it amounts to a regulation of commerce among the States, has been sufficiently considered in the case of *Munn* v. *Illinois*. This road, like the warehouse in that case, is situated within the limits of a single State. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in State as well as in interstate commerce, and, until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in doing so those without may be indirectly affected."

But the strongest language used by this court in these cases is to be found in *Peik* v. *Chicago & Northwestern Railway*, 94 U. S. 164, 177–178, as follows: —

"As to the effect of the statute as a regulation of interstate commerce. The law is confined to State commerce, or such interstate commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without."

These extracts show that the question of the right of the State to regulate the rates of fares and tolls on railroads, and how far that right was affected by the commerce clause of the Constitution of the United States, was presented to the court in those cases. And it must be admitted that, in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the States in the absence of any legislation by Congress on the same subject.

By the slightest attention to the matter it will be readily seen that the circumstances under which a bridge may be authorized across a navigable stream within the limits of a State, for the use of a public highway, and the local rules which shall govern the conduct of the pilots of each of the varying harbors of the coasts of the United States, depend upon principles far more limited in their application and importance than those which should regulate the transportation of persons and property across the half or the whole of the continent, over the territories of half a dozen States, through which they are carried without change of car or breaking bulk.

Of the members of the court who concurred in those opinions, there being two dissentients, but three remain, and the writer of this opinion

is one of the three. He is prepared to take his share of the responsibility for the language used in those opinions, including the extracts above presented. He does not feel called upon to say whether those extracts justify the decision of the Illinois court in the present case. It will be seen, from the opinions themselves, and from the arguments of counsel presented in the reports, that the question did not receive any very elaborate consideration, either in the opinions of the court or in the arguments of counsel. And the question how far a charge made for a continuous transportation over several States, which included a State whose laws were in question, may be divided into separate charges for each State, in enforcing the power of the State to regulate the fares of its railroads, was evidently not fully considered. These three cases, with others concerning the same subject, were argued at the same time by able counsel, and in relation to the different laws affecting the subject, of the States of Illinois, Iowa, Wisconsin, and Minnesota; the main question in all the cases being the right of the State to establish any limitation upon the power of the railroad companies to fix the price at which they would carry passengers and freight. It was strenuously denied, and very confidently, by all the railroad companies, that any legislative body whatever had a right to limit the tolls and charges to be made by the carrying companies for transportation. And the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the State within which a railroad company did business to regulate or limit the amount of any of these traffic charges.

The importance of that question overshadowed all others; and the case of *Munn* v. *Illinois* was selected by the court as the most appropriate one in which to give its opinion on that subject, because that case presented the question of a private citizen, or unincorporated partnership, engaged in the warehousing business in Chicago, free from any claim of right or contract under an Act of incorporation of any State whatever, and free from the question of continuous transportation through several States. And in that case the court was presented with the question, which it decided, whether any one engaged in a public business, in which all the public had a right to require his service, could be regulated by Acts of the legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services.

The railroad companies set up another defence, apart from denying the general right of the legislature to regulate transportation charges, namely, that in their charters from the States they each had a contract, express or implied, that they might regulate and establish their own fares and rates of transportation. These two questions were of primary importance; and though it is true that, as incidental or auxiliary to these, the question of the exclusive right of Congress to make such regulations of charges as any legislative power had the right to make, to the exclusion of the States, was presented, it received but little

attention at the hands of the court, and was passed over with the remarks in the opinions of the court which have been cited.

The case of the *State Freight Tax*, 15 Wall. 232, which was decided only four years before these cases, held an Act of the Legislature of Pennsylvania void, as being in conflict with the commerce clause of the Constitution of the United States, which levied a tax upon all freight carried through the State by any railroad company, or into it from any other State, or out of it into any other State, and valid as to all freight the carriage of which was begun and ended within the limits of the State, because the former was a regulation of interstate commerce, and the latter was a commerce solely within the State which it had a right to regulate. And the question now under consideration, whether these statutes were of a class which the legislatures of the States could enact in the absence of any Act of Congress on the subject, was considered and decided in the negative.

It is impossible to see any distinction in its effect upon commerce of either class, between a statute which regulates the charges for transportation, and a statute which levies a tax for the benefit of the State upon the same transportation; and, in fact, the judgment of the court in the *State Freight Tax Case* rested upon the ground that the tax was always added to the cost of transportation, and thus was a tax in effect upon the privilege of carrying the goods through the State. It is also very difficult to believe that the court consciously intended to overrule the first of these cases without any reference to it in the opinion.

At the very next term of the court after the delivery of these opinions, the case of *Hall* v. *De Cuir*, 95 U. S. 485, was decided, in which the same point was considered, in reference to a statute of the State of Louisiana which attempted to regulate the carriage of passengers upon railroads, steamboats, and other public conveyances, and which provided that no regulations of any companies engaged in that business should make any discrimination on account of race or color. This statute by its terms was limited to persons engaged in that class of business within the State, as is the one now under consideration, and the case presented under the statute was that of a person of color who took passage from New Orleans for Hermitage, both places being within the limits of the State of Louisiana, and was refused accommodations in the general cabin on account of her color. In regard to this the court declared that, "for the purposes of this case, we must treat the Act of Louisiana of February 23, 1869, as requiring those engaged in interstate commerce to give all persons travelling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. . . . We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the States."

And, speaking in reference to the right of the States in certain classes of interstate commerce to pass laws regulating them, the opin-

ion says: . . . [Here follows a passage given *supra*, p. 1983, beginning with the words: "The line which separates," and ending on p. 1984, at the words: "No carrier of passengers."]

The applicability of this language to the case now under consideration, of a continuous transportation of goods from New York to Central Illinois, or from the latter to New York, is obvious, and it is not easy to see how any distinction can be made. Whatever may be the instrumentalities by which this transportation from the one point to the other is effected, it is but one voyage, as much so as that of the steamboat on the Mississippi River. It is not the railroads themselves that are regulated by this Act of the Illinois Legislature so much as the charge for transportation, and, in language just cited, if each one of the States through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word "regulation" can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. "It was," in the language of the court cited above, "to meet just such a case that the commerce clause of the Constitution was adopted."

It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the State might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the States and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. *Cook* v. *Pennsylvania*, 97 U. S. 566, 574; *Brown* v. *Maryland*, 12 Wheat. 419, 446. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce.

The argument on this subject can never be better stated than it is by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 195–196. He there demonstrates that commerce among the States, like commerce with foreign nations, is necessarily a commerce which crosses State lines, and extends into the States, and the power of Congress to regulate it exists wherever that commerce is found. Speaking of navigation as an element of commerce, which it is, only, as a means of transportation, now largely superseded by railroads, he says: "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 [the Hudson River] to which the prohibition now under consideration applies," p. 197. So the same power may pass the line of the State of Illinois and act upon its restriction upon the right of transportation extending over several States, including that one. . . . [Here follow quotations or statements of the cases of *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Welton* v. *Mo.*, *supra*, p. 1957; *Mobile* v. *Kimball*, *supra*, p. 1997; *Gloucester Ferry Co.* v. *Pa.*, *supra*, p. 2013, and *The R. R. Com. Cases*, *supra*, p. 1733.]

We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law.

Let us see precisely what is the degree of interference with transportation of property or persons from one State to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the State of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier, "I am free to make a fair and reasonable contract for this carriage to the line of the State of Illinois, but when the car which carries these goods is to cross the line of that State, pursuing at the same time this continuous track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that State, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other places of delivery." So that while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of fifteen cents per hundred pounds, he is not permitted to do so because the Illinois railroad company has already charged at the rate of twenty-five cents per hundred pounds for carriage to Gilman, in Illinois, which is eighty-six miles shorter than the distance to Peoria.

So, also, in the present case, the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of fifteen cents per hundred pounds for a car-load, but is compelled to pay at the rate of twenty-five cents per hundred pounds, because the railroad company has received from a person residing at Gilman twenty-five cents per hundred pounds for the transportation of a car-load of the same class of freight over the same line of road from Gilman to

New York. This is the result of the statute of Illinois, in its endeavor to prevent unjust discrimination, as construed by the Supreme Court of that State. The effect of it is, that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon, a distance of twenty-three miles, in which the loading and the unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York.

The obvious injustice of such a rule as this, which railroad companies are by heavy penalties compelled to conform to, in regard to commerce among the States, when applied to transportation which includes Illinois in a long line of carriage through several States, shows the value of the constitutional provision which confides the power of regulating interstate commerce to the Congress of the United States, whose enlarged view of the interests of all the States, and of the railroads concerned, better fits it to establish just and equitable rules.

Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the State legislature to determine that question. But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution.

The judgment of the Supreme Court of Illinois is therefore

Reversed, and the case remanded to that court for further proceedings in conformity with this opinion.

Mr. Justice Bradley, with whom concurred The Chief Justice and Mr. Justice Gray, dissenting. [In the course of the dissenting opinion, a quotation from the opinion of the Supreme Court of Illinois was made to the effect that "the excess in the charge for the less distance presumably affects every part of the line of carriage between Gilman and the State line proportionately with the balance of the line." And Bradley, J., added,] "We have no doubt that this view of the presumed equal distribution of the charge to every part of the route is cor-

rect. If one-tenth, or any other proportion, of the whole route of transportation was in Illinois, the clear presumption is, if nothing be shown to the contrary (as nothing was shown), that the like proportion of the whole charge was made for the transportation in that State.

"The principal question in this case, therefore, is whether, in the absence of Congressional legislation, a State legislature has the power to regulate the charges made by the railroads of the State for transporting goods and passengers to and from places within the State, when such goods or passengers are brought from, or carried to, points without the State, and are, therefore, in the course of transportation from another State, or to another State. It is contended that as such transportation is commerce between or among different States, the power does not exist. The majority of the court so hold. We feel obliged to dissent from that opinion. We think that the State does not lose its power to regulate the charges of its own railroads in its own territory, simply because the goods or persons transported have been brought from or are destined to a point beyond the State in another State. . . .

"It is evident from what has been said, that the dealing of a State with a railroad corporation of its own creation, in authorizing the construction and maintenance of its road, and the charge of fares and freights thereon, is, in its purpose, a matter entirely aside from that kind of regulation of commerce which is obnoxious to the provisions of the Constitution. There is not a particle of doubt that it was the right of the State to prescribe the route of the plaintiff's road, — it might be in a direction north and south, or east and west; it might be by one town, or by a different town; it was its right to prescribe how the road should be built, what means of locomotion should be used on it, how fast the trains might run, at what stations they should stop. It was its right to prescribe its charges, and to declare that they should be uniform, or, if not uniform, how otherwise: this certainly was the right of the State at the inception of the charter, and every one of these things would most materially affect commerce, not only internal but external; and yet not one of them would be repugnant to the power of Congress to regulate commerce within the meaning of the Constitution.

"Suppose the original charter of the railroad company in this case had contained precisely the provisions against discriminating charges which is contained in the general law now complained of, could the company disregard the conditions of its charter, and defy the authority of the State? We think it clear that it could not. But if the State had the power to impose such a condition in the original charter, it must have the same power at any time afterwards; for the exercise of the power in the original grant would be just as repugnant to the Constitution, and no more, as the exercise of it at a subsequent period. The regulation of charges is just as unconstitutional in a charter as in a general law.

"To sum up the matter in a word: we hold it to be a sound proposi-

tion of law, that the making of railroads and regulating the charges for their use is not such a regulation of commerce as to be in the remotest degree repugnant to any power given to Congress by the Constitution, so long as that power is dormant, and has not been exercised by Congress. They affect commerce, they incidentally regulate it; but they are acts in relation to the subject which the State has a perfect right to do, subject, always, to the controlling power of Congress over the regulation of commerce when Congress sees fit to act. . . . The inconveniences which it has been supposed in argument would follow from the execution of the laws of Illinois, we think have been greatly exaggerated. But if it should be found to present any real difficulty in the modes of transacting business on through lines, it is always in the power of Congress to make such reasonable regulations as the interests of interstate commerce may demand, without denuding the States of their just powers over their own roads and their own corporations."[1]

ROBBINS *v.* SHELBY COUNTY TAXING DISTRICT.

SUPREME COURT OF THE UNITED STATES. 1887.

[120 *U. S.* 489.]

. . . THE cause was submitted at the last term of court. The court, on the 8th of March, 1886, ordered it argued; and argument was heard accordingly at this term. The case is stated in the opinion of the court.

Mr. Luke E. Wright, for plaintiff in error; *Mr. F. T. Edmondson* was with him on the brief; *Mr. S. P. Walker*, for defendant in error.

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

[1] This case was decided October 25, 1886. The Federal Interstate Commerce Act (24 Stat at Large, 379) was approved by the President, February 4, 1887.

In *Lafarier* v. *Gr. Trunk Ry. of Canada*, 84 Me. 286 (1892), it was held that a statute of Maine making railroad tickets good for six years, with a right of the holder to "stop off" at as many stopping places as he pleases, cannot constitutionally apply to a ticket for a continuous passage between a place in Canada and another in Maine, citing *Carpenter* v. *Ry. Co.*, 72 Me. 388. The court (PETERS, C. J.) said: "The plaintiff places great reliance upon the case of *Dryden* v. *Railway Co.*, 60 Me. 512 (1872), a case much like the present, where the statute in question was held to be valid. But that was many years ago, and the point now presented was not even intimated to the court. No thought was taken of it. Questions of interstate commerce have grown to an immense national importance since the time of that decision." — ED.

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." Stats. Tennessee, 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. On the trial of the cause in the inferior court, a jury being waived, the following agreed statement of facts was submitted to the court, to wit: [The facts are sufficiently stated above.] This was all the evidence, and thereupon the court rendered judgment against the defendant, to which he excepted, and a bill of exceptions was taken.

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 regulation 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 discrimi-

nation 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 a 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 rights 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 com-

merce? 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 discriminative 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.

Mr. Chief Justice Waite, with whom concurred Mr. Justice Field and Mr. Justice Gray, dissenting.[1]

[1] In the dissenting opinion it is said: "The license fee is demanded for the privilege of selling goods by sample within the Taxing District. The fee is exacted from all alike who do that kind of business, unless they have 'a licensed house of business' in the district. There is no discrimination between citizens of the State and citizens of other States. The tax is upon the business, and this I have always understood to be lawful, whether the business was carried on by a citizen of the State under whose authority the exaction was made, or a citizen of another State, unless there was discrimination against citizens of other States. In *Osborne* v. *Mobile*, 16 Wall. 481, it is said: 'The whole court agreed that a tax on business carried on within the State, and without discrimination between its citizens and the citizens of other States, might be constitutionally imposed and collected.' And I cannot believe that if Robbins had opened an office for his business within the Taxing District, at which he kept and exhibited his

PHILADELPHIA, ETC. STEAMSHIP COMPANY *v.* PENNSYLVANIA.

SUPREME COURT OF THE UNITED STATES. 1887.

[122 *U. S.* 326.]

[ON error to the Supreme Court of Pennsylvania.]

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. . . .

Mr. Morton P. Henry, for plaintiff in error; *Mr. W. S. Kirkpatrick*, Attorney-General of Pennsylvania, for defendant in error; *Mr. John*

samples, it would be held that he would not be liable to the tax, and this whether he stayed there all the time or came only at intervals. But what can be the difference in principle, so far as this question is concerned, whether he takes a room permanently in a business block of the district where, when he comes, he sends his boxes and exhibits his wares, or engages a room temporarily at a hotel or private house and carries on his business there during his stay? Or even whether he takes his sample boxes around with him to his different customers and shows his wares from them? In either case he goes to the district to ply his trade and make his sales from the goods he exhibits. He does not sell those goods, but he sells others like them. It is true that his business was to solicit orders for his principals, but in doing so he bargained for them, carried on business for them in the district by means of the samples of their goods, which had been furnished him for that purpose. To all intents and purposes he had his goods with him for sale, for what he sold was like what he exhibited as the subjects of sale. I am unable to see any difference in principle between a tax on a seller by sample and a tax on a pedler, and yet I can hardly believe it would be contended that the provision of the same statute now in question, which fixes a license fee for all pedlers in the district, would be held to be unconstitutional in its application to pedlers who came with their goods from another State and expected to go back again."

In *Asher* v. *Texas*, 128 U. S. 129, 131 (1888), the court (BRADLEY, J.), after saying that the case was not distinguishable from *Robbins* v *Shelby County Tax. District*, and that this was conceded by the lower court in this case (the Texas Court of Appeals), added: "But it is strenuously contended by that court that the decision of this court in *Robbins* v. *The Shelby Taxing District* is contrary to sound principles of constitutional construction, and in conflict with well-adjudicated cases formerly decided by this court and not overruled. Even if it were true that the decision referred to was not in harmony with some of the previous decisions, we had supposed that a later decision in conflict with prior ones had the effect to overrule them, whether mentioned and commented on or not. And as to the constitutional principles involved, our views were quite fully and carefully, if not clearly and satisfactorily, expressed in the *Robbins case*. We do not propose to enter upon a renewed discussion of the subject at this time. If any further illustration is desired of the unconstitutionality of local burdens imposed upon interstate commerce by way of taxing an occupation directly concerned therein, reference may be made to the still more recent case of *Leloup* v *Port of Mobile*, 127 U. S. 640, which related to a general license tax on telegraph companies, and was decided by the unanimous concurrence of the court." — ED.

F. Sanderson, Deputy Attorney-General of the State, was with him on the brief.

Mr. Justice Bradley, after stating the case as above reported, delivered the opinion of the court.

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 received 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.

This court did not so reason in the case of *Brown* v. *Maryland*, 12 Wheat. 419 . . .

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*, *supra*, p. 1938, and *Railway Gross Receipts*, *supra*, p. 1945, reported in 15th of Wallace, have upon the question in hand. . . .

If this case [*The State Freight Tax*] 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. . . .

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. . . . 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.

There is another point, however, which may properly deserve some attention. Can the tax in this case be regarded as an income tax? and, if it can, does that make any difference as to its constitutionality? . . . As a tax on transportation, we have already seen from the quotations from *The State Freight Tax Case* that it cannot be supported where that transportation is an ingredient of interstate or foreign commerce, even though the law imposing the tax be expressed in such general terms as to include receipts from transportation which are properly taxable. It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. It is clearly not such, but a tax on transportation only.

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. We may refer to the following: *Railroad Co.* v. *Husen*, 95 U. S. 465; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Guy* v. *Baltimore*, 100 U. S. 434; *Webber* v. *Virginia*, 103 U. S. 344; *Moran* v. *New Orleans*, 112 U. S. 69; *Walling* v. *Michigan*, 116 U. S. 446; *Pickard* v. *Pullman Co.*, 117 U. S. 34; *Wabash & St. Louis Railroad* v. *Illinois*, 118 U. S. 557; *Robbins* v. *Shelby County*, 120 U. S. 489; *Fargo* v. *Michigan*, 121 U. S. 230. The cases of *Moran* v. *New Orleans* and *Fargo* v. *Michigan* are especially apposite to the case now under consideration. As showing the power of the States over local

matters incidentally affecting commerce, see *Munn* v. *Illinois*, 94 U. S. 113, 123, and other cases in the same volume, viz.: *Chicago & Burlington Railroad* v. *Iowa*, pp. 155, 161; *Peik* v. *Chicago & Northwestern Railway*, pp. 164, 176; *Winona & St. Peter Railroad* v. *Blake*, p. 180, as explained by *Wabash Co.* v. *Illinois*; *The Wharfage Cases*, viz., *Packet Co.* v. *Keokuk*, 95 U. S. 80, *Packet Co.* v. *St. Louis*, 100 U. S. 423, 428, *Packet Co.* v. *Catlettsburg*, 105 U. S. 559, 563; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 698; *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444; *Mobile* v. *Kimball*, 102 U. S. 691; *Brown* v. *Houston*, 114 U. S. 622, 630; *Railroad Commission Cases*, 116 U. S. 307; *Coe* v. *Errol*, 116 U. S. 517.

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. . . . Our conclusion is, that the imposition of the tax in question in this cause was a regulation of interstate and foreign commerce, in conflict with the exclusive powers of Congress under the Constitution. *Judgment reversed.*[1]

[1] In *Stockton* v. *Balt. & N. Y. R. R. Co., et al.*, 32 Fed. Rep. 9 (1887), on a bill for an injunction, removed from the New Jersey Court of Chancery to the United States Circuit Court for New Jersey, it appeared that by an Act of Congress of June 16, 1886, a New York corporation had been authorized to build a railroad bridge across the Staten Island Sound, known as Arthur Kill, between New York and New Jersey, to connect with the road of the above-named company, a New Jersey corporation. In holding this legislation valid, the court (BRADLEY, J.) said: "In our judgment, if Congress itself has the power to construct a bridge across a navigable stream for the furtherance of commerce among the States, it may authorize the same to be done by agents, whether individuals, or a corporation created by itself, or a State corporation already existing and concerned in the enterprise. The objection that Congress cannot confer powers on a State corporation is untenable. It has used their agency for carrying on its own purposes from an early period. It adopted as post-roads the turnpikes belonging to the various turnpike corporations of the country, as far back as such corporations were known, and subjected them to burdens, and accorded to them privileges, arising out of that relation. It continued the same system with regard to canals and railroads, when these modes of transportation came into existence. Nearly half a century ago, it constituted every railroad built, or to be built, in the United States, a post-road. This, of course, involved duties, and conferred privileges and powers, not contained in their original charter. In 1866, Congress authorized every steam-railroad company in the United States to carry passengers and goods on their way from one State to another, 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. The powers thus conferred were independent of the powers conferred by the charter of any railroad company. Surely these acts of Congress cannot be condemned as unconstitutional exertions of power. . . .

Hitherto, it is true, the means of commercial communication have been supplied, either by nature in the navigable waters of the country or by the States in the construction of roads, canals, and railroads, so that the functions of Congress have not

SMITH *v.* ALABAMA.

SUPREME COURT OF THE UNITED STATES. 1888.

[124 *U. S.* 465.][1]

ON error to a judgment of the Supreme Court of Alabama, denying the plaintiff's petition, on *habeas corpus*, to be discharged from a commitment by a justice of the peace to await an indictment for driving a locomotive engine without the license required by a statute of Alabama, approved February 28, 1887. The petitioner, when arrested in July, 1887, was acting as locomotive engineer on the Mobile & Ohio Railroad Company, a corporation owning and operating a line of railroad forming a continuous and unbroken line from Mobile, in the State of Alabama, to St. Louis, in the State of Missouri; and as such was then engaged in handling, operating, and driving a locomotive engine, attached to a regular passenger train on the Mobile and Ohio Railroad, within the county and State, consisting of a postal car carrying the United States mail to all parts of the Union; a Southern express car containing perishable freight, money packages, and other valuable merchandise destined to Mississippi, Tennessee, Kentucky, and other States; passenger-coaches, and a Pullman palace sleeping-car occupied by passengers, to be transported by said train to the States of Mississippi,

been largely called into exercise under this branch of its jurisdiction and power, except in the improvement of rivers and harbors, and the licensing of bridges across navigable streams. But this is no proof that its power does not extend to the whole subject in all its possible requirements. Indeed, it has been put forth in several notable instances, which stand as strong arguments of practical construction given to the Constitution by the legislative department of the government The Cumberland or National Road is one instance of a grand thoroughfare projected by Congress, extending from the Potomac to the Mississippi. After being nearly completed, it was surrendered to the several States within which it was situate. The system of Pacific railroads presents several instances of railroads constructed through or into different States, as Iowa, Kansas, and California. The main stem of the Union Pacific commences at Council Bluffs, in Iowa, and crosses the Missouri by a bridge at that place erected under the authority of Congress alone. In 1862, a bridge was authorized by Congress to be constructed across the Ohio River at Steubenville, between the States of Virginia and Ohio, to be completed, maintained, and operated by the railroad company authorized to build it, and by another company named, "anything in any law or laws of the above-named States to the contrary notwithstanding." 12 St. 569.

Still, it is contended that, although Congress may have power to construct roads and other means of communication between the States, yet this can only be done with the concurrence and consent of the States in which the structures are made. If this is so, then the power of regulation in Congress is not supreme; it depends on the will of the States. We do not concur in this view. We think that the power of Congress is supreme over the whole subject, unimpeded and unembarrassed by State lines or State laws; that, in this matter, the country is one, and the work to be accomplished is national; and that State interests, State jealousies, and State prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no States. — ED.

[1] The statement of facts is shortened. — ED.

Tennessee, and Kentucky. The petitioner's run, as a locomotive engineer in the service of the Mobile and Ohio Railroad Company, was regularly from the city of Mobile, in the State of Alabama, to Corinth, in the State of Mississippi, sixty miles of which run was in the State of Alabama, and two hundred and sixty-five miles in the State of Mississippi; and he never handled and operated an engine pulling a train of cars whose destination was a point within the State of Alabama when said engine and train of cars started from a point within that State. His train started at Mobile and ran through without change of coaches or cars on one continuous trip. His employment as locomotive engineer in the service of said company also required him to take charge of and handle, drive, and operate an engine drawing a passenger train which started from St. Louis, in the State of Missouri, destined to the city of Mobile, in the State of Alabama, said train being loaded with merchandise and occupied by passengers destined to Alabama and other States; this engine and train he took charge of at Corinth, in Mississippi, and handled, drove, and operated the same along and over the Mobile and Ohio Railroad through the States of Mississippi and Alabama to the city of Mobile. It frequently happened that he was ordered by the proper officers of the said company to handle, drive, and operate an engine drawing a passenger train loaded with merchandise, carrying the United States mail, and occupied by passengers, from the city of Mobile, in Alabama, to the city of St. Louis, in Missouri, being allowed two lay-overs; said train passing through the States of Alabama, Mississippi, Tennessee, Illinois, and into the State of Missouri. The statute, under certain penalties, required all locomotive engineers, including those now in service, to apply to and be examined by a State board of examiners, who were to give him, if found competent, a license, on payment of five dollars. This sum was to be paid for the examination in any event.

Mr. E. L. Russell and *Mr. B. B. Boone*, for plaintiff in error; *Mr. T. N. McClellan*, Attorney-General of the State of Alabama, for defendant in error.

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

The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority. As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised. And when it is manifest that Congress intends to leave that commerce, which is sub-

ject to its jurisdiction, free and unfettered by any positive regulations, such intention would be contravened by State laws operating as regulations of commerce as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in Congress has been construed to be not only paramount but exclusive, so as to withdraw the subject as the basis of legislation altogether from the States.

There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations. If their operation and application in such cases regulate such commerce, so as to conflict with the regulation of the same subject by Congress, either as expressed in positive laws or implied from the absence of legislation, such legislation on the part of the State, to the extent of that conflict, must be regarded as annulled. To draw the line of interference between the two fields of jurisdiction, and to define and declare the instances of unconstitutional encroachment, is a judicial question often of much difficulty, the solution of which, perhaps, is not to be found in any single and exact rule of decision. Some general lines of discrimination, however, have been drawn in varied and numerous decisions of this court. It has been uniformly held, for example, that the States cannot by legislation place burdens upon commerce with foreign nations or among the several States. . . . [The court here states and quotes from *Sherlock* v. *Alling*, *supra*, p. 1973.]

The statute of Indiana held to be valid in that case was an addition to and an amendment of the general body of the law previously existing and in force regulating the relative rights and duties of persons within the jurisdiction of the State, and operating upon them, even when engaged in the business of interstate commerce. This general system of law, subject to be modified by State legislation, whether consisting in that customary law which prevails as the common law of the land in each State, or as a code of positive provisions expressly enacted, is nevertheless the law of the State in which it is administered, and derives all its force and effect from the actual or presumed exercise of its legislative power. It does not emanate from the authority of the national government, nor flow from the exercise of any legislative powers conferred upon Congress by the Constitution of the United States, nor can it be implied as existing by force of any other legislative authority than that of the several States in which it is enforced. It has never been doubted but that this entire body and system of law, regulating in general the relative rights and duties of persons within the territorial jurisdiction of the State, without regard to their pursuits, is subject to change at the will of the legislature of each State, except as that will may be restrained by the Constitution of the United States. It is to this law that persons within the scope of its operation look for the definition of their rights and for the redress of wrongs committed upon them. It is the source of all those relative obligations and duties enforceable

by law, the observance of which the State undertakes to enforce as its public policy. And it was in contemplation of the continued existence of this separate system of law in each State that the Constitution of the United States was framed and ordained with such legislative powers as are therein granted expressly or by reasonable implication.

It is among these laws of the States, therefore, that we find provisions concerning the rights and duties of common carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable according to the laws of the State for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the State in its courts; or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, a right of action for the consequent damage is given by the local law. In neither case would it be a defence that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the State. This, indeed, was the very point decided in *Sherlock* v. *Alling*, above cited. If it is competent for the State thus to administer justice according to its own laws for wrongs done and injuries suffered, when committed and inflicted by defendants while engaged in the business of interstate or foreign commerce, notwithstanding the power over those subjects conferred upon Congress by the Constitution, what is there to forbid the State, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the State has power to redress and punish? If the State has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles, or employés of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, why may not the State also impose, on behalf of the public, as additional means of prevention, penalties for the non-observance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier in order to insure the safety of the persons and things he carries, or of the persons and property of others liable to be affected by them?

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 carrier owes the duty of care, and what shall constitute that negligence for which he shall be responsible.

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 covers 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. . . . It would, indeed, be competent for Congress to legislate upon [this] subject-matter, and to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or interstate commerce. It has legislated upon a similar subject by prescribing the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States while engaged in commerce among the States, Rev. Stat. Tit. 52, §§ 4399–4500, and such legislation undoubtedly is justified on the ground that it is incident to the power to regulate interstate commerce.

In *Sinnot* v. *Davenport*, 22 How. 227, this court adjudged a law of the State of Alabama to be unconstitutional, so far as it applied to vessels engaged in interstate commerce, which prohibited any steamboat from navigating any of the waters of the State without complying with certain prescribed conditions, inconsistent with the Act of Congress of February 17, 1793, in reference to the enrolment and licensing of vessels engaged in the coasting trade. In that case it was said (p. 243): "The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an Act of the legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the State law must give way, and this without regard to the source of power whence the State legislature derived its enactment."

The power might with equal authority be exercised in prescribing the qualifications for locomotive engineers employed by railroad companies

engaged in the transportation of passengers and goods among the States, and in that case would supersede any conflicting provisions on the same subject made by local authority.

But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves, they are parts of that body of the local law which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the State or in commerce among the States.

No objection to the statute, as an impediment to the free transaction of commerce among the States, can be found in any of its special provisions. It requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed nor prescribe any arbitrary conditions to the grant. The fee of five dollars to be paid by an applicant for his examination is not a provision for raising revenue, but is no more than an equivalent for the service rendered, and cannot be considered in the light of a tax or burden upon transportation. The applicant is required before obtaining his license to satisfy a board of examiners in reference to his knowledge of practical mechanics, his skill in operating a locomotive engine, and his general competency as an engineer, and the board before issuing the license is required to inquire into his character and habits, and to withhold the license if he be found to be reckless or intemperate.

Certainly it is the duty of every carrier, whether engaged in the domestic commerce of the State or in interstate commerce, to provide and furnish itself with locomotive engineers of this precise description, competent and well qualified, skilled and sober; and if, by reason of carelessness in the selection of an engineer not so qualified, injury or loss is caused, the carrier, no matter in what business engaged, is responsible according to the local law admitted to govern in such cases, in the absence of Congressional legislation.

The statute in question further provides that any engineer licensed under the Act shall forfeit his license if at any time found guilty by the board of examiners of an act of recklessness, carelessness, or negligence while running an engine, by which damage to person or property is done, or who shall, immediately preceding or during the time he is engaged in running an engine, be in a state of intoxication; and the board are authorized to revoke and cancel the license whenever they shall be satisfied of the unfitness or incompetency of the engineer by reason of any act or habit unknown at the time of his examination, or acquired or formed subsequent to it. The eighth section of the Act declares that any engineer violating its provisions shall be guilty of a

misdemeanor, and upon conviction inflicts upon him the punishment of a fine not less than $50 nor more than $500, and also that he may be sentenced to hard labor for the county for not more than six months.

If a locomotive engineer, running an engine, as was the petitioner in this case, in the business of transporting passengers and goods between Alabama and other States, should, while in that State, by mere negligence and recklessness in operating his engine, cause the death of one or more passengers carried, he might certainly be held to answer to the criminal laws of the State if they declare the offence in such a case to be manslaughter. The power to punish for the offence after it is committed certainly includes the power to provide penalties directed, as are those in the statute in question, against those acts of omission which, if performed, would prevent the commission of the larger offence.

It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a State, and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the State. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and property demands the use of specific guards and precautions. The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns, and cities, are all matters naturally and peculiarly within the provisions of that law from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.

In conclusion, we find, therefore, first, that the statute of Alabama, the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public, safety of person and property; and, thirdly, that, so far it affects transactions of commerce among the States, it does so only indi-

rectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence.

For these reasons, we hold this statute, so far as it is alleged to contravene the Constitution of the United States, to be a valid law.

The judgment of the Supreme Court of Alabama is therefore affirmed.[1]

Mr. Justice Bradley dissented.

WILLAMETTE IRON BRIDGE COMPANY *v.* HATCH.

Supreme Court of the United States. 1888.

[125 *U. S.* 1.]

Bill of Review. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion of the court.

Mr. John Mullan, for appellant; *Mr. Rufus Mallory*, filed a brief for same. *Mr. J. N. Dolph*, for appellees.

Mr. Justice Bradley delivered the opinion of the court.

This is a bill of review filed by the appellants, a corporation of Oregon, to obtain the reversal of a decree made by the court below against them in favor of Hatch and Lownsdale, the appellees. The case is shortly this: On the 18th of October, 1878, the Legislature of Oregon passed an Act entitled "An Act to authorize the construction of a bridge on the Willamette River, between the city of Portland and the city of East Portland, in Multnomah County, State of Oregon. . . . [The opinion here sets forth a part of the Act incorporating a company

[1] In *Nashville, &c. Ry.* v. *Alabama*, 128 U. S. 96 (1888), on error to the Supreme Court of Alabama, it appeared that the appellant corporation had been indicted and convicted under a State statute of June, 1887, for employing a train conductor who had not obtained a certificate from a State board of medical examiners that he was free from color-blindness. In sustaining the judgment of the State court, affirming the conviction, the court (Field, J.), after remarking that so far as the validity of the statute was concerned, the point was covered by *Smith* v. *Alabama*, added: "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employés and others on railway trains engaged in that commerce; and that such legislation will supersede any State action on the subject. But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of State and Federal courts, that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the States, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable." — Ed.

under which the defendant claims to build and maintain the said bridge, and providing that it should have a draw; and states that while the defendants were proceeding to build the bridge, the appellees filed a bill in the Circuit Court of the United States for Oregon for an injunction to restrain them, and to abate the structure already built; that the plaintiffs sued as citizens of the United States residing in Oregon, and described the defendant as an Oregon corporation, with other allegations showing the well-known navigable character of the large river in question, and the plaintiff's right to relief on account of the nature of their business and the injurious effects of the structure.]

The cause being put at issue, and proofs being taken on the 22d of October, 1881, a decree was made in favor of the complainants for a perpetual injunction against the building of the bridge, and for an abatement of the portion already built. The decision of the case was placed principally on the ground that the bridge would be, and that the piers were, an obstruction to the navigation of the river, contrary to the Act of Congress passed in 1859, admitting Oregon into the Union, and declaring "that all the navigable waters of the said State shall be common highways, and forever free, as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor;" and that without the consent of Congress, a State law was not sufficient authority for the erection of such a structure; and, even if it was, the bridge did not conform to the requirements of the State law. See *Hatch* v. *Willamette Iron Bridge Co.*, 7 Sawyer, 127, 141. The defendants took an appeal which was not prosecuted; but after the decision of this court in the case of *Escanaba Co.* v. *Chicago*, 107 U. S. 678, they filed the present bill of review for the reversal of the decree. . . .

This bill was demurred to, and the court affirmed the decree in the original suit and dismissed the bill of review. *Willamette Iron Bridge Co.* v. *Hatch*, 9 Sawyer, 643; s. c. 19 Fed. Rep. 347. The present appeal is taken from this decree. . . .

The gravamen of the bill was, the obstruction of the navigation of the Willamette River by the defendants, by the erection of the bridge which they were engaged in building. The defendants pleaded the authority of the State legislature for the erection of the bridge. The court held that the work was not done in conformity with the requirements of the State law; but whether it were or not, it lacked the assent of Congress, which assent the court held was necessary in view of that provision in the Act of Congress admitting Oregon as a State, which has been referred to. The court held that this provision of the Act was tantamount to a declaration that the navigation of the Willamette River should not be obstructed or interfered with; and that any such obstruction or interference, without the consent of Congress, whether by State sanction or not, was a violation of the Act of Congress; and that the obstruction complained of was in violation of said Act. And this is the principal and important question in this case, namely,

whether the erection of a bridge over the Willamette River at Portland was a violation of said Act of Congress. If it was not, if it could not be, if the Act did not apply to obstructions of this kind, then the case did not arise under the Constitution or laws of the United States, unless under some other law referred to in the bill.

The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law; and if such law could be enforced (a point which we do not undertake to decide), it would not avail to sustain the bill in equity filed in the original case. There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the States. Such obstructions and nuisances are offences against the laws of the States within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offences against United States laws which do not exist; and none such exist except what are to be found on the statute book. Of course, where the litigant parties are citizens of different States, the circuit courts of the United States may take jurisdiction on that ground, but on no other. This is the result of so many cases, and expressions of opinion by this court, that it is almost superfluous to cite authorities on the subject. We refer to the following by way of illustration: *Willson* v. *Blackbird Creek Co.*, 2 Pet. 245; *Pollard's Lessee* v. *Hagan*, 3 How. 212, 229; *Passaic Bridges*, 3 Wall. 782 App.; *Gilman* v. *Philadelphia*, 3 Wall. 713, 724; *Pound* v. *Turck*, 95 U. S. 459; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Cardwell* v. *American Bridge Company*, 113 U. S. 205; *Hamilton* v. *Vicksburg, &c. Railroad Co.*, 119 U. S. 280; *Huse* v. *Glover*, 119 U. S. 543; *Sands* v. *Manistee River Imp. Co.*, 123 U. S. 288; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 700. The usual case, of course, is that in which the Acts complained of are clearly supported by a State statute; but that really makes no difference. Whether they are conformable, or not conformable, to the State law relied on, is a State question, not a Federal one. The failure of State functionaries to prosecute for breaches of the State law, does not confer power upon United States functionaries to prosecute under a United States law, when there is no such law in existence. But, as we have stated, the court below held that the Act of Congress of 1859 was a law which prohibited any obstructions or impediments to the navigation of the public rivers of Oregon, including that of the Willamette River. Was it such an act? Did it have such an effect?

The clause in question had its origin in the 4th article of the compact contained in the Ordinance of the Old Congress for the government

of the Territory northwest of the Ohio, adopted July 13th, 1787; in which it was amongst other things declared that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor." 1 Stat. 52 *n.* This court has held, that when any new State was admitted into the Union from the Northwest Territory, the Ordinance in question ceased to have any operative force in limiting its powers of legislation as compared with those possessed by the original States. On the admission of any such new State, it at once became entitled to and possessed all the rights of dominion and sovereignty which belonged to them. See the cases of *Pollard's Lessee* v. *Hagan*, *supra*; *Permoli* v. *First Municipality*, 3 How. 589; *Escanaba Co.* v. *Chicago; Cardwell* v. *American Bridge Co.; Huse* v. *Glover*, *qua supra*. In admitting some of the new States, however, the clause in question has been inserted in the law, as it was in the case of Oregon, whether the State was carved out of the Territory northwest of the Ohio, or not; and it has been supposed that in this new form of enactment, it might be regarded as a regulation of commerce, which Congress has the right to impose. *Pollard's Lessee* v. *Hagan*, 3 How. 212, 230. Conceding this to be the correct view, the question then arises, what is its fair construction? What regulation of commerce does it effect? Does it prohibit physical obstructions and impediments to the navigation of the streams? Or does it prohibit only the imposition of duties for the use of the navigation, and any discrimination denying to citizens of other States the equal right to such use? This question has been before this court, and has been decided in favor of the latter construction.

It is obvious that if the clause in question does prohibit physical obstructions and impediments in navigable waters, the State legislature itself, in a State where the clause is in force, would not have the power to cause or authorize such obstructions to be made without the consent of Congress. But it is well settled that the legislatures of such States do have the same power to authorize the erection of bridges, dams, etc., in and upon the navigable waters wholly within their limits, as have the original States, in reference to which no such clause exists. . . .

It seems clear, therefore, that according to the construction given by this court to the clause in the Act of Congress relied upon by the court below, it does not refer to physical obstructions, but to political regulations which would hamper the freedom of commerce. It is to be remembered that in its original form the clause embraced carrying-places between the rivers, as well as the rivers themselves; and it cannot be supposed that those carrying-places were intended to be always kept up as such. No doubt that at the present time some of them are covered by populous towns, or occupied in some other way incompatible with their original use; and such a diversion of their use, in the progress

of society, cannot but have been contemplated. What the people of the old States wished to secure was, the free use of the streams and carrying-places in the Northwest Territory, as fully as it might be enjoyed by the inhabitants of that territory themselves, without any impost or discriminating burden. The clause in question cannot be regarded as establishing the police power of the United States over the rivers of Oregon, or as giving to the Federal courts the right to hear and determine, according to Federal law, every complaint that may be made of an impediment in, or an encroachment upon, the navigation of those rivers. We do not doubt that Congress, if it saw fit, could thus assume the care of said streams, in the interest of foreign and interstate commerce; we only say that, in our opinion, it has not done so by the clause in question. And although, until Congress acts, the States have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams. It might itself give original authority for the erection of such bridges when called for by the demands of interstate commerce by land; but, in many, perhaps the majority of cases, its assent only is asked, and the primary authority is sought at the hands of the State. With regard to this very river, the Willamette, three acts of Congress have been passed in relation to the construction of bridges thereon, to wit: one, approved February 2, 1870, which gave consent to the corporation of the city of Portland to erect a bridge from Portland to the east bank of the river, not obstructing, impairing, or injuriously modifying its navigation, and first submitting the plans to the Secretary of War; another, approved on the 22d of June, 1874, which authorized the County Commissioners of Marion County, or said commissioners jointly with those of Polk County, to build a bridge across said river at Salem; a third Act, approved June 23, 1874, which authorized the Oregon and California Railroad Company, alone, or jointly with the Oregon Central Railroad Company, to build a railroad bridge across said river at the city of Portland, with a draw of not less than 100 feet in the clear on each side of the draw abutment, and so constructed as not to impede the navigation of the river, and allow the free passage of vessels through the bridge. These Acts are special in their character, and do not involve the assumption by Congress of general police power over the river.

The argument of the appellees, that Congress must be deemed to have assumed police power over the Willamette River in consequence of having expended money in improving its navigation, and of having made Portland a port of entry, is not well founded. Such Acts are not sufficient to establish the police power of the United States over the

navigable streams to which they relate. Of course, any interference with the operations, constructions, or improvements made by the general government, or any violation of a port law enacted by Congress, would be an offence against the laws and authority of the United States; and an action or suit brought in consequence thereof would be one arising under the laws of the United States. But no such violation or interference is shown by the allegations of the bill in the original suit in this case, which simply states the fact that improvements have been made in the river by the government, without stating where, and that Portland had been created a port of entry. . . . In the present case there is no allegation, if such an allegation would be material, that any improvements in the navigation of the Willamette River have been made by the government at any point above the site of the proposed bridge.

As to the making of Portland a port of entry, the observation of Mr. Justice Grier, in *The Passaic Bridge Cases*, 3 Wall. 782, 793, App., are very apposite. . . .

It is urged that in the *Wheeling Bridge Case*, 13 How. 518, this court decided the bridge there complained of to be a nuisance, and decreed its prostration, or such increased elevation as to permit the tall chimneys of the Pittsburg steamers to pass under it at high water. But in that case this court had original jurisdiction in consequence of a State being a party; and the complainant (the State of Pennsylvania) was entitled to invoke, and the court had power to apply, any law applicable to the case, whether State law, Federal law, or international law. . . .

On the whole, our opinion is, that the original suit in this case was not a suit arising under any law of the United States; and since, on such ground alone, the court below could have had jurisdiction of it, it follows that the decree on the bill of review must be *Reversed*. . . .

BOWMAN *v.* CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

SUPREME COURT OF THE UNITED STATES. 1888.

[125 *U. S.* 465.][1]

ERROR to the Circuit Court of the United States for the Northern District of Illinois. The two plaintiffs, citizens, respectively, of Nebraska and Iowa, partners, doing business in Iowa, brought an action on the case against the defendant, an Illinois corporation, for refusing to take five thousand barrels of beer offered them at Chicago on May 20, 1886, to be carried to their place of business in Iowa, being a sta-

[1] The statement of facts is shortened. — ED.

tion on the defendants' road. The defendants, alleging that the beer was intoxicating liquor, set up the statutes of Iowa which forbade common carriers, under a penalty, to bring such liquors into that State for any one else, without a certificate described in the statute showing that the consignee is authorized to sell such liquors; and said that no such certificate was given them, and that they gave to the plaintiff as a reason for not receiving the beer that they were furnished no such certificate. The plaintiffs demurred, assigning for cause that this statute was unconstitutional. Demurrer overruled and judgment for defendant.

Mr. Louis J. Blum and *Mr. Edgar C. Blum*, for plaintiffs in error; *Mr. A. J. Baker*, Attorney-General of the State of Iowa, for defendant in error; *Mr. James E. Munroe* and *Mr. W. C. Goudy* also filed a brief for defendants in error.

Mr. Justice Matthews, after stating the case as above reported, delivered the opinion of the court. . . .

This statutory provision does not stand alone, and must be considered with reference to the system of legislation of which it forms a part. The Act of April 5, 1886, in which it is contained, relates to the sale of intoxicating liquors within the State of Iowa, and is amendatory of chapter 143 of the Acts of the twentieth General Assembly of that State "relating to intoxicating liquors and providing for the more effectual suppression of the illegal sale and transportation of intoxicating liquors and abatement of nuisances." The original § 1553 of the Iowa Code contains a similar provision in respect to common carriers. By § 1523 of the Code, the manufacture and sale of intoxicating liquors, except as thereinafter provided, is made unlawful, and the keeping of intoxicating liquor with intent to sell the same within the State, contrary to the provisions of the Act, is prohibited, and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared to be a nuisance, to be forfeited and dealt with as thereinafter provided. Section 1524 excepts from the operation of the law sales by the importer thereof of foreign intoxicating liquor, imported under the authority of the laws of the United States regarding the importation of such liquors and in accordance with such laws, provided that the said liquor at the time of said sale by said importer remains in the original casks or packages in which it was by him imported, and in quantities of not less than the quantities in which the laws of the United States require such liquors to be imported, and is sold by him in said original casks or packages and in said quantities only. The law also permits the manufacture in the State of liquors for the purpose of being sold, according to the provisions of the statute, to be used for mechanical, medicinal, culinary, or sacramental purposes; and for these purposes only any citizen of the State, except hotel-keepers, keepers of saloons, eating-houses, grocery keepers, and confectioners, is permitted within the county of his residence to buy and sell intoxicating liquors, provided he shall first obtain permission from the Board of Supervisors of the county in which such business is conducted. It also declares the building or erection of what-

ever kind, or the ground itself in or upon which intoxicating liquor is manufactured or sold, or kept with intent to sell, contrary to law, to be a nuisance, and that it may be abated as such. The original provisions of the Code (§ 1555) excluded from the definition of intoxicating liquors, beer, cider from apples, and wine from grapes, currants, and other fruits grown in the State, but by an amendment that section was made to include alcohol, ale, wine, beer, spirituous, vinous, and malt liquors, and all intoxicating liquors whatever. It thus appears that the provisions of the statute set out in the plea, prohibiting the transportation by a common carrier of intoxicating liquor from a point within any other State for delivery at a place within the State of Iowa, is intended to more effectually carry out the general policy of the law of that State with respect to the suppression of the illegal manufacture and sale of intoxicating liquor within the State as a nuisance. It may, therefore, fairly be said that the provision in question has been adopted by the State of Iowa, not expressly for the purpose of regulating commerce between its citizens and those of other States, but as subservient to the general design of protecting the health and morals of its people, and the peace and good order of the State, against the physical and moral evils resulting from the unrestricted manufacture and sale within the State of intoxicating liquors.

We have had recent occasion to consider State legislation of this character in its relation to the Constitution of the United States. In the case of *Mugler* v. *Kansas*, 123 U. S. 623, 657, it was said: "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. . . . 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." . . . [Here the court states pretty fully *The License Cases*, *supra*, p. 1851, and then continues:] —

From a review of all the opinions the following conclusions are to be deduced as the result of the judgment in those cases: —

1. All the justices concurred in the proposition that the statutes in question were not made void by the mere existence of the power to regulate commerce with foreign nations and among the States delegated to Congress by the Constitution.

2. They all concurred in the proposition that there was no legislation by Congress in pursuance of that power with which these statutes were in conflict.

3. Some, including the Chief Justice, held that the matter of the importation and sale of articles of commerce was subject to the exclusive

regulation of Congress, whenever it chose to exert its power, and that any statute of the State on the same subject in conflict with such positive provisions of law enacted by Congress would be void.

4. Others maintained the view that the power of Congress to regulate commerce did not extend to or include the subject of the sale of such articles of commerce after they had been introduced into a State, but that when the act of importation ended, by a delivery to the consignee, the exclusive power over the subject belonged to the States as a part of their police power.

From this analysis it is apparent that the question presented in this case was not decided in *The License Cases*. The point in judgment in them was strictly confined to the right of the States to prohibit the sale of intoxicating liquor after it had been brought within their territorial limits. The right to bring it within the States was not questioned; and the reasoning which justified the right to prohibit sales admitted, by implication, the right to introduce intoxicating liquor, as merchandise, from foreign countries, or from other States of the Union, free from the control of the several States, and subject to the exclusive power of Congress over commerce.

It cannot be doubted that the law of Iowa now under examination, regarded as a rule for the transportation of merchandise, operates as a regulation of commerce among the States. "Beyond all question, the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself." . . . *Case of the State Freight Tax*, 15 Wall. 232, 275, per Mr. Justice Strong. It was, therefore, decided in that case that a tax upon freight transported from State to State was a regulation of interstate transportation, and for that reason a regulation of commerce among the States. And this conclusion was reached notwithstanding the fact that Congress had not legislated on the subject, and notwithstanding the inference sought to be drawn from the fact, that it was thereby left open to the legislation of the several States. . . . [Here follow other quotations from the same case.]

The distinction between cases in which Congress has exerted its power over commerce, and those in which it has abstained from its exercise, as bearing upon State legislation touching the subject, was first plainly pointed out by Mr. Justice Curtis in the case of *Cooley* v. *Port Wardens*, 12 How. 299, and applies to commerce with foreign nations as well as to commerce among the States. In that case, speaking of commerce with foreign nations, he said (p. 319): "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." It was, therefore, held in that case that the laws of the several States concerning pilotage, although in

their nature regulations of foreign commerce, were, in the absence of legislation on the same subject by Congress, valid exercises of power. The subject was local and not national, and was likely to be 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; and to this it may be added that it was a subject imperatively demanding positive regulation. The absence of legislation on the subject, therefore, by Congress, was evidence of its opinion that the matter might be best regulated by local authority, and proof of its intention that local regulations might be made.

It may be argued, however, that, aside from such regulations as these, which are purely local, the inference to be drawn from the absence of legislation by Congress on the subject excludes State legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States. Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation. The organization of our State and Federal system of government is such that the people of the several States can have no relations with foreign powers in respect to commerce or any other subject, except through the government of the United States and its laws and treaties. *Henderson* v. *Mayor of New York*, 92 U. S. 259, 273.

The same necessity perhaps does not exist equally in reference to commerce among the States. The power conferred upon Congress to regulate commerce among the States is indeed contained in the same clause of the Constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character and equally extensive. The actual exercise of its power over either subject is equally and necessarily exclusive of that of the States, and paramount over all the powers of the States; so that State legislation, however legitimate in its origin or object, when it conflicts with the positive legislation of Congress, or its intention reasonably implied from its silence, in respect to the subject of commerce of both kinds, must fail. And yet in respect to commerce among the States, it may be for the reason already assigned, that the same inference is not always to be drawn from the absence of Congressional legislation as might be in the case of commerce with foreign nations. The question, therefore, may be still considered in each case as it arises, whether the fact that Congress has failed in the particular instance to provide by law a regulation of commerce among the States is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce may be left to be freely dealt with by the respective States.

We have seen that in the *Case of the State Freight Tax*, 15

Wall. 232, a tax imposed by one State upon freight transported to or from another State was held to be void as a regulation of commerce among the States, on the ground that the transportation of passengers or merchandise through a State, or from one State to another, was in its nature national, so that it should be subjected to one uniform system or plan of regulation under the control of one regulating power. In that case the tax was not imposed for the purpose of regulating interstate commerce, but in order to raise a revenue, and would have been a legitimate exercise of an admitted power of the State if it had not been exerted so as to operate as a regulation of interstate commerce. Any other regulation of interstate commerce, applied as the tax was in that case, would fall equally within the rule of its decision. If the State has not power to tax freight and passengers passing through it, or to or from it, from or into another State, much less would it have the power directly to regulate such transportation, or to forbid it altogether. If in the present case 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 repugnant to the Constitution of the United States. In point of fact, however, it applies only to one class of articles of a particular kind, and prohibits their introduction into the State upon special grounds. It remains for us to consider whether those grounds are sufficient to justify it as an exception from the rule which would govern if they did not exist.

It may be material also to state in this connection that Congress had legislated on the general subject of interstate commerce by means of railroads prior to the date of the transaction on which the present suit is founded. Section 5258 of the Revised Statutes provides that "every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized 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 the case of *Railroad Co.* v. *Richmond*, 19 Wall. 584, this section, then constituting a part of the Act of Congress of June 15, 1866, was considered. Referring to this Act and the Act of July 25, 1866, authorizing the construction of bridges over the Mississippi River, the court say: "These Acts were passed under the power vested in Congress to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States which had previously existed, and to prevent a creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi. But they were intended to reach trammels interposed by State enactments or by existing laws of Congress. . . . The power to regulate commerce among

the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation." p. 589.

Congress had also legislated on the subject of the transportation of passengers and merchandise in chapter 6, title 48, of the Revised Statutes; §§ 4252 to 4289, inclusive, having reference, however, mainly to transportation in vessels, by water, but §§ 4278 and 4279 relate also to the transportation of nitro-glycerine and other similar explosive substances by land or water, and either as a matter of commerce with foreign countries or among the several States. Section 4280 provides that " the two preceding sections shall not be so construed as to prevent any State, Territory, district, city, or town within the United States 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."

So far as these regulations made by Congress extend, they are certainly indications of its intention that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, or by the States in particular cases by the express permission of Congress. . . . [Here follow quotations from *Co. of Mobile* v. *Kimball*, *supra*, p. 1998.]

The principle thus announced has a more obvious application to the circumstances of such a case as the present, when it is considered that the law of the State of Iowa under consideration, while it professes to regulate the conduct of carriers engaged in transportation within the limits of that State, nevertheless materially affects, if allowed to operate, the conduct of such carriers, both as respects their rights and obligations, in every other State into or through which they pass in the prosecution of their business of interstate transportation. In the present case, the defendant is sued as a common carrier in the State of Illinois, and the breach of duty alleged against it is a violation of the law of that State in refusing to receive and transport goods which, as a common carrier, by that law, it was bound to accept and carry. It interposes as a defence a law of the State of Iowa, which forbids the delivery of such goods within that State. Has the law of Iowa any extra-territorial force which does not belong to the law of the State of Illinois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter? In view of this necessary operation of the law of Iowa, if it be valid, the language of this court in the case of *Hall* v. *DeCuir*, 95 U. S. 485, 488, is exactly in point. . . . [Here follows a passage from this case, beginning at " But we think." *supra*, p. 1983, and ending at the sentence beginning " If this statute," *supra*, p. 1984.]

It is impossible to justify this statute of Iowa by classifying it as an inspection law. The right of the States to pass inspection laws is ex-

pressly recognized in Art. 1, § 10, of the Constitution, in the clause declaring 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 all such laws shall be subject to the revision and control of the Congress." The nature and character of the inspection laws of the States, contemplated by this provision of the Constitution, were very fully exhibited in the case of *Turner* v. *Maryland*, 107 U. S. 38. "The object of inspection laws," said Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, "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 are confined to such particulars as, in the estimation of the legislature and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving to the purchaser public assurance that the article is in that condition, and of that quality, which makes it merchantable and fit for use or consumption. They are not founded on the idea that the things, in respect to which inspection is required, are dangerous or noxious in themselves. As was said in *Turner* v. *Maryland*, 107 U. S. 38, 55: "Recognized elements of inspection laws have always been: quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds, — all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should coexist in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirement, or the inspection may be made to extend to all of the above matters." It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse.

For similar reasons the statute of Iowa under consideration cannot be regarded as a regulation of quarantine or a sanitary provision for the purpose of protecting the physical health of the community, or a law to prevent the introduction into the State of disease, contagious, infectious, or otherwise. Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of smallpox, or cattle or meat or other provisions that are deceased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not

legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution. Upon this point, the observations of Mr. Justice Catron in *The License Cases*, 5 How. 504, 599, are very much to the point. . . . [Here follows a quotation from this opinion of Catron, J.]

This question was considered in the case of *Railroad Co.* v. *Husen*, 95 U. S. 465, in which this court declared an Act of the Legislature of Missouri, which prohibited driving or conveying any Texas, Mexican, or Indian cattle into the State, between the 1st day of March and the 1st day of November of each year, to be in conflict with the constitutional provision investing Congress with power to regulate commerce among the several States, holding that such a statute was more than a quarantine regulation and not a legitimate exercise of the police power of the State. In that case it was said (p. 472): "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, etc., 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. . . . The reach of the statute was far beyond its professed object, and far into the realm which is within the exclusive jurisdiction of Congress. . . . 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."

The same principles were declared in *Henderson* v. *The Mayor of New York*, 92 U. S. 259, and *Chy Lung* v. *Freeman*, 92 U. S. 275. In the latter case, speaking of the right of the State to protect itself from the introduction of paupers and convicted criminals from abroad, the court said (p. 280): "Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity." "It may also be admitted," as was said in the case of *Railroad Co.* v. *Husen*, 95 U. S. 465, 471, "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, pau-

pers, 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 Grier, 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. . . . 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."

It is conceded, as we have already shown, that for the purposes of its policy a State has legislative control, exclusive of Congress, within its territory, of all persons, things, and transactions of strictly internal concern. 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.

The statute of Iowa under consideration falls within this prohibition. It is not an inspection law; it is not a quarantine or sanitary law. It is essentially a regulation of commerce among the States within any definition heretofore given to that term, or which can be given; and although its motive and purpose are to perfect the policy of the State of Iowa in protecting its citizens against the evils of intemperance, it is none the less on that account a regulation of commerce. If it had extended its provisions so as to prohibit the introduction into the State from foreign countries of all importations of intoxicating liquors produced abroad, no one would doubt the nature of the provision as a regulation of foreign commerce. Its nature is not changed by its application to commerce among the States.

Can it be supposed that by omitting any express declarations 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. . . . [Here follow quotations from *Wabash, &c. Ry. Co.* v. *Illinois, supra*, p. 2045, *Brown* v. *Houston*, *supra*, p. 2022, and *Walling* v. *Michigan*, *supra*, p. 2028; and then, referring to the last-named case, the opinion continues:] —

It would be error to lay any stress on the fact that the statute passed upon in that case made a discrimination between citizens and products of other States in favor of those of the State of Michigan, notwithstanding the intimation on that point in the foregoing extract from the opinion. This appears plainly from what was decided in the case of *Robbins* v. *Shelby Taxing District*, 120 U. S. 489. It was there said (p. 497): "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." . . . [Here follow other quotations from the last two cases above named.]

The section of the statute of Iowa, the validity of which is drawn in question in this case, does not fall within this enumeration of legitimate exertions of the police power. It is not an exercise of the jurisdiction of the State over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other States. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchan-

dise is brought to its border. It is not one of those local regulations designed to aid and facilitate commerce; it is not an inspection law to secure the due quality and measure of a commodity; it is not a law to regulate or restrict the sale of an article deemed injurious to the health and morals of the community; it is not a regulation confined to the purely internal and domestic commerce of the State; it is not a restriction which only operates upon property after it has become mingled with and forms part of the mass of the property within the State. It is, on the other hand, a regulation directly affecting interstate commerce in an essential and vital point. If authorized, in the present instance, upon the grounds and motives of the policy which have dictated it, the same reason would justify any and every other State regulation of interstate commerce upon any grounds and reasons which might prompt in particular cases their adoption. It is, therefore, a regulation of that character which constitutes an unauthorized interference with the power given to Congress over the subject. If not in contravention of any positive legislation by Congress, it is nevertheless a breach and interruption of that liberty of trade which Congress ordains as the national policy, by willing that it shall be free from restrictive regulations.

It may be said, however, that the right of the State to restrict or prohibit sales of intoxicating liquor within its limits, conceded to exist as a part of its police power, implies the right to prohibit its importation, because the latter is necessary to the effectual exercise of the former. The argument is that a prohibition of the sale cannot be made effective, except by preventing the introduction of the subject of the sale; that if its entrance into the State is permitted, the traffic in it cannot be suppressed. But the right to prohibit sales, so far as conceded to the States, arises only after the act of transportation has terminated, because the sales which the State may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it. It might be very convenient and useful in the execution of the policy of prohibition within the State to extend the powers of the State beyond its territorial limits. But such extra-territorial powers cannot be assumed upon such an implication. On the contrary, the nature of the case contradicts their existence. For if they belong to one State, they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the Constitution by its delegations of national power to prevent.

It is easier to think that the right of importation from abroad, and of transportation from one State to another, includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates; for the very purpose and motive of that branch of commerce which consists in transportation, is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported. Such, indeed, was the point

decided in the case of *Brown* v. *Maryland*, 12 Wheat. 419, as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among the States. But it is not necessary now to express any opinion upon the point, because that question does not arise in the present case. The precise line which divides the transaction, so far as it belongs to foreign or interstate commerce, from the internal and domestic commerce of the State, we are not now called upon to delineate. It is enough to say, that the power to regulate or forbid the sale of a commodity, after it has been brought into the State, does not carry with it the right and power to prevent its introduction by transportation from another State.

For these reasons, we are constrained to pronounce against the validity of the section of the statute of Iowa involved in this case. The judgment of the Circuit Court of the United States for the Northern District of Illinois is therefore *Reversed.*

[The separate concurring opinion of FIELD, J., is omitted. HARLAN, J., in a dissenting opinion for himself, WAITE, C. J.,[1] and GRAY, J., said:] —

It is admitted that a State may prevent the introduction within her limits of rags or other goods infected with disease, or of cattle or meat, or other provisions which, from their condition, are unfit for human use or consumption; because, it is said, such articles are not merchantable or legitimate subjects of trade and commerce. But suppose the people of a State believe, upon reasonable grounds, that the general use of intoxicating liquors is dangerous to the public peace, the public health, and the public morals, what authority has Congress or the judiciary to review their judgment upon that subject, and compel them to submit to a condition of things which they regard as destructive of their happiness and the peace and good order of society? If, consistently with the Constitution of the United States, a State can protect her sound cattle by prohibiting altogether the introduction within her limits of diseased cattle, she ought not to be deemed disloyal to that Constitution when she seeks by similar legislation to protect her people and their homes against the introduction of articles which are, in good faith, and not unreasonably, regarded by her citizens as "laden with infection" more dangerous to the public than diseased cattle, or than rags containing the germs of disease. . . . [Here the opinion quotes from *Mugler's Case*, *supra*, p. 782.]

Now, can it be possible that the framers of the Constitution intended — whether Congress chose or not to act upon the subject — to withhold from a State authority to prevent the introduction into her midst of articles or commodities, the manufacture of which, within her limits, she could prohibit, without impairing the constitutional rights of her own

[1] The Chief Justice died March 23, 1888, four days after this case was decided. — ED.

people? If a State may declare a place where intoxicating liquors are sold for use as a beverage to be a common nuisance, subjecting the person maintaining the same to fine and imprisonment, can her people be compelled to submit to the sale of such liquors, when brought there from another State for that purpose? This court has often declared that the most important function of government was to preserve the public health, morals, and safety; that it could not divest itself of that power, nor, by contract, limit its exercise; and that even the constitutional prohibition upon laws impairing the obligation of contracts does not restrict the power of the State to protect the health, the morals, or the safety of the community, as the one or the other may be involved in the execution of such contracts. *Stone* v. *Mississippi*, 101 U. S. 814, 816; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 751; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 672; *Mugler* v. *Kansas*, 123 U. S. 623, 664. Does the mere grant of the power to regulate commerce among the States invest individuals of one State with the right, even without the express sanction of Congressional legislation, to introduce among the people of another State articles which, by statute, they have declared to be deleterious to their health and dangerous to their safety? In our opinion, these questions should be answered in the negative. It is inconceivable that the well-being of any State is at the mercy of the liquor manufacturers of other States. . . .

It may be said, generally, that free commercial intercourse exists among the several States by force of the Constitution. But as, by the express terms of that instrument, the powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people, and as, by the repeated adjudications of this court, the States have not surrendered, but have reserved, the power, to protect, by police regulations, the health, morals, and safety of their people, Congress may not prescribe any rule to govern commerce among the States which prevents the proper and reasonable exercise of this reserved power. Even if Congress, under the power to regulate commerce, had authority to declare what shall or what shall not be subjects of commerce among the States, that power would not fairly imply authority to compel a State to admit within her limits that which, in fact, is, or which, upon reasonable grounds, she may declare to be destructive of the health, morals, and peace of her people. The purpose of committing to Congress the regulation of commerce was to insure equality of commercial facilities, by preventing one State from building up her own trade at the expense of sister States. But that purpose is not defeated when a State employs appropriate means to prevent the introduction into her limits of what she lawfully forbids her own people from making. It certainly was not meant to give citizens of other States greater rights in Iowa than Iowa's own people have.

But if this be not a sound interpretation of the Constitution; if intoxicating liquors are entitled to the same protection by the national

government as ordinary merchandise entering into commerce among the States; if Congress, under the power to regulate commerce, may, in its discretion, permit or prohibit commerce among the States in intoxicating liquors; and if, therefore, State police power, as the health, morals, and safety of the people may be involved in its proper exercise, can be overborne by national regulations of commerce, the former decisions of this court would seem to show that such laws of the States are valid, even where they affect commercial intercourse among the States, until displaced by Federal legislation, or until they come in direct conflict with some Act of Congress. Such was the doctrine announced in *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245. . . .

But, perhaps, the language of this court — all the judges concurring — which most directly bears upon the question before us, is found in *County of Mobile* v. *Kimball*, 102 U. S. 691, 701, reaffirming *Willson* v. *Blackbird Creek Marsh Co.* It was there said: "In *The License Cases* (5 How. 504), which were before the court in 1847, there was great diversity of views in the opinions of the different judges upon the operation of the grant of the commercial power of Congress in the absence of Congressional legislation. Extreme doctrines upon both sides of the question were asserted by some of the judges, but the decision reached, so far as it can be viewed as determining any question of construction, was confirmatory of the doctrine that legislation of Congress is essential to prohibit the action of the States upon the subject thus considered." This language is peculiarly significant in view of the fact that in one of *The License Cases* — *Peirce* v. *New Hampshire*, 5 How. 504, 557, 578 — the question was as to the validity of an Act of that State under which Peirce was indicted, convicted, and fined, for having sold, without a local town license, a barrel of gin, which he purchased in Boston, transported to Dover, New Hampshire, and there sold in the identical cask in which it was carried to that State from Massachusetts. . . .

It would seem that if the Constitution of the United States does not, by its own force, displace or annul a State law, authorizing the construction of bridges or dams across public navigable waters of the United States, thereby wholly preventing the passage of vessels engaged in interstate commerce upon such waters, the same Constitution ought not to be held to annul or displace a law of one of the States which, by its operation, forbids the bringing within her limits, from other States, articles which that State, in the most solemn manner, has declared to be injurious to the health, morals, and safety of her people. The silence of Congress upon the subject of interstate commerce, as affected by the police laws of the States, enacted in good faith to promote the public health, the public morals, and the public safety, and to that end prohibiting the manufacture and sale, within their limits, of intoxicating liquors to be used as a beverage, ought to have, at least, as much effect as the silence of Congress in reference to physical obstructions placed, under the authority of a State, in a navigable water

of the United States. The reserved power of the States to guard the health, morals, and safety of their people is more vital to the existence of society, than their power in respect to trade and commerce having no possible connection with those subjects.

For these reasons, we feel constrained to dissent from the opinion and judgment of the court.

Mr. Justice Lamar was not present at the argument of this case, and took no part in its decision.

LELOUP *v.* PORT OF MOBILE.

Supreme Court of the United States. 1888.

[127 *U. S.* 640.]

The case is stated in the opinion.

Mr. Gaylord B. Clark, for plaintiff in error submitted on his brief.

No appearance for defendant in error.

Mr. Justice Bradley delivered the opinion of the court.

This was an action brought in the Mobile Circuit Court, in the State of Alabama, by the Port of Mobile, a municipal corporation, against Edward Leloup, agent of the Western Union Telegraph Company, to recover a penalty imposed upon him for the violation of an ordinance of said corporation, adopted in pursuance of the powers given to it by the Legislature of Alabama, and in force in August, 1883. The ordinance was as follows, to wit: "Be it ordained by the Mobile Police Board, that the license tax for the year, from the 15th of March, 1883, to the 15th of March, 1884, be, and the same is hereby, fixed as follows: . . . On telegraph companies, $225. . . . Be it further ordained: For each and every violation of the aforesaid ordinance the person convicted thereof shall be fined by the recorder not less than one nor more than fifty dollars." . . .

In approaching the question thus presented, it is proper to note that the license tax in question is purely a tax on the privilege of doing the business in which the telegraph company was engaged. By the laws of Alabama in force at the time this tax was imposed, the telegraph company was required, in addition, to pay taxes to the State, county, and port of Mobile, on its poles, wires, fixtures, and other property, at the same rate and to the same extent as other corporations and individuals were required to do. Besides the tax on tangible property, they were also required to pay a tax of three-quarters of one per cent on their gross receipts within the State.

The question is squarely presented to us, therefore, whether a State, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business

is the transmission of messages from one State to another and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the Act of Congress passed July 24, 1866, and other Acts incorporated in Title LXV. of the Revised Statutes? Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done.

Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business.

Now, we have decided that communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between different States, it is commerce among the several States, and directly within the power of regulation conferred upon Congress, and free from the control of State regulations, except such as are strictly of a police character. . . . [Here the court states the decision in *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, *supra*, p. 1985, and *Western Union Telegraph Co.* v. *Texas*, *supra*, p. 1989 n.]. In the present case, it is true the tax is not laid upon individual messages, but it is laid on the occupation, or the business of sending such messages.

It comes plainly within the principle of the decisions lately made by this court in *Robbins* v. *The Taxing District of Shelby County*, 120 U. S. 489, and *Philadelphia and Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326.

It is parallel with the case of *Brown* v. *Maryland*, 12 Wheat. 419. That was a tax on an occupation, and this court held that it was equivalent to a tax on the business carried on, — (the importation of goods from foreign countries), — and even equivalent to a tax on the imports themselves, and therefore contrary to the clause of the Constitution which prohibits the States from laying any duty on imports. . . .

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 subjected to taxation, without the imposition of a tax which covers the entire operations of the company.

The State court relies upon the case of *Osborne* v. *Mobile*, 16 Wall. 479, which brought up for consideration an ordinance of the city, requiring every express company, or railroad company doing business in that city, and having a business extending beyond the limits of the State, to pay an annual license of $500; if the business was confined within the

limits of the State, the license fee was only $100; if confined within the city, it was $50; subject in each case to a penalty for neglect or refusal to pay the charge. This court held that the ordinance was not unconstitutional. This was in December term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several States.

A great number and variety of cases involving the commercial power of Congress have been brought to the attention of this court during the past fifteen years which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been that in order to give full and fair effect to the different clauses of the Constitution, the court has felt constrained to recur to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times, and to modify in some degree certain *dicta* and decisions that have occasionally been made in the intervening period. This is always done, however, with great caution, and an anxious desire to place the final conclusion reached upon the fairest and most just construction of the Constitution in all its parts.

In our opinion such a construction of the Constitution leads to the conclusion 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, 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. This is the result of so many recent cases that citation is hardly necessary. As a matter of convenient reference we give the following list: *Case of State Freight Tax*, 15 Wall. 232; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Mobile* v. *Kimball*, 102 U. S. 691; *Western Union Telegraph Co.* v. *Texas*, 105 U. S. 460; *Moran* v. *New Orleans*, 112 U. S. 69; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Brown* v. *Houston*, 114 U. S. 622; *Walling* v. *Michigan*, 116 U. S. 446; *Picard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Wabash Railway Co.* v. *Illinois*, 118 U. S. 557; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Western Union Telegraph Co.* v. *Pendleton*, 112 U. S. 347; *Ratterman* v. *Western Union Telegraph Co.* [127 U. S.], 411.

We may here repeat, what we have so often said before, that this exemption of interstate and foreign commerce from State regulation does not prevent the State from taxing the property of those engaged in such commerce located within the State as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce, such as wharfage, pilotage, and the

like. We have recently had before us the question of taxing the property of a telegraph company, in the case of *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530. . . . *Judgment reversed.*[1]

In *Stoutenburgh* v. *Hennick*, 129 U. S. 141 (1889), on error to the Supreme Court of the District of Columbia, the defendant in error had been convicted of acting as a commercial agent in the District without a license. A District legislative Act defined every person whose business it was to offer goods for sale by sample, etc., as a commercial agent, and required a license. The defendant was doing this sort of business as agent of a firm of merchants in Baltimore, Maryland. The Supreme Court of the District had discharged the defendant on *habeas corpus*, holding the Act invalid.

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

It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity.

Congress has express power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia, thus possessing the combined powers of a general and of a State government in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia "a body corporate for municipal purposes" could only authorize it to exercise municipal powers, and this is all that Congress attempted to do.

The Act of the Legislative Assembly under which Hennick was convicted imposed, as stated in its title, "a license on trades, business, and professions practised or carried on in the District of Columbia," and required by clause three of section twenty-one, among other persons in trade, commercial agents, whose business it was to offer merchandise for sale by sample, to take out and pay for such license. This provision was manifestly regarded as a regulation of a purely municipal character, as is perfectly obvious, upon the principle of *noscitur a sociis*, if the clause be taken as it should be, in connection with the other clauses and parts of the Act. But it is indistinguishable from that held void in *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, and

[1] See *Asher* v. *Texas*, *supra*, p. 2063 n.; *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *Massachusetts* v. *Western Union Tel. Co.*, 141 U. S. 40; *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 92; s. c. *supra*, p. 1279; *Postal Tel. Co.* v. *Charleston*, 153 U. S 692. — Ed.

Asher v. *Texas*, 128 U. S. 129, as being a regulation of interstate commerce, so far as applicable to persons soliciting, as Hennick was, the sale of goods on behalf of individuals or firms doing business outside the District.

The conclusions announced in the case of Robbins were that the power granted to Congress to regulate commerce is necessarily exclusive whenever the subjects of it are national or admit only of one uniform system or plan of regulation throughout the country, and in such case the failure of Congress to make express regulations is equivalent to indicating its will that the subject shall be left free; 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; and that a State statute requiring persons soliciting the sale of goods on behalf of individuals or firms doing business in another State to pay license fees for permission to do so, is, in the absence of Congressional action, a regulation of commerce in violation of the Constitution. The business referred to is thus definitely assigned to that class of subjects which call for uniform rules and national legislation, and is excluded from that class which can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. *Cooley* v. *Board of Wardens*, 12 How. 299; *Gilman* v. *Philadelphia*, 3 Wall. 713. It falls, therefore, within the domain of the great, distinct, substantive power to regulate commerce, the exercise of which cannot be treated as a mere matter of local concern, and committed to those immediately interested in the affairs of a particular locality.

It is forcibly argued that it is beyond the power of Congress to pass a law of the character in question solely for the District of Columbia, because whenever Congress acts upon the subject the regulations it establishes must constitute a system applicable to the whole country; but the disposition of this case calls for no expression of opinion upon that point.

In our judgment Congress, for the reasons given, could not have delegated the power to enact the 3d clause of the 21st section of the Act of Assembly, construed to include business agents such as Hennick, and there is nothing in this record to justify the assumption that it endeavored to do so, for the powers granted to the District were municipal merely, and although by several Acts Congress repealed or modified parts of this particular by-law, these parts were separably operative and such as were within the scope of municipal action, so that this Congressional legislation cannot be resorted to as ratifying the objectionable clause, irrespective of the inability to ratify that which could not originally have been authorized.

The judgment of the Supreme Court of the District is *Affirmed.*

MR. JUSTICE MILLER dissenting. I do not find myself able to agree with the court in its judgment in this case.

The Act of Congress creating a territorial government for the Dis

trict of Columbia declared that the legislative power of the District should "extend to all rightful subjects of legislation within said District;" which undoubtedly was intended to authorize the District to exercise the usual municipal powers. The Act of the Legislative Assembly of the District, under which Hennick was convicted, imposed "a license on trades, business, and professions practised or carried on in the District of Columbia," and a penalty on all persons engaging in such trades, business, or profession without obtaining that license. As the court says in its opinion, this was "manifestly regarded as a regulation of a purely municipal character."

The taxing of persons engaged in the business of selling by sample, commonly called drummers, is one of this class, and the only thing urged against the validity of this law is that it is a regulation of interstate commerce, and therefore an exercise of a power which rests exclusively in Congress. I pass the question, which is a very important one, whether this Act of the Legislature of the District of Columbia, being one exercised under the power conferred on it by Congress, and coming, as I think, strictly within the limit of the power thus conferred, is not, so far as this question is concerned, sustained by the authority of Congress itself, and is substantially the action of that body.

The cases of *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, and *Asher* v. *Texas*, 128 U. S. 129, hold the regulations requiring drummers to be licensed to be regulations of commerce, and invasions of the power conferred upon Congress on that subject by the Constitution of the United States. In those cases I concurred in the judgment, because, as applied to commerce between citizens of one State and those of another State, it was a regulation of interstate commerce; or, in the language of the Constitution, of commerce "among the several States," being a prosecution of a citizen of a State other than Tennessee, in the first case, for selling goods without a license to citizens of Tennessee, and in the other case to citizens of Texas.

But the constitutional provision is not that Congress shall have power to regulate all commerce. It has been repeatedly held that there is a commerce entirely within a State, and among its own citizens, which Congress has no power to regulate. The language of the constitutional provision points out three distinct classes of cases in which Congress may regulate commerce, and no others. The language is that "Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Unless the act for which Hennick was prosecuted in this case was commerce with a foreign nation, among the several States, or with an Indian tribe, it is not an act over which the Congress of the United States had any exclusive power of regulation. Commerce among the several States, as was early held by this court in *Gibbons* v. *Ogden*, 6 Wheat. 448, means commerce between the citizens of the several States, and had no reference to transactions by a State, as such, with another State in their corporate or public capacities. Indeed, it would

be of very little value if that was the limitation or the meaning to be placed upon it. I take it for granted, therefore, that its practical utility is in the power to regulate commerce between the citizens of the different States.

Commerce between a citizen of Baltimore, which Hennick is alleged to be in the prosecution in this case, and citizens of Washington, or of the District of Columbia, is not commerce "among the several States," and is not commerce between citizens of different States in any sense. Commerce by a citizen of one State, in order to come within the constitutional provision, must be commerce with a citizen of another State; and where one of the parties is a citizen of a Territory, or of the District of Columbia, or of any other place out of a State of the Union, it is not commerce among the citizens of the several States.

As the license law under which Hennick was prosecuted made it necessary for him to take out a license to do his business in the city of Washington, or the District of Columbia, which was not a State, nor a foreign nation, nor within the domain of an Indian tribe, the Act upon the subject does not infringe the Constitution of the United States.

For these reasons I dissent from the judgment of the court.

In *Louisville, etc. Ry. Co.* v. *Mississippi*, 133 U. S. 587 (1890), on error to the Supreme Court of Mississippi, Mr. Justice Brewer delivered the opinion of the court. The question presented is as to the validity of an Act passed by the Legislature of the State of Mississippi on the 2d of March, 1888. That Act is as follows: —

"Sec. 1. Be it enacted, That all railroads carrying passengers in this State (other than street railroads) shall provide equal, but separate, accommodation for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations. . . . [The other sections require conductors to assign each passenger to the proper car or compartment of a car, impose penalties upon corporations and conductors for violating the statute, repeal certain other Acts and give effect to this one from the time of its passage.]

The plaintiff in error was indicted for a violation of that statute. A conviction in the trial court was sustained in the Supreme Court, and from its judgment this case is here on error. The question is whether the Act is a regulation of interstate commerce and therefore beyond the power of the State; and the cases of *Hall* v. *DeCuir*, 95 U. S. 485, and *Wabash, St. Louis, etc. Railway* v. *Illinois*, 118 U. S. 557, are specially relied on by plaintiff in error.

It will be observed that this indictment was against the company for the violation of section one, in not providing separate accommodations for the two races; and not against a conductor for a violation of section two, in failing to assign each passenger to his separate compartment. It will also be observed that this is not a civil action brought

by an individual to recover damages for being compelled to occupy one particular compartment, or prevented from riding on the train; and hence there is no question of personal insult or alleged violation of personal rights. The question is limited to the power of the State to compel railroad companies to provide, within the State, separate accommodations for the two races. Whether such accommodation is to be a matter of choice or compulsion does not enter into this case. The case of *Hall* v. *DeCuir*, *supra*, was a civil action to recover damages from the owner of a steamboat for refusing to the plaintiff, a person of color, accommodations in the cabin specially set apart for white persons; and the validity of a statute of the State of Louisiana, prohibiting discrimination on account of color, and giving a right of action to the party injured for the violation thereof, was a question for consideration. The steamboat was engaged in interstate commerce, but the plaintiff only sought transportation from one point to another in the State. This court held that statute, so far as applicable to the facts in that case, to be invalid. That decision is invoked here; but there is this marked difference. The Supreme Court of the State of Louisiana held that the Act applied to interstate carriers, and required them, when they came within the limits of the State, to receive colored passengers into the cabin set apart for white persons. This court, accepting that construction as conclusive, held that the Act was a regulation of interstate commerce, and therefore beyond the power of the State. . . .

So the decision was by its terms carefully limited to those cases in which the law practically interfered with interstate commerce. Obviously whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with passengers of another race, was a question of interstate commerce, and to be determined by Congress alone. In this case, the Supreme Court of Mississippi held that the statute applied solely to commerce within the State; and that construction being the construction of the statute of the State by its highest court, must be accepted as conclusive here. If it be a matter respecting wholly commerce within a State, and not interfering with commerce between the States, then, obviously, there is no violation of the commerce clause of the Federal Constitution. Counsel for plaintiff in error strenuously insists that it does affect and regulate interstate commerce, but this contention cannot be sustained.

So far as the first section is concerned (and it is with that alone we have to do), its provisions are fully complied with when to trains within the State is attached a separate car for colored passengers. This may cause an extra expense to the railroad company; but not more so than State statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the State.

No question arises under this section, as to the power of the State to

separate in different compartments interstate passengers, or to affect, in any manner, the privileges and rights of such passengers. All that we can consider is, whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the State is no invasion of the powers given to Congress by the commerce clause. . . . [Here follows a quotation from the opinion in *Wabash Ry. Co.* v. *Illinois, supra*, p. 2045.]

The statute in this case, as settled by the Supreme Court of the State of Mississippi,[1] affects only such commerce within the State, and comes, therefore, within the principles thus laid down. It comes also within the opinion of this court in the case of *Stone* v. *Farmers' Loan and Trust Co.*, 116 U. S. 307.

We see no error in the ruling of the Supreme Court of the State of Mississippi, and its judgment is, therefore, *Affirmed.*

[Mr. Justice Harlan dissenting.][2]

[1] In s. c. 66 Miss. 662 (1889). In the course of the opinion in that case, the court (Cooper, J.) remarked: "The development of an immense interstate commerce, with its incidental multitude of phases and ramifications, has disclosed to the generation of this day the magnitude of the power delegated to the Federal Government by that clause of § 8 of Art. I. of the Constitution by which Congress is given power 'to regulate commerce with foreign nations and among the States, and with the Indian tribes.' It is not surprising that the recognition of its extent has been of gradual growth in the court called upon to construe it, nor that in judicial utterances there have been inconsistent and conflicting expressions." — Ed.

[2] In the dissenting opinion, Harlan, J., after quoting from *Hall* v. *DeCuir, supra*, p. 1983, added: "It seems to me that those observations are entirely pertinent to the case before us. In its application to passengers on vessels engaged in interstate commerce, the Louisiana enactment forbade the separation of the white and black races while such vessels were within the limits of that State. The Mississippi statute, in its application to passengers on railroad trains employed in interstate commerce, requires such separation of races, while those trains are within that State. I am unable to perceive how the former is a regulation of interstate commerce, and the other is not. It is difficult to understand how a state enactment, requiring the separation of the white and black races on interstate carriers of passengers, is a regulation of commerce among the States, while a similar enactment forbidding such separation is not a regulation of that character. Without considering other grounds upon which, in my judgment, the statute in question might properly be held to be repugnant to the Constitution of the United States, I dissent from the opinion and judgment in this case upon the ground that the statute of Mississippi is, within the decision in *Hall* v. *DeCuir*, a regulation of commerce among the States, and is, therefore, void. I am authorized by Mr. Justice Bradley to say that, in his opinion, the statute of Mississippi is void as a regulation of interstate commerce." — Ed.

LEISY *v.* HARDIN.

SUPREME COURT OF THE UNITED STATES. 1890.

[135 *U. S.* 100.][1]

ERROR to the Supreme Court of Iowa. The plaintiffs brought replevin, in a court of the city of Keokuk, in Iowa, against Hardin, marshal of that city, and a constable of the county, to recover a large quantity of beer in quarter barrels, one eighth barrels, and sealed cases. On issue joined, the case, by consent, was tried by the court without a jury, and judgment was given for the plaintiffs. The court found that the plaintiffs were citizens of Illinois, doing business, as brewers, at Peoria, in that State; that the beer in question was made by them and sealed up in Illinois, and transported to Iowa and there sold and offered for sale, but only in the original and unbroken packages, and that none of it was sold or offered for sale to minors or persons in the habit of becoming intoxicated; that the defendant, as constable, on June 30, 1888, under color of authority from a justice of the peace, acting under State statutes, seized the beer, and that the plaintiffs on July 2, 1888, filed a petition claiming the goods as owners and denying the validity of the State statutes, and thereupon recovered possession of the beer. The local court held the State enactment invalid. On exceptions the Supreme Court of Iowa reversed this judgment.

The statutes of Iowa (Code of 1873, § 1523), forbade manufacturing or selling intoxicating liquors, or keeping them with intent to sell, except as provided in the Act. A law of April 12, 1888 (Laws, 1888, p. 91), forbade manufacturing for sale, selling, keeping for sale, giving away, exchanging, bartering, or dispensing intoxicating liquor for any purpose except as provided in the Act. Permits for one year were allowed for pharmaceutical, medicinal, chemical, and sacramental purposes only. By an Act of 1884, beer had been defined as intoxicating liquor.

Section 1524 of the Code of 1873 had saved from the prohibitions of the State law the importer and seller of foreign liquors in the original package, who acted under the laws of the United States regulating such importation, and it also allowed the manufacture in Iowa of intoxicating liquors to be sold for the purposes specifically authorized by law. But this section was repealed by the Act of April 12, 1888. And an Act of April 5, 1886 (Laws, 1886, p. 83), had amended § 1553 of the Code of 1873, by that provision as to bringing in intoxicating liquors, which, in 1888, was held unconstitutional in *Bowman* v. *Chic., &c. Ry. Co.*, *supra*, p. 2080.

Mr. James C. Davis, for plaintiffs in error; *Mr. H. Scott Howell* and *Mr. W. B. Collins*, for defendant in error; *Mr. John Y. Stone*, Attorney-General for the State of Iowa, for that State.

[1] The statement of facts is shortened. — ED.

Mr. Chief Justice Fuller, after stating the case, 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. 466; *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 of Philadelphia*, 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 government 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* 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? . . . [Here follows a statement of *Brown* v. *Md.*, *supra*, p. 1826].

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. . . . [Here follows a statement of *Bowman* v. *Chicago, &c. Ry. Co.*, *supra*, p. 2080, and quotations from that case

and also from *The License Cases* (*Peirce* v. *N. H.*), *supra*, p. 1851. After quoting from the opinion of TANEY, C. J., in that case, the opinion proceeds :]

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. . . . [Here follows a summary of the decisions in twenty-four cases in this court.]

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. . . . [Here follows a quotation from *Mugler* v. *Kansas*, *supra*, p. 782].

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.

Prior to 1888 the statutes of Iowa permitted the sale of foreign liquors imported under the laws of the United States, provided the sale was by the importer in the original casks or packages, and in quantities not less than those in which they were required to be imported; and the provisions of the statute to this effect were declared by the Supreme Court of Iowa, in *Pearson* v. *International Distillery*, 72 Iowa, 348, 354. to be "intended to conform the statute to the doctrine of the United States Supreme Court, announced in *Brown* v. *Maryland*, 12 Wheat. 419, and *License Cases*, 5 How. 504, so that the statute should not conflict with the laws and authority of the United States." But that provision of the statute was repealed in 1888, and the law so far amended that we understand it now to provide that, whether imported or not, wine cannot be sold in Iowa except for sacramental purposes, nor alcohol, except for specified chemical purposes, nor intoxicating liquors, including ale and beer, except for pharmaceutical and medicinal purposes, and not at all except by citizens of the State of Iowa, who are registered pharmacists, and have permits obtained as prescribed by the statute, a permit being also grantable to one discreet person in any township where a pharmacist does not obtain it.

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]

Mr. Justice Gray, with whom concurred Mr. Justice Harlan and Mr. Justice Brewer, dissenting.

[The dissenting opinion given by Mr. Justice Gray concludes as follows:]

[1] This case, submitted on January 6, 1890, was decided on April 23, 1890. For an interesting and elaborate decision *contra*, given in the interval, see *State* v. *Fulker*, 43 Kans. 237. In that case the opinion (Johnson, J.) was filed January 11, 1890. In *State* v. *Winters*, 44 Kans. 723 (opinion filed December 6, 1890), the court followed *Leisy* v. *Hardin*, as being the controlling authority. And so *Wind* v. *Iler*, 61 N. W. Rep. 1001 (Iowa, 1895).

Leisy v. *Hardin*, below, is found in 78 Iowa, 286. Compare *In re* Sanders, 52 Fed Rep. 802. — Ed.

It only remains to sum up the reasons which have satisfied us that the judgment of the Supreme Court of Iowa in the case at bar should be affirmed.

The protection of the safety, the health, the morals, the good order, and the general welfare of the people is the chief end of government. *Salus populi suprema lex.* The police power is inherent in the States, reserved to them by the Constitution, and necessary to their existence as organized governments. The Constitution of the United States and the laws made in pursuance thereof being the supreme law of the land, all statutes of a State must, of course, give way, so far as they are repugnant to the national Constitution and laws. But an intention is not lightly to be imputed to the framers of the Constitution, or to the Congress of the United States, to subordinate the protection of the safety, health, and morals of the people to the promotion of trade and commerce.

The police power extends to the control and regulation of things which, when used in a lawful and proper manner, are subjects of property and of commerce, and yet may be used so as to be injurious or dangerous to the public safety, the public health, or the public morals. Common experience has shown that the general and unrestricted use of intoxicating liquors tends to produce idleness, disorder, disease, pauperism and crime.

The power of regulating or prohibiting the manufacture and sale of intoxicating liquors appropriately belongs, as a branch of the police power, to the legislatures of the several States, and can be judiciously and effectively exercised by them alone, according to their views of public policy and local needs; and cannot practically, if it can constitutionally, be wielded by Congress as part of a national and uniform system.

The statutes in question were enacted by the State of Iowa in the exercise of its undoubted power to protect its inhabitants against the evils, physical, moral, and social, attending the free use of intoxicating liquors. They are not aimed at interstate commerce; they have no relation to the movement of goods from one State to another, but operate only on intoxicating liquors within the territorial limits of the State; they include all such liquors without discrimination, and do not even mention where they are made or whence they come. They affect commerce much more remotely and indirectly than laws of a State (the validity of which is unquestioned), authorizing the erection of bridges and dams across navigable waters within its limits, which wholly obstruct the course of commerce and navigation; or than quarantine laws, which operate directly upon all ships and merchandise coming into the ports of the State.

If the statutes of a State, restricting or prohibiting the sale of intoxicating liquors within its territory, are to be held inoperative and void as applied to liquors sent or brought from another State and sold by the importer in what are called original packages, the consequence must be

that an inhabitant of any State may, under the pretext of interstate commerce, and without license or supervision of any public authority, carry or send into, and sell in, any or all of the other States of the Union intoxicating liquors of whatever description, in cases or kegs, or even in single bottles or flasks, despite any legislation of those States on the subject, and although his own State should be the only one which had not enacted similar laws. It would require positive and explicit legislation on the part of Congress, to convince us that it contemplated or intended such a result.

The decision in *The License Cases*, 5 How. 504, by which the court, maintaining these views, unanimously adjudged that a general statute of a State, prohibiting the sale of intoxicating liquors without license from municipal authorities included liquors brought from another State and sold by the importer in the original barrel or package, should be upheld and followed; because it was made upon full argument and great consideration; because it established a wise and just rule, regarding a most delicate point in our complex system of government, a point always difficult of definition and adjustment, the contact between the paramount commercial power granted to Congress and the inherent police power reserved to the States; because it is in accordance with the usage and practice which have prevailed during the century since the adoption of the Constitution; because it has been accepted and acted on for forty years by Congress, by the State legislatures, by the courts and by the people; and because to hold otherwise would add nothing to the dignity and supremacy of the powers of Congress, while it would cripple, not to say destroy, the whole control of every State over the sale of intoxicating liquors within its borders.

The silence and inaction of Congress upon the subject, during the long period since the decision in *The License Cases*, appear to us to require the inference that Congress intended that the law should remain as thereby declared by this court; rather than to warrant the presumption that Congress intended that commerce among the States should be free from the indirect effect of such an exercise of the police power for the public safety, as had been adjudged by that decision to be within the constitutional authority of the States.

For these reasons, we are compelled to dissent from the opinion and judgment of the majority of the court.[1]

[1] In *Lyng* v. *Michigan*, 135 U. S. 161 (1890), the case immediately following *Leisy* v. *Hardin*, in the reports, on error to the Supreme Court of Michigan, in reversing a judgment of that court upon a similar question, the court (FULLER, C. J.) said: "Under the statute in question, which is entitled 'An Act to provide for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving or delivering spirituous or intoxicating liquors and malt, brewed or fermented liquors or vinous liquors in this State, and to repeal all Acts or parts of Acts inconsistent with the provisions of this Act,' an annual tax is levied 'upon the business of selling only brewed or malt liquors at wholesale or retail, or at wholesale and retail' of three hundred dollars, and 'upon the business of manufacturing brewed or malt liquors for sale, sixty-five dollars per annum.' The manufacturer of malt or brewed

In *Minnesota* v. *Barber*, 136 U. S. 313 (1890), Mr. Justice Harlan delivered the opinion of the court.

Henry E. Barber, the appellee, was convicted before a justice of the peace in Ramsey County, Minnesota, of the offence of having wrongfully and unlawfully offered and exposed for sale, and of having sold, for human food, one hundred pounds of fresh uncured beef, part of an animal slaughtered in the State of Illinois, but which had not been inspected in Minnesota, and "certified" before slaughter by an inspector appointed under the laws of the latter State. Having been committed to the common jail of the county pursuant to a judgment of imprisonment for the term of thirty days, he sued out a writ of *habeas corpus* from the Circuit Court of the United States for the District of Minnesota, and prayed to be discharged from such imprisonment, upon the ground that the statute of that State, approved April 16, 1889, and under which he was prosecuted, was repugnant to the provision of the Constitution giving Congress power to regulate commerce among the several States, as well as to the provision declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens

liquors made outside of the State of Michigan cannot introduce them into the hands of consumers or retail dealers in that State, without becoming subject to this wholesale dealer's tax of three hundred dollars per annum in every township, village, or city where he attempts to do this. The manufacturer in the State need only pay the manufacturer's tax of sixty-five dollars, and is then exempt from paying the tax imposed on the wholesale dealer.

"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 such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. *Leloup* v. *Mobile*, 127 U. S. 640, 648, and cases cited. In *Bowman* v. *Chicago and Northwestern Railway*, 125 U. S. 465, it was decided that a section of the Code of the State of Iowa, 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 essentially a regulation of commerce among the States, and not being sanctioned by the authority, express or implied, of Congress, was invalid because repugnant to the Constitution of the United States; and in *Leisy* v. *Hardin* [135 U. S.], 100, the judgment in which has just been announced, that the right of importation of ardent spirits, distilled liquors, ale and beer, from one State into another, includes, by necessary implication, the right of sale in the original packages at the place where the importation terminates; and that the power cannot be conceded to a State to exclude, directly or indirectly, the subject of interstate commerce, or, by the imposition of burdens thereon, to regulate such commerce, without Congressional permission. The same rule that applies to the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops of Washington, the tobacco of Maryland and Connecticut, or the products, natural or manufactured, of any State, applies to all commodities in which a right of traffic exists, recognized by the laws of Congress, the decisions of courts, and the usages of the commercial world. It devolves on Congress to indicate such exceptions as in its judgment a wise discretion may demand under particular circumstances. Lyng was merely the representative of the importers, and his conviction cannot be sustained, in view of the conclusions at which we have arrived."

Justices Harlan, Gray, and Brewer dissented upon the grounds stated in their opinion in *Leisy* v. *Hardin* [135 U. S.], 100.

in the several States. Art. 1, Sec. 8. Art. 4, Sec. 2. The court below, speaking by Judge Nelson, held the statute to be in violation of both of these provisions, and discharged the prisoner from custody. *In re Barber*, 39 Fed. Rep. 641. A similar conclusion in reference to the same statute had been previously reached by Judge Blodgett, holding the Circuit Court of the United States for the Northern District of Illinois. *Swift* v. *Sutphin*, 39 Fed. Rep. 630.

From the judgment discharging Barber the State has prosecuted the present appeal. Rev. Stat. § 764; 23 Stat. 437, c. 353. Attorneys representing persons interested in maintaining the validity of a statute of Indiana, alleged to be similar to that of Minnesota, were allowed to participate in the argument in this court, and to file briefs.

The statute of Minnesota upon the validity of which the decision of the case depends is as follows: Laws of 1889, c. 8, p. 51. . . . [Here follows the Act in full. It is entitled "An Act for the protection of the public health," &c. It prohibits the sale of "fresh beef, veal, mutton, lamb or pork for human food in this State, except as hereinafter provided;" provides for the appointment of inspectors of cattle, sheep, and swine, to inspect such creatures within twenty-four hours before they are slaughtered, and give certificates if found fit for slaughter, and to remove and destroy if found unfit.]

The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, — namely, to protect the health of the people of Minnesota, — cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose 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 such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this court. . . . [Here follow quotations from *Henderson* v. *New York*, *supra*, p. 1961, *People* v. *Compagnie Gén. Trans.*, *supra*, p. 1967 n., *Soon Hing* v. *Crowley*, *supra*, p. 627 n., *Mugler* v. *Kansas*, *supra*, p. 782.]

Underlying the entire argument in behalf of the State is the proposition that it is impossible to tell, by an inspection of fresh beef, veal, mutton, lamb, or pork, designed for human food, whether or not it came from animals that were diseased when slaughtered; that inspection on the hoof, within a very short time before animals are slaughtered, is the only mode by which their condition can be ascertained with certainty. And it is insisted, with great confidence, that of this fact the court must take judicial notice. If a fact, alleged to exist, and upon which the rights of parties depend, is within common experience and knowledge, it is one of which the courts will take judicial notice. *Brown* v. *Piper*, 91 U. S. 37, 42; *Phillips* v. *Detroit*, 111 U. S. 604, 606. But we cannot assent to the suggestion that the fact alleged in this case to exist is of that class.

It may be the opinion of some that the presence of disease in animals, at the time of their being slaughtered, cannot be determined by inspection of the meat taken from them; but we are not aware that such is the view universally, or even generally, entertained. But if, as alleged, the inspection of fresh beef, veal, mutton, lamb, or pork will not necessarily show whether the animal from which it was taken was diseased when slaughtered, it would not follow that a statute like the one before us is within the constitutional power of the State to enact. On the contrary, the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease. A careful examination of the Minnesota Act will place this construction of it beyond question.

The first section prohibits the sale of any fresh beef, veal, mutton, lamb, or pork for human food, except as provided in that Act. The second and third sections provide that all cattle, sheep, and swine to be slaughtered for human food within the respective jurisdictions of the inspectors, shall be inspected by the proper local inspector appointed in Minnesota, within twenty-four hours before the animals are slaughtered, and that a certificate shall be made by such inspector, showing (if such be the fact) that the animals, when slaughtered, were found healthy and in suitable condition to be slaughtered for human food. The fourth section makes it a misdemeanor, punishable by fine or imprisonment, for any one to sell, expose, or offer for sale, for human food, in the State, any fresh beef, veal, mutton, lamb, or pork, not taken from an animal inspected and "certified before slaughter, by the proper local inspector" appointed under that Act. As the inspection must take place within the twenty-four hours immediately before the slaughtering, the Act, by its necessary operation, excludes from the Minnesota market, practically, all fresh beef, veal, mutton, lamb, or pork — in whatever form, and although entirely sound, healthy, and fit for human food — taken from animals slaughtered in other States; and directly tends to restrict the slaughtering of animals, whose meat is to be sold in Minnesota for human food, to those engaged in such business in that State. This must be so, because the time, expense, and labor of sending animals from points outside of Minnesota to points in that State to be there inspected, and bringing them back, after inspection, to be slaughtered at the place from which they were sent — the slaughtering to take place within twenty-four hours after inspection, else the certificate of inspection becomes of no value — will be so great as to amount to an absolute prohibition upon sales, in Minnesota, of meat from animals not slaughtered within its limits. When to this is added the fact that the statute, by its necessary operation, prohibits the sale, in the State, of fresh beef, veal, mutton, lamb, or pork, from animals that may have been inspected carefully and thoroughly in the State where they were

slaughtered, and before they were slaughtered, no doubt can remain as to its effect upon commerce among the several States. It will not do to say — certainly no judicial tribunal can, with propriety, assume — that the people of Minnesota may not, with due regard to their health, rely upon inspections in other States of animals there slaughtered for purposes of human food. If the object of the statute had been to deny altogether to the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb, or pork, from animals slaughtered outside of that State, and to compel the people of Minnesota, wishing to buy such meats, either to purchase those taken from animals inspected and slaughtered in the State, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the State, that object is attained by the Act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other States in favor of the products and business of Minnesota as interferes with and burdens commerce among the several States, it would be difficult to enact legislation that would have that result.

The principles we have announced are fully supported by the decisions of this court. . . . [Here follow quotations from *Woodruff* v. *Parham*, *supra*, p. 1922, *Hinson* v. *Lott*, *supra*, p. 1926 n., *Welton* v. *Mo.*, *supra*, p. 1957, *R. R. Co.* v. *Husen*, *supra*, p. 753, and *Guy* v. *Baltimore*, 100 U. S. 434.]

The latest case in this court upon the subject of interstate commerce, as affected by local enactments discriminating against the products and citizens of other States, is *Walling* v. *Michigan*, 116 U. S. 446, 455. We there held to be unconstitutional a statute of Michigan, imposing a license tax upon persons, not residing or having their principal place of business in that State, but whose business was that of selling or soliciting the sale of intoxicating liquors to be shipped into the State from places without, a similar tax not being imposed in respect to the sale and soliciting for sale of liquors manufactured in Michigan. Mr. Justice Bradley, delivering the opinion of the court, said: "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 power conferred by the Constitution upon the Congress of the United States."

It is, however, contended, in behalf of the State, that there is, in fact, no interference, by this statute, with the bringing of cattle, sheep, and swine into Minnesota from other States, nor any discrimination against the products or business of other States, for the reason — such is the argument — that the statute requiring an inspection of animals on the hoof, as a condition of the privilege of selling, or offering for sale, in the State, the meats taken from them, is applicable alike to all owners of

such animals, whether citizens of Minnesota or citizens of other States. To this we answer, that a statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish. 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. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497; *Case of the State Freight Tax*, 15 Wall. 232. The people of Minnesota have as much right to protection against the enactments of that State, interfering with the freedom of commerce among the States, as have the people of other States. Although this statute is not avowedly, or in terms, directed against the bringing into Minnesota of the products of other States, its necessary effect is to burden or obstruct commerce with other States, as involved in the transportation into that State, for purposes of sale there, of all fresh beef, veal, mutton, lamb, or pork, however free from disease may have been the animals from which it was taken.

The learned counsel for the State relies with confidence upon *Patterson* v. *Kentucky*, 97 U. S. 501, as supporting the principles for which he contends. . . . [Here follows a statement of that case, and quotations from it.] Now, the counsel of the State asks: If the State may, by the exercise of its police power, determine for itself what test shall be made of the safety of illuminating oils, and prohibit the sale of all oils not subjected to and sustaining such test, although such oils are manufactured by a process patented under the Constitution and laws of the United States, why may it not determine for itself what test shall be made of the wholesomeness and safety of food, and prohibit the sale of all such food not submitted to and sustaining the test, although it may chance that articles otherwise subject to the Constitution and laws of the United States cannot sustain the test? The analogy, the learned counsel observes, seems close. But it is only seemingly close. There is no real analogy between that case and the one before us. The Kentucky statute prescribed no test of inspection which, in view of the nature of the property, was either unusual or unreasonable, or which by its necessary operation discriminated against any particular oil because of the locality of its production. If it had prescribed a mode of inspection to which citizens of other States, having oils designed for illuminating purposes, and which they desired to sell in the Kentucky market, could not have reasonably conformed, it would undoubtedly have been held to be an unauthorized burden upon interstate commerce. Looking at the nature of the property to which the Kentucky statute had reference, there was no difficulty in the way of the patentee of the particular oil there in question submitting to the required local inspection.

But a law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exertion of the police powers of the State, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether

the introduction into the State of sound meats, the product of animals slaughtered in other States. It is one thing for a State to exclude from its limits cattle, sheep, or swine, actually diseased, or meats that, by reason of their condition, or the condition of the animals from which they are taken, are unfit for human food, and punish all sales of such animals or of such meats within its limits. It is quite a different thing for a State to declare, as does Minnesota by the necessary operation of its statute, that fresh beef, veal, mutton, lamb, or pork — articles that are used in every part of this country to support human life — shall not be sold at all for human food within its limits, unless the animal from which such meats are taken is inspected in that State, or, as is practically said, unless the animal is slaughtered in that State.

One other suggestion by the counsel for the State deserves to be examined. It is, that so far as this statute is concerned, the people of Minnesota can purchase in other States fresh beef, veal, mutton, lamb, and pork, and bring such meats into Minnesota for their own personal use. We do not perceive that this view strengthens the case for the State, for it ignores the right which the people of other States have in commerce between those States and the State of Minnesota. And it ignores the right of the people of Minnesota to bring into that State, for purposes of sale, sound and healthy meat, wherever such meat may have come into existence. But there is a consideration arising out of the suggestion just alluded to which militates somewhat against the theory that the statute in question is a legitimate exertion of the police powers of the State for the protection of the public health. If every hotel-keeper, railroad or mining corporation, or contractor, in Minnesota, furnishing subsistence to large numbers of persons, and every private family in that State, that is so disposed, can, without violating this statute, bring into the State from other States and use for their own purposes, fresh beef, veal, mutton, lamb, and pork, taken from animals slaughtered outside of Minnesota which may not have been inspected at all, or not within twenty-four hours before being slaughtered, what becomes of the argument, pressed with so much earnestness, that the health of the people of that State requires that they be protected against the use of meats from animals not inspected in Minnesota within the twenty-four hours before being slaughtered? If the statute, while permitting the sale of meats from animals slaughtered, inspected, and "certified" in that State, had expressly forbidden the introduction from other States, and their sale in Minnesota, of all fresh meats, of every kind, without making any distinction between those that were from animals inspected on the hoof and those that were not so inspected, its unconstitutionality could not have been doubted. And yet it is so framed that this precise result is attained as to all sales in Minnesota, for human food, of meats from animals slaughtered in other States.

In the opinion of the court the statute in question, so far as its provisions require, as a condition of sales in Minnesota of fresh beef, veal, mutton, lamb, or pork for human food, that the animals from which

such meats are taken shall have been inspected in Minnesota before being slaughtered, is in violation of the Constitution of the United States and void.

The judgment discharging the appellee from custody is affirmed.[1]

[1] In *Brimmer* v. *Rebman*, 138 U. S. 78 (1891), a statute of Virginia, approved Feb. 18, 1890, reciting a belief that "unwholesome meats are being offered for sale in this Commonwealth," made it unlawful and penal to offer for sale therein, any fresh beef, veal, or mutton, slaughtered one hundred miles or over from the place where so offered for sale, unless first inspected and approved by a certain official of the county or city, who should be paid by the owner for his inspection one cent per pound. Rebman had been convicted and imprisoned by a local justice of the peace under this statute, and discharged on *habeas corpus* by the Circuit Court of the United States for the Eastern District of Virginia; whereon the officer having him in charge brought the case into the Supreme Court on appeal. In affirming the judgment of the Circuit Court, HARLAN, J., for the court, said: "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 there 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 kind, 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.*"

In *Voight* v. *Wright*, 141 U. S. 62 (1891), on error to the Corporation Court of Norfolk, Virginia, in holding invalid a law of that State which required flour brought into the State to be "reviewed and have the Virginia inspection marked thereon," and required a payment to the inspector of two cents a barrel, and did not require, although it permitted, inspection in the case of flour manufactured in the State, the court (BRADLEY, J.) said: "The State of Virginia has had a system of inspection laws from an early period; but they have related to articles produced in the State, and the main purpose of the inspection required has been to prepare the articles for exportation, in order 'to preserve the credit of the exports of the State in foreign markets, as well as to certify their genuineness and purity for the benefit of purchasers generally. Chief Justice Marshall, in *Gibbons* v. *Ogden*, 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.' 9 Wheat. 1, 203. In *Brown* v. *Maryland*, speaking of the time when inspection is made, he adds: '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.' 12 Wheat. 419, 438. Whilst, from the remark of the Chief Justice, last cited, it would appear that inspection may be made of imported goods, as well as goods intended for export, yet in what manner and to what extent this may be done without coming into collision with the power of Congress to regulate foreign and interstate commerce, may be somewhat difficult to explain with precision. In the case of *People* v. *Compagnie*

Générale Transatlantique, 107 U. S. 59, it was held by this court that a law of the State of New York, imposing a tax upon alien passengers coming by vessel from a foreign country to the port of New York, is a regulation of foreign commerce, and void, although it was declared by the title of the law to be 'An Act to raise money for the execution of the inspection laws of the State;' which laws authorized passengers to be inspected in order to determine who were criminals, paupers, lunatics, orphans or infirm persons, without means or capacity to support themselves, and subject to become a public charge. It is true that the law was held not to be an inspection law, because such laws have reference only to personal property, and not to persons. But the question is still open as to the mode and extent in which State inspection laws can constitutionally be applied to personal property imported from abroad, or from another State, — whether such laws can go beyond the identification and regulation of such things as are directly injurious to the health and lives of the people, and therefore not entitled to the protection of the commercial power of the government, as explained and distinguished in the case of *Crutcher* v. *Kentucky*, [141 U. S.], 47, just decided.

"It may be remarked, in passing, that in the notes to *Turner* v. *Maryland*, 107 U. S. 38, 51, 53, prepared by Mr. Justice Blatchford, in which is contained a list of the various inspection laws of the different States, we do not observe any laws which seem to provide for the inspection of articles other than those which are the produce of the State, and this generally with a view to preparing them for exportation.

"But, be this as it may, and without attempting to lay down any specific proposition on this somewhat difficult subject, there is enough in the case before us to decide it on satisfactory grounds, without passing upon the general right of the State to inspect imports, or the qualifications to which it must necessarily be subject. The law in question is a discriminating law, and requires the inspection of flour brought from other States, when such inspection is not required for flour manufactured in Virginia. This aspect of the case brings it directly within the principle of *Brimmer* v. *Rebman*, 138 U. S. 78, decided at the present term."

In *Turner* v. *Md.*, 107 U. S. 38, 51 (1882), in affirming a judgment of the Maryland Court of Appeals, holding valid certain statutes for the inspection of tobacco, the court (BLATCHFORD, J.), after quoting what is said in *Gibbons* v. *Ogden* (*supra*, p. 1799), as to this sort of law, had said: "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 [a valuable note preserves a reference to these 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 contents 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 [another important note preserves full and exact references to the State laws], 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.

"Objection is made that the Maryland laws are not inspection laws, but are regulations of commerce, because they require every hogshead of tobacco to be brought to a State tobacco warehouse. But we are of opinion that, it being lawful to require the article to be subjected to the prescribed examination by a public officer before it can be accounted a lawful subject of commerce, it is not foreign to the character of an inspection law to require that the article shall be brought to the officer instead of sending the officer to the article. It is a matter as to which the State has a reasonable discretion, and we are unable to see that such discretion has been exercised in any such manner as to carry the statutes beyond the scope of inspection laws.

"There is another view of the subject which has great force. Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds, all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should coexist in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirement, or the inspection may be made to extend to all of the above matters. When all are prescribed, and then inspection as to quality is dropped out, leaving the rest in force, it cannot be said to be a necessary legal conclusion that the law has ceased to be an inspection law.

"As is suggested in *Neilson* v. *Garza*, 2 Woods, 287, by Mr. Justice Bradley, it may be doubtful whether it is not exclusively the province of Congress, and not at all that of a court, to decide whether a charge or duty, under an inspection law, is or is not excessive. There is nothing in the record from which it can be inferred that the State of Maryland intended to make its tobacco-inspection laws a mere cover for laying revenue duties upon exports. The case is not like that of *Jackson Mining Co.* v. *Auditor-General*, 32 Mich. 488, where a State tax imposed on mineral ore exported from the State before being smelted was held to be a tax on interstate commerce, no such tax being imposed on like ore reduced within the State. The question of the right of Maryland, under the Constitution of the United States, to require that the dimensions and gross weight of a hogshead containing tobacco grown upon its soil shall be ascertained by its officers before the tobacco shall be exported, is a question of law, because the question is as to whether such law is an inspection law. Moreover, the question as to whether the charges for such examination and its attendant duties are 'absolutely necessary,' was not before the State court, and was not passed upon by it, and cannot be considered by this court.

"It is urged, however, that the Maryland law is a regulation of commerce and unconstitutional, because it discriminates between the State buyer and manufacturer of leaf tobacco and the purchaser who buys for the purpose of transporting the tobacco to another State or to a foreign country. But the State, having the right to prescribe the form, dimensions, and capacity of the packages in which its products shall be encased before they are brought to, or sold in, the public market, has enacted that no tobacco of the growth of the State shall be passed or accounted lawful tobacco unless it be packed

in hogsheads of a specified size. Laws of 1872, c. 36, sect. 26. This regulation covers all tobacco grown in the State and packed in hogsheads, without reference to the purpose for which it is packed. If the tobacco is to be dealt in within the limits of the State, the examination as to dimensions is properly left to the contracting parties, probably under the view that the seller for the home market will have a sufficient stimulus to observe the requirement of the law, in a desire to maintain the reputation of his commodity. But, if the tobacco is to be exported as lawful tobacco, the State may, with equal propriety, prescribe and enforce an examination by an officer, within the State, of a hogshead containing tobacco grown in the State, and intended for shipment beyond the limits of the State, in order to ascertain, before the hogshead is carried out of the State, and before it becomes an article of commerce, that it is of the dimensions prescribed as necessary to make it lawful tobacco. In *Cooley* v. *The Board of Wardens*, 12 How. 299, a law of Pennsylvania provided that a vessel not taking a pilot should pay half pilotage, but that this should not apply to American vessels engaged in the Pennsylvania coal trade. It was held that the general regulation as to half pilotage was proper, and that the exemption was a fair exercise of legislative discretion acting upon the subject of the regulation of the pilotage of the port of Philadelphia. The court said that, in making pilotage regulations, the legislative discretion had been constantly exercised, in this and other countries, in making discriminations, founded on differences both in the character of the trade and in the tonnage of vessels engaged therein. Any discrimination appearing in the present case is of the same character as that in the pilotage case, and fairly within the discretion of the State. Such discretion reasonably extends to exempting from opening for internal inspection an article grown in the State, when it is marked with the name of an ascertained owner, and to requiring that an article grown in the State shall be opened for internal inspection when it is not intended to be put on the market on the credit of an ascertained owner, and is not identified by marks as owned by him. So, too, in the exercise of the same discretion, and of its power to prescribe the method in which its products shall be fitted for exportation, it may direct that a certain product, while it remains 'in the bosom of the country' and before it has become an article 'of foreign commerce or of commerce between the States,' shall be encased in such a package as appears best fitted to secure the safety of the package and to identify its contents as the growth of the State, and may direct that the weight of the package, and the name of the owner of its contents, shall be plainly marked on the package, and may also exempt the contents from inspection as to quality, when the weight of the package and the name of the owner are duly ascertained to be marked thereon. Such a law is an inspection law, and may be executed by imposing a 'tax or duty of inspection,' which tax, so far as it acts upon articles for exportation, is an exception to the prohibition on the States against laying duties on exports, the exception being made because the tax would otherwise be within the prohibition. *Brown* v *State of Maryland*, 12 Wheat. 419, 438. At the same time we fully recognize the principle that any inspection law is subject to the paramount right of Congress to regulate commerce with foreign nations and among the several States.

"The general provision of the Maryland statute is, that it shall not be lawful to carry out of the State, in hogsheads, any tobacco raised in the State, except in hogsheads which shall have been inspected, passed, and marked agreeably to the provisions of the Act. These provisions include the doing of many things in addition to an inspection of quality. If the tobacco is grown in the State, and packed in the county or neighborhood where grown, it may be carried out of the State without having its quality inspected, if it be marked in the manner prescribed. But it still is necessary it should be inspected in all other particulars, and inspected also to ascertain that it was grown in the State and packed where grown, and is marked as required. If it does not answer the latter requirements, it is to be further inspected as to quality. The necessity thus existing for subjecting the hogshead to inspection under all circumstances, a charge of some kind was proper for outage; that is, a charge payable, on withdrawing the hogshead, for labor connected with receiving and handling it and doing the other things above mentioned. Such charge appears to be a charge for services properly rendered.

The above views cover the objection made that the Maryland law discriminates

In re RAHRER.

Supreme Court of the United States. 1891.

[140 *U. S.* 545.][1]

This was an application for a writ of *habeas corpus* made to the Circuit Court of the United States for the District of Kansas by Charles A. Rahrer, who alleged in his petition that he was illegally and wrongfully restrained of his liberty by John M. Wilkerson, sheriff of Shawnee County, Kansas, in violation of the Constitution of the United States.

The writ was issued, and return having been made thereto, the cause was heard on the following agreed statement of facts: . . . [The petitioner, being merely the agent at Topeka, in Kansas, of Maynard, Hopkins, & Co., a firm of dealers in intoxicating liquors in Kansas City, Mo., received from them in 1890 a car-load of such liquors, and sold at Topeka, on August 9, 1890, a part of it in the original packages; namely, a "pony keg" of beer, and one pint of whiskey. For these sales he was arrested, under the laws of Kansas, and held in custody by the respondent, Wilkerson. The sales were unlawful under the laws of Kansas, if they were subject to the operation of those laws.]

On August 8, 1890, an Act of Congress was approved, entitled "An Act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases," which reads 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." 26 Stat. 313, c. 728.

between different classes of exporters of tobacco, and favors the person who packs it for exportation in the county or neighborhood where it is grown, as against other exporters. Whatever discrimination in this respect or in respect of purchases for exportation, before referred to, results from any provisions of the law, is a discrimination which, we think, the State has a right to make, resulting, as it does, wholly from regulations which affect the article before it has become an article of commerce, and which attach to it as and when it is grown, and before it is packed or sold. The tobacco is grown with these regulations in force, and the State has a right to say what shall be lawful merchantable tobacco. This is really all that has been done in regard to the tobacco in question.

"In this case no inspection is involved except that of tobacco grown in Maryland, and we must not be understood as expressing any opinion as to any provisions of the Maryland laws which refer to the inspection of tobacco grown out of Maryland." — Ed.

[1] The statement of facts is shortened. — Ed.

Mr. A. L. Williams, *Mr. J. N. Ives*, and *Mr. R. B. Welch*, for appellant, opposing the petitioner. *Mr. L. B. Kellogg*, Attorney-General of Kansas, was with *Mr. Welch*, on his brief. *Mr. Louis J. Blum* and *Mr. David Overmyer*, for appellee. *Mr. Edgar C. Blum* was with *Mr. Louis J. Blum*, on his brief.

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

The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, 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. And this court has uniformly recognized State legislation, legitimately for police purposes, as not in the sense of the Constitution necessarily infringing upon any right which has been confided expressly or by implication to the national government.

The Fourteenth Amendment, in forbidding a State to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest Congress with power to legislate upon subjects which are within the domain of State legislation.

As observed by Mr. Justice Bradley, delivering the opinion of the court in the *Civil Rights Cases*, 109 U. S. 3, 13, the legislation under that amendment 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 short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, and cannot be assumed by the national government, and that in this respect it is not interfered with by the Fourteenth Amendment. *Barbier* v. *Connolly*, 113 U. S. 27, 31.

The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, 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 restraint. 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. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489. 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. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210. That which is not supreme must yield to that which is supreme. *Brown* v. *Maryland*, 12 Wheat. 419, 448.

"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." Unquestionably, fermented, distilled, or other intoxicating liquors or liquids are subjects of commercial intercourse, exchange, barter, and traffic, between nation and nation, and between State and State, 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. Nevertheless, it has been often held that State legislation which prohibits the manufacture of spirituous, malt, vinous, fermented, or other intoxicating liquors within the limits of a 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. *Mugler* v. *Kansas*, 123 U. S. 623, and cases cited. "These cases," in the language of the opinion in *Mugler* v. *Kansas* (p. 659), "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." But it was not thought in that case that the record presented any question of the invalidity of State laws, because repugnant to the power to regulate commerce among the States. It is upon the theory of such repugnancy that the case before us arises, and involves the distinction which exists between the commercial power and the police power, which "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." 12 Wheat. 441.

And here the sagacious observations of Mr. Justice Catron, in *The*

License Cases, 5 How. 599, may profitably be quoted, as they have often been before. . . . And the learned judge reached the conclusion that the law of New Hampshire, which particularly raised the question, might be sustained as a regulation of commerce, lawful, because not repugnant to any actual exercise of the commercial power by Congress. In respect of this the opposite view has since prevailed, but the argument retains its force in its bearing upon the purview of the police power as not concurrent with and necessarily not superior to the commercial power.

The laws of Iowa under consideration in *Bowman* v. *Railway Company*, 125 U. S. 465, and *Leisy* v. *Hardin*, 135 U. S. 100, were enacted in the exercise of the police power of the State, and not at all as regulations of commerce with foreign nations and among the States, but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one State and another, or another country and this, they amounted in effect to a regulation of such commerce. Hence, it was held that 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 did not pass any law to regulate it specifically, or in such way as to allow the laws of the State to operate upon it, Congress thereby indicated its will that such commerce should be free and untrammelled, and therefore that the laws of Iowa, referred to, were inoperative, in so far as they amounted to regulations of foreign or interstate commerce, in inhibiting the reception of such articles within the State, or their sale upon arrival, in the form in which they were imported there from a foreign country or another State. It followed as a corollary, that when Congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured.

Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of a similar nature. Is the law open to constitutional objection?

By the first clause of section 10 of Article I. of the Constitution, certain powers are enumerated which the States are forbidden to exercise in any event; and by clauses two and three, certain others, which may be exercised with the consent of Congress. As to those in the first class, Congress cannot relieve from the positive restriction imposed. As to those in the second, their exercise may be authorized; and they include the collection of the revenue from imposts and duties on imports and exports, by State enactments, subject to the revision and control of Congress; and a tonnage duty, to the exaction of which only the consent of Congress is required. Beyond this, Congress is not empowered to enable the State to go in this direction. Nor can Congress transfer legislative powers to a State nor sanction a State law in violation of the Constitution; and if it can adopt a State law as its

own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power. *Cooley* v. *Port Wardens of Philadelphia*, 12 How. 299; *Gunn* v. *Barry*, 15 Wall. 610, 623; *United States* v. *Dewitt*, 9 Wall. 41.

It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State. This being so, it is urged that the Act of Congress cannot be sustained as a regulation of commerce, because the Constitution, in the matter of interstate commerce, operates *ex proprio vigore* as a restraint upon the power of Congress to so regulate it as to bring any of its subjects within the grasp of the police power of the State. In other words, it is earnestly contended that the Constitution guarantees freedom of commerce among the States in all things, and that not only may intoxicating liquors be imported from one State into another, without being subject to regulation under the laws of the latter, but that Congress is powerless to obviate that result. Thus the grant to the general government of a power designed to prevent embarrassing restrictions upon interstate commerce by any State, would be made to forbid any restraint whatever. We do not concur in this view. In surrendering their own power over external commerce the States did not secure absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to Congress.

By the adoption of the Constitution the ability of the several States to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the general government substituted. No affirmative guaranty was thereby given to any State of the right to demand as between it and the others what it could not have obtained before; while the object was undoubtedly sought to be attained of preventing commercial regulations partial in their character or contrary to the common interests. And the magnificent growth and prosperity of the country attest the success which has attended the accomplishment of that object. But this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt State laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in State laws in dealing with such property.

The principle upon which local option laws, so called, have been sustained is, that while the legislature cannot delegate its power to make a law, it can make a law which leaves it to municipalities or the people to determine some fact or state of things, upon which the action of the law may depend; but we do not rest the validity of the Act of Congress on this analogy. The power over interstate commerce

is too vital to the integrity of the nation to be qualified by any refinement of reasoning. The power to regulate is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or State. 12 Wheat. 448.

No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so. The differences of opinion which have existed in this tribunal in many leading cases upon this subject have arisen, not from a denial of the power of Congress, when exercised, but upon the question whether the inaction of Congress was in itself equivalent to the affirmative interposition of a bar to the operation of an undisputed power possessed by the States.

We recall no decision giving color to the idea that when Congress acted its action would be less potent than when it kept silent.

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. The manner of that disposition brought into determination upon this record involves no ground for adjudging the Act of Congress inoperative and void.

We inquire then whether fermented, distilled, or other intoxicating liquors or liquids transported into the State of Kansas, and there offered for sale and sold, after the passage of the Act, became subject to the operation and effect of the existing laws of that State in reference to such articles. It is said that this cannot be so, because, by the decision in *Leisy* v. *Hardin*, similar State laws were held unconstitutional, in so far as they prohibited the sale of liquors by the importer in the condition in which they had been imported. In that case, certain beer imported into Iowa had been seized in the original packages or kegs, unbroken and unopened, in the hands of the importer, and the Supreme Court of Iowa held this seizure to have been lawful under the statutes of the State. We reversed the judgment upon the ground that the legislation to the extent indicated, that is to say, as construed to apply to importations into the State from without and to permit the seizure of the articles before they had by sale or other transmutation become a part of the common mass of property of the State, was repugnant to the third clause of section eight of article one of the Constitution of the United States, in that it could not be given that operation without bringing it into collision with the implied exercise of a power exclusively confided to the general government. This was far from holding that the statutes in question were absolutely void, in whole or in part, and as if they had never been enacted. On the contrary, the decision did not annul the law, but limited its operation to property strictly within the jurisdiction of the State. . . . [Here follow

references to *Chicago, &c., Railway Co.* v. *Minnesota*, *supra*, p. 660, and *Tiernan* v. *Rinker*, 102 U. S. 123.]

In the case at bar, petitioner was arrested by the State authorities for selling imported liquor on the 9th of August, 1890, contrary to the laws of the State. The Act of Congress had gone into effect on the 8th of August, 1890, providing that imported liquors should be subject to the operation and effect of the State laws to the same extent and in the same manner as though the liquors had been produced in the State; and the law of Kansas forbade the sale. Petitioner was thereby prevented from claiming the right to proceed in defiance of the law of the State, upon the implication arising from the want of action on the part of Congress up to that time. The laws of the State had been passed in the exercise of its police powers, and applied to the sale of all intoxicating liquors, whether imported or not, there being no exception as to those imported, and no inference arising, in view of the provisions of the State Constitution and the terms of the law (within whose mischief all intoxicating liquors came), that the State did not intend imported liquors to be included. We do not mean that the intention is to be imputed of violating any constitutional rule, but that the State law should not be regarded as less comprehensive than its language is, upon the ground that action under it might in particular instances be adjudged invalid from an external cause.

Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.

It appears from the agreed statement of facts that this liquor arrived in Kansas prior to the passage of the Act of Congress, but no question is presented here as to the right of the importer in reference to the withdrawal of the property from the State, nor can we perceive that the Congressional enactment is given a retrospective operation by holding it applicable to a transaction of sale occurring after it took effect. This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the Act of Congress. That Act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the State law was required before it could have the effect upon imported which it had always had upon domestic property.

Jurisdiction attached, not in virtue of the law of Congress, but because the effect of the latter was to place the property where jurisdiction could attach.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Mr. Justice Harlan, Mr. Justice Gray, and Mr. Justice Brewer concurred in the judgment of reversal, but not in all the reasoning of the opinion of the court.

In *Pullman's Pal. Car Co.* v. *Pa.*, 141 U. S. 18 (1891), on error to the Supreme Court of Pennsylvania, the Federal Court affirmed a judgment sustaining a tax of the defendant State on a proportion of the plaintiff's capital stock, corresponding to that between the number of miles of railroad over which its cars run in Pennsylvania, to the whole number over which they run in all the States. The ground for the tax was that the plaintiff furnished cars to be run by railroad companies in the State, receiving itself, directly, a compensation from the passengers; these cars, averaging one hundred all the time, constituted the property of the plaintiff in Pennsylvania.

Mr. Justice Gray . . . delivered the opinion of the court.

Upon this writ of error, whether this tax was in accordance with the law of Pennsylvania is a question on which the decision of the highest court of the State is conclusive. The only question of which this court has jurisdiction is, whether the tax was in violation of the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several States. The plaintiff in error contends that its cars could be taxed only in the State of Illinois, in which it was incorporated and had its principal place of business. . . .

For the purposes of taxation, as has been repeatedly affirmed by this court, 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. . . .

It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction. . . .

Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States, at the domicil of their owners in one State, are not subject to taxation in another State at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and therefore can be taxed only at their legal situs, their home port, and the domicil of their owners. *Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596; *St. Louis* v. *Ferry Co.*, 11 Wall. 423; *Morgan* v. *Parham*, 16 Wall. 471; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196.

Between ships and vessels, having their situs fixed by Act of Congress, and their course over navigable waters, and touching land only incidentally and temporarily; and cars or vehicles of any kind, having no *situs* so fixed, and traversing the land only, the distinction is obvious. As has been said by this court: "Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land." *Railroad Co.* v. *Maryland*, 21 Wall. 456, 470. . . .

The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the State to other States or countries. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation, on account of its property within the State, is, in substance and effect, a tax on that property. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 209; *Western Union Telegraph Co.* v. *Attorney-General of Massachusetts*, 125 U. S. 530, 552. This is not only admitted, but insisted on, by the plaintiff in error.

The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the State could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the State boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them. The State, having the right, for the purposes of taxation, to tax any personal property found within its

jurisdiction, without regard to the place of the owner's domicil, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the State, particular cars may not remain within the State; but the company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State.

The mode which the State of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.

The validity of this mode of apportioning such a tax is sustained by several decisions of this court, in cases which came up from the circuit courts of the United States, and in which, therefore, the jurisdiction of this court extended to the determination of the whole case, and was not limited, as upon writs of error to the State courts, to questions under the Constitution and laws of the United States. . . . [Here follow quotations from *State Railroad Tax Cases*, 92 U. S. 575, and *W. U. Tel. Co.* v. *Mass.*, *supra*, p. 1390.]

Even more in point is the case of *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117, in which the question was whether a railroad company incorporated by the State of Maryland, and no part of whose own railroad was within the State of Virginia, was taxable under general laws of Virginia upon rolling-stock owned by the company, and employed upon connecting railroads leased by it in that State, yet not assigned permanently to those roads, but used interchangeably upon them and upon roads in other States, as the company's necessities required. It was held not to be so taxable, solely because the tax laws of Virginia appeared upon their face to be limited to railroad corporations of that State; and Mr. Justice Matthews, delivering the unanimous judgment of the court, said: —

"It is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the *situs* of the Baltimore and Ohio Railroad Company is in the State of Maryland, that also, upon general principles, is the *situs* of all its personal property; but for purposes of taxation, as well as for other purposes, that *situs* may be fixed

in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore and Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases, the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawlessness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the States, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid." 127 U. S. 123, 124.

For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the States should concur in abandoning the legal fiction that personal property has its *situs* at the owner's domicil, and in adopting the system of taxing it at the place at which it is used and by whose laws it is protected, property employed in any business requiring continuous and constant movement from one State to another would escape taxation altogether. *Judgment affirmed.*

MR. JUSTICE BRADLEY, with whom concurred MR. JUSTICE FIELD and MR. JUSTICE HARLAN, dissenting.[1]

[1] In the course of his dissenting opinion, BRADLEY, J., said: "I concede that all property, personal as well as real, within a State, and belonging there, may be taxed by the State. Of that there can be no doubt. But where property does not belong in the State another question arises. It is the question of the jurisdiction of the State over the property. It is stated in the opinion of the court as a fundamental proposition on which the opinion really turns, that all personal as well as real property within a State is subject to the laws thereof. I conceive that that proposition is not maintainable as a general and absolute proposition. Amongst independent nations, it is true, persons and property within the territory of a nation are subject to its laws, and it is responsible to other nations for any injustice it may do to the persons or property of such other nations. This is a rule of international law. But the States of this government are not independent nations. There is such a thing as a Constitution of the United States, and there is such a thing as a government of the United States, and there are many things, and many persons, and many articles of property that a State cannot lay the weight of its finger upon, because it would be contrary to the Constitution of the United States. Certainly, property merely carried through a State cannot be taxed by the State. Such a tax would be a duty — which a State cannot impose. If a drove of cattle is driven through Pennsylvania from Illinois to New

York, for the purpose of being sold in New York, whilst in Pennsylvania it may be subject to the police regulations of the State, but it is not subject to taxation there. It is not generally subject to the laws of the State as other property is. So if a train of cars starts at Cincinnati for New York and passes through Pennsylvania, it may be subject to the police regulations of that State whilst within it, but it would be repugnant to the Constitution of the United States to tax it. We have decided this very question in the *Case of State Freight Tax*, 15 Wall. 232. The point was directly raised and decided that property on its passage through a State in the course of interstate commerce cannot be taxed by the State, because taxation is incidentally regulation, and a State cannot regulate interstate commerce. The same doctrine was recognized in *Coe* v. *Errol*, 116 U. S. 517. . . .

"But when personal property is permanently located within a State for the purpose of ordinary use or sale, then, indeed, it is subject to the laws of the State and to the burdens of taxation; as well when owned by persons residing out of the State as when owned by persons residing in the State. It has then acquired a *situs* in the State where it is found.

"A man residing in New York may own a store, a factory, or a mine in Alabama, stocked with goods, utensils, or materials for sale or use in that State. There is no question that the *situs* of personal property so situated is in the State where it is found, and that it may be subjected to double taxation, — in the State of the owner's residence, as a part of the general mass of his estate; and in the state of its *situs*. Although this is a consequence which often bears hardly on the owner, yet it is too firmly sanctioned by the law to be disturbed, and no remedy seems to exist but a sense of equity and justice in the legislatures of the several States. The rule would undoubtedly be more just if it made the property taxable, like lands and real estate, only in the place where it is permanently situated.

"Personal as well as real property may have a *situs* of its own, independent of the owner's residence, even when employed in interstate or foreign commerce. An office or warehouse, connected with a steamship line, or with a continental railway, may be provided with furniture and all the apparatus and appliances usual in such establishments. Such property would be subject to the *lex rei sitæ* and to local taxation, though solely devoted to the purposes of the business of those lines. But the ships that traverse the sea, and the cars that traverse the land, in those lines, being the vehicles of commerce, interstate or foreign, and intended for its movement from one State or country to another, and having no fixed or permanent *situs* or home, except at the residence of the owner, cannot, without an invasion of the powers and duties of the Federal government, be subjected to the burdens of taxation in the places where they only go or come in the transaction of their business, except where they belong *Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596; *Morgan* v. *Parham*, 16 Wall. 471; *Transportation Co.* v. *Wheeling*, 99 U. S. 273. To contend that there is any difference between cars or trains of cars and ocean steamships in this regard, is to lose sight of the essential qualities of things. This is a matter that does not depend upon the affirmative action of Congress. The regulation of ships and vessels, by Act of Congress, does not make them the instruments of commerce. They would be equally so if no such affirmative regulations existed. For the States to interfere with them in either case would be to interfere with, and to assume the exercise of, that power which, by the Constitution, has been surrendered by the States to the government of the United States, namely, the power to regulate commerce. . . .

"Of course I do not mean to say that either railroad cars or ships are to be free from taxation, but I do say that they are not taxable by those States in which they are only transiently present in the transaction of their commercial operations. A British ship coming to the harbor of New York from Liverpool ever so regularly and spending half its time (when not on the ocean) in that harbor, cannot be taxed by the State of New York (harbor, pilotage, and quarantine dues not being taxes). So New York ships plying regularly to the port of New Orleans, so that one of the line may be always lying at the latter port, cannot be taxed by the State of Louisiana. (See cases above cited.) No more can a train of cars belonging in Pennsylvania, and running

In *Crutcher* v. *Kentucky*, 141 U. S. 47 (1891), Mr. Justice Bradley delivered the opinion of the court: . . . 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

regularly from Philadelphia to New York, or to Chicago, be taxed by the State of New York, in the one case, or by Illinois in the other. If it may lawfully be taxed by these States, it may lawfully be taxed by all the intermediate States, New Jersey, Ohio, and Indiana. And then we should have back again all the confusion and competition and State jealousies which existed before the adoption of the Constitution, and for putting an end to which the Constitution was adopted.

"In the opinion of the court it is suggested that if all the States should adopt as equitable a rule of proportioning the taxes on the Pullman Company as that adopted by Pennsylvania, a just system of taxation of the whole capital stock of the company would be the result. Yes, if — ! But Illinois may tax the company on its whole capital stock. Where would be the equity then ? This, however, is a consideration that cannot be compared with the question as to the power to tax at all, — as to the relative power of the State and general governments over the regulation of internal commerce, — as to the right of the States to resume those powers which have been vested in the government of the United States.

"It seems to me that the real question in the present case is as to the *situs* of the cars in question. They are used in interstate commerce between Pennsylvania, New York, and the Western States. Their legal *situs* no more depends on the States or places where they are carried in the course of their operations than would that of any steamboats employed by the Pennsylvania Railroad Company to carry passengers on the Ohio or Mississippi. If such steamboats belonged to a company located at Chicago, and were changed from time to time as their condition as to repairs and the convenience of the owners might render necessary, is it possible that the States in which they were running and landing in the exercise of interstate commerce could subject them to taxation ? No one, I think, would contend this. It seems to me that the cars in question belonging to the Pullman Car Company are in precisely the same category." — Ed.

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* 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 impos-

ing 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.[1] 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

[1] Including marine insurance. *Hooper* v *Cal.*, 15 Sup. Ct. Rep. 207 (1895). — Ed.

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 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 judgment is reversed accordingly, and the cause remanded for further proceedings not inconsistent with this opinion.

The Chief Justice and Mr. Justice Gray dissented.

Mr. Justice Brown, not having been a member of the court when the case was argued, took no part in the decision.

MAINE *v.* GRAND TRUNK RAILWAY COMPANY.

Supreme Court of the United States. 1891.

[142 *U. S.* 217.][1]

Error to the United States Circuit Court for Maine. By a statute of Maine in 1881 (Laws Me. 1881, c. 91), every corporation or other person operating a railroad in the State was required to pay "an

[1] The statement of facts is shortened. — Ed.

annual excise tax for the privilege of exercising its franchises in this State." The gross annual transportation receipts were to be divided by the number of miles operated, to get the average gross receipts per mile, and the tax was fixed with reference to these. In the case of a railroad partly within and partly without the State, or operated as part of a line extending beyond the State, the tax was to be ascertained in the same way, but was assessed for the number of miles operated within the State.

The defendant is a corporation created under the laws of Canada, and has its principal place of business at Montreal, in that Province. Its railroad in Maine was constructed by the Atlantic and St. Lawrence Railroad Company, under a charter from that State, which authorized it to construct and operate a railroad from the city of Portland to the boundary line of the State; and, with the permission of New Hampshire and Vermont, it constructed a railroad from that city to Island Pond in Vermont, a distance of 149½ miles, of which 82½ miles are within the State of Maine. In March, 1853, that company leased its rights and privileges to the defendant, The Grand Trunk Railway Company, which had obtained legislative permission to take the same; and since then it has operated that road and used its franchises.

The defendant, The Grand Trunk Railway Company, made no returns as a corporation, but it furnished the data and caused the Atlantic and St. Lawrence Railroad Company to make a return of the gross transportation receipts over its road, 149½ miles in length, including the 82½ miles in Maine, for the years 1881 and 1882, and upon this return the governor and council, pursuant to the statute, ascertained the proportion of the gross receipts in the State, and assessed the tax in controversy accordingly. The tax thus assessed for 1881 was $9569.66, and for 1882, $12,095.56, and, to recover these amounts as debts to the State, the present action was brought in the Supreme Judicial Court of the State of Maine, and, on application of the defendant, it was transferred to the Circuit Court of the United States. The defendant pleaded *nil debet*, accompanied with a statement of special matters of defence. By stipulation of the parties, the case was tried by the court, which held that the imposition of the taxes in question was a regulation of interstate and foreign commerce, in conflict with the exclusive powers of Congress under the Constitution of the United States, and was therefore invalid. It accordingly gave judgment for the defendant, that the plaintiff take nothing by its writ, and that the defendant recover its costs. From that judgment the case is brought to this court on writ of error.

Mr. Charles E. Littlefield, Attorney-General of the State of Maine, for plaintiff in error; *Mr. A. A. Strout*, for defendant in error.

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

The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercis-

ing its franchises within the State of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of the State to levy, there can be no question. The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises. It is used more frequently, in this country, in the latter sense than in any other. The privilege of exercising the franchises of a corporation within a State is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation, is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed.

The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and therefore in conflict with the exclusive power of Congress in that respect; and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the State as to the value of the privilege were limited to receipts of certain past years instead of the year in which the tax is collected, it is conceded that the validity of

the tax would not be affected; and if not, we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred.

This conclusion is sustained by the decision in *Home Insurance Co.* v. *New York*, 134 U. S. 594. . . . [Here follows a statement of *Home Ins. Co.* v. *N. Y.*, *supra*, p. 1399.]

The case of *Philadelphia and Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, in no way conflicts with this decision. That was the case of a tax, in terms, upon the gross receipts of a steamship company, incorporated under the laws of the State, derived from the transportation of persons and property between different States and to and from foreign countries. Such tax was held, without any dissent, to be a regulation of interstate and foreign commerce, and, therefore, invalid. We do not question the correctness of that decision, nor do the views we hold in this case in any way qualify or impair it.

It follows from what we have said, that the judgment of the court below must be *reversed, and the cause remanded, with directions to enter judgment in favor of the State for the amount of the taxes demanded; and it is so ordered.*[1]

Mr. Justice Bradley, with whom concurred Mr. Justice Harlan, Mr. Justice Lamar, and Mr. Justice Brown, dissenting.[2]

[1] See *Postal Tel. Cable Co.* v. *Adams*, 15 Sup. Ct. Rep. 268 (1895) — Ed.

[2] In his dissenting opinion Bradley, J., said: "Justices Harlan, Lamar, Brown, and myself dissent from the judgment of the court in this case. We do so both on principle and authority. On principle, because, whilst the purpose of the law professes to be to lay a tax upon the foreign company for the privilege of exercising its franchise in the State of Maine, the mode of doing this is unconstitutional. The mode adopted is the laying of a tax on the gross receipts of the company, and these receipts, of course, include receipts for interstate and international transportation between other States and Maine, and between Canada and the United States. Now, if after the previous legislation which has been adopted with regard to admitting the company to carry on business within the State, the legislature has still the right to tax it for the exercise of its franchises, it should do so in a constitutional manner, and not (as it has done) by a tax on the receipts derived from interstate and international transportation. The power to regulate commerce among the several States (except as to matters merely local) is just as exclusive a power in Congress as is the power to regulate commerce with foreign nations and with the Indian tribes. It is given in the same clause and couched in the same phraseology; but if it may be exercised by the States, it might as well be expunged from the Constitution. We think it a power not only granted to be exercised, but that it is of first importance, being one of the principal moving causes of the adoption of the Constitution. The disputes between the different States in reference to interstate facilities of intercourse, and the discriminations adopted to favor each its own maritime cities, produced a state of things almost intolerable to be borne. But, passing this by, the decisions of this court for a number of years past have settled the principle that taxation (which is a mode of regulation) of interstate commerce, or of the revenues derived therefrom, (which is the same thing,) is contrary to the Constitution. Going no further back than *Pickard* v. *Pullman's Southern Car Co.*, 117 U. S. 34, we find that principle laid down. There a privilege tax was imposed upon Pullman's Palace Car Company, by general legislation it is true, but applied to the company, of $50 per annum on every sleeping-car going

FICKLEN *v.* SHELBY COUNTY TAXING DISTRICT.

SUPREME COURT OF THE UNITED STATES. 1892.

[145 *U. S.* 1.][1]

ERROR to the Supreme Court of Tennessee. This was a bill filed in the Chancery Court of Shelby County, Tennessee, by C. L. Ficklen, and Cooper & Company, against the taxing district of Shelby County, and Andrew J. Harris, County Trustee.

through the State. It was well known, and appeared by the record, that every sleeping-car going through the State carried passengers from Ohio and other Northern States, to Alabama, and *vice versa*, and we held that Tennessee had no right to tax those cars. It was the same thing as if they had taxed the amount derived from the passengers in the cars. So also in the case of *Leloup* v. *The Port of Mobile*, 127 U. S. 640, we held that the receipts derived by the telegraph company from messages sent from one State to another could not be taxed. So in the case of the *Norfolk and Western Railroad* v. *Pennsylvania*, 136 U. S. 114, where the railroad was a link in a through line by which passengers and freight were carried into other States, the company was held to be engaged in the business of interstate commerce, and could not be taxed for the privilege of keeping an office in the State. And in the case of *Crutcher* v. *Kentucky*, 141 U. S. 47, we held that the taxation of an express company for doing an express business between different States was unconstitutional and void. And in the case of *Philadelphia, &c. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, we held that a tax upon the gross receipts of the company was void because they were derived from interstate and foreign commerce. A great many other cases might be referred to, showing that in the decisions and opinions of this court this kind of taxation is unconstitutional and void.

"We think that the present decision is a departure from the line of these decisions. The tax, it is true, is called a tax on a franchise. It is so called, but what is it in fact? It is a tax on the receipts of the company derived from international transportation.

"This court and some of the State courts have gone a great length in sustaining various forms of taxes upon corporations. The train of reasoning upon which it is founded may be questionable. A corporation, according to this class of decisions, may be taxed several times over. It may be taxed for its charter; for its franchises; for the privilege of carrying on its business; it may be taxed on its capital; and it may be taxed on its property. Each of these taxations may be carried to the full amount of the property of the company. I do not know that jealousy of corporate institutions could be carried much further. This court held that the taxation of the capital stock of the Western Union Telegraph Company in Massachusetts, graduated according to the mileage of lines in that State compared with the lines in all the States, was nothing but a taxation upon the property of the company; yet it was in terms a tax upon its capital stock, and might as well have been a tax upon its gross receipts. By the present decision it is held that taxation may be imposed upon the gross receipts of the company for the exercise of its franchise within the State, if graduated according to the number of miles that the road runs in the State. Then it comes to this: A State may tax a railroad company upon its gross receipts in proportion to the number of miles run within the State, as a tax on its property; and may also lay a tax upon these same gross receipts, in proportion to the same number of miles, for the privilege of exercising its franchise in the State! I do not know what else it may not tax the gross receipts for. If the interstate commerce of the country is not, or will not be, handicapped by this course of decision, I do not understand the ordinary principles which govern human conduct.

"We dissent from the opinion of the court." — ED.

[1] The statement of facts is shortened. — ED.

The bill alleged that complainants were "commercial agents or merchandise brokers located within the taxing district of Shelby County, where their respective firms rent a room for the purpose of keeping and, at times, exhibiting their samples, and carrying on their correspondence with their respective principals; that they use no capital in their business; that they handle or deal in no merchandise, and are neither buyers nor sellers; they only engage in negotiating sales for their respective principals; they do precisely the same business that commercial drummers do, the only difference being that they are stationary, while the commercial drummers are transitory, and go from place to place and secure a temporary room at each town or city in which to exhibit their samples. That each solicits orders for the sales of the merchandise of their respective principals and forwards the same to them, when such orders are filled by shipping the goods direct to the purchasers thereof in the county of Shelby."

It was then averred that all of the sales negotiated by complainant Ficklen were exclusively for non-resident firms, who resided and carried on business in other States than Tennessee, and all the merchandise so sold was in other States than Tennessee, where the sales were made, and was shipped into Tennessee, when the orders were forwarded and filled.

That at least nine-tenths of the sales negotiated and effected by complainants Cooper & Company, and at least nine-tenths of their gross commissions, were derived from merchandise of non-resident firms or persons, and which merchandise was shipped into Tennessee, from other States, after the sales were effected.

That section 9, chapter 96, of the Acts of 1881, of Tennessee (Sess. Laws of 1881, pp. 111, 113), made subsection 17 of section 22 of the Taxing District Acts (Taxing District Digest 50), provides: —

"Every person or firm dealing in cotton, or any other article whatever, whether as factor, broker, buyer, or seller, on commission or otherwise ($50) fifty dollars per annum, and in addition, every such person or firm shall be taxed *ad valorem* (10 cts.) ten cents on every one hundred dollars of amount of capital invested or used in such business; *Provided, however*, that if such person or firm carry on the cotton or other business in connection with the grocery or any other business, the capital invested in both shall only be taxed once; but such person or firm must pay the privilege tax for both occupations; *And provided, further*, that if the persons taxed in this subsection have no capital invested, they shall pay 2½ per cent on their gross yearly commissions, charges, or compensations for said business, and at the time of taking out their said license, they shall give bond to return said gross commissions, charges, or compensation to the trustee at the end of the year, and at the end of the year they shall make return to said trustee accordingly, and pay to him the said 2½ per cent."

Complainants charged that, as they were neither dealers, buyers, nor sellers, but only engaged in negotiating sales for buyers, they were not

embraced within the meaning of said section, and further stated that they had each heretofore paid the privilege tax and the income tax, except for the year 1887, and had tendered the privilege tax of $50 and costs of issuing license for the year 1888 to the trustee, who refused to accept the same unless complainants would also pay the income tax for the year 1887.

From the bill and exhibits attached it appeared that complainants in January, 1887, each paid the sum of $50 for the use of the taxing district, and executed bonds agreeably to the requirements of the law in that behalf, and received licenses as merchandise brokers within the limits of the district for the year 1887, and that in January, 1888, they tendered, as commercial brokers, to the trustee fifty dollars and twenty-five cents, each, as their privilege tax and charges for the year 1888, which he refused to accept because they refused to pay for the year 1887 two and one half per cent upon their gross commissions derived from their business for the year 1887, although they executed bonds in January, 1887, to report said gross commissions. . . .

To this bill the defendants filed a demurrer, which was overruled by the chancellor, and, the defendants electing to stand by it, a final decree was entered, making the injunction perpetual in behalf of Ficklen as to the entire tax, including the $50; and, as to Cooper & Company, adjudging that they were legally bound to pay the sum of $50 and the tax of two and one-half per cent on their commissions, to the extent that those commissions were upon sales of property owned by residents of Tennessee, and perpetuating the injunction in all other respects. From this decree the defendants prayed an appeal to the Supreme Court of the State, and that court decided that the Act of the legislature in question was not in violation of the State Constitution. . . . The decree of the chancellor was accordingly reversed, the demurrer sustained, and the bill dismissed, whereupon a writ of error was taken out from this court.

Mr. W. Hallett Phillips, for plaintiffs in error.

The single question is whether the negotiation in one State, by samples, of sales of goods in another State, can be taxed by the State in which the negotiation is carried on. . . . It is not a tax on a non-resident merchant, through the resident broker. It is not a tax on the goods, or on the proceeds of the goods sold. It is an occupation or privilege tax, exacted of a resident citizen pursuing the vocation of a general merchandise broker, graduated in amount by the value of the business transacted; or it may be considered in the light simply of an income tax on the resident citizen. The plaintiff is not specially the representative or accredited agent of any one non-resident merchant or manufacturer. He has a regular office, holds himself out as a general broker, and, in his line of business, is ready to serve all comers.

Mr. Henry Craft filed a brief for plaintiffs in error.

Mr. S. P. Walker, for defendant in error. . . .

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court. . . . [Here follows a statement of *Robbins* v. *Shelby Co. Tax. Dist.*, *supra*, p. 2056, with quotations from it.]

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.

The language of the court in *Lyng* v. *State of Michigan*, 135 U. S. 161, 166, was: "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 such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." But here the tax was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business; and complainants voluntarily subjected themselves thereto in order to do a general business.

In *McCall* v. *California*, 136 U. S. 104, it was held that: "An agency of a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers going

from San Francisco to New York to take that line at Chicago, but not engaged in selling tickets for the route, or receiving or paying out money on account of it, is an agency engaged in interstate commerce; and a license tax imposed upon the agent for the privilege of doing business in San Francisco is a tax upon interstate commerce, and is unconstitutional." This was because the business of the agency was carried on with the purpose to assist in increasing the amount of passenger traffic over the road, and was therefore a part of the commerce of the road, and hence of interstate commerce.

In *Philadelphia and Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 345, Mr. Justice Bradley, speaking for the court, said: "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." And this of course is equally true of the property, the business, and the income of individual citizens of a State. It is well settled that a State has power to tax all property having a *situs* within its limits, whether employed in interstate commerce or not. It is not taxed because it is so employed, but because it is within the territory and jurisdiction of the State. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196.

And it has often been laid down that the property of corporations holding their franchises from the government of the United States is not exempt from taxation by the States of its *situs*. *Railroad Company* v. *Peniston*, 18 Wall. 5; *Thomson* v. *Pacific Railroad*, 9 Wall. 579; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530.

So in *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, 374, where an annual license fee was imposed on the ferry company by the city of East St. Louis, the company having been chartered by the State of Illinois and being domiciled in East St. Louis, its boats plying between that place and St. Louis, Missouri, the court said: "The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a State expressly grants to an incorporated city, as in this case, the power 'to license, tax, and regulate ferries,' the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different States, and the Act by which this exaction is authorized will not be held to be a regulation of commerce."

Again, in *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217, we decided that a State statute which required every corporation, person, or association operating a railroad within the State to pay an annual tax for the privilege of exercising its franchise therein, to be determined by the amount of its gross transportation receipts, and further provided that when applied to a railroad lying partly within and partly

without a State, or to one operated as a part of a line or system extending beyond the State, the tax should be equal to the proportion of the gross receipts in the State, to be ascertained in the manner provided by the statute, did not conflict with the Constitution of the United States. It was held that the reference by the statute to the transportation receipts and to a certain percentage of the same, in determining the amount of the excise tax, was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied. In this respect the tax was unlike that levied in *Philadelphia Steamship Company* v. *Pennsylvania*, *supra*, where the specific gross receipts for transportation were taxed as such, taxed "not only because they are money, or its value, but because they were received for transportation."

Since a railroad company engaged in interstate commerce is liable to pay an excise tax according to the value of the business done in the State, ascertained as above stated, it is difficult to see why a citizen doing a general business at the place of his domicil should escape payment of his share of the burdens of municipal government because the amount of his tax is arrived at by reference to his profits. This tax is not on the goods, or on the proceeds of the goods, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in any way, it is incidentally, and so remotely as not to amount to a regulation of such commerce

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 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.

The judgment of the Supreme Court is *Affirmed*.[1]

Mr. Justice Harlan dissenting. It seems to me that the opinion and judgment in this case are not in harmony with numerous decisions of this court. I do not assume that the court intends to modify or overrule any of those cases, because no such purpose is expressed.

[1] Compare *Bateman* v. *West Star. Co.*, 20 So. W. Rep. 931 (Tex. 1892). — Ed.

And yet I feel sure that the present decision will be cited as having that effect. . . . [Here follows a statement of several cases in this court.]

The principles announced in these cases, if fairly applied to the present case, ought, in my judgment, to have led to a conclusion different from that reached by the court. Ficklen took out a license as merchandise broker, and gave bond to make a return of the gross commissions earned by him. His commissions in 1887 were wholly derived from interstate business, that is, from mere orders taken in Tennessee for goods in other States, to be shipped into that State when the orders were forwarded and filled. He was denied a license for 1888 unless he first paid two and a half per cent on his gross commissions. And the court holds that it was consistent with the Constitution of the United States for the local authorities of the Taxing District of Shelby County to make it a condition precedent of Ficklen's right to a license for 1888 that he should pay the required per cent of the gross commissions earned by him in 1887 in interstate business. This is a very clever device to enable the Taxing District of Shelby County to sustain its government by taxation upon interstate commerce. If the ordinance in question had, in express terms, made the granting of a license as merchandise broker depend upon the payment by the applicant of a given per cent upon his earnings in the previous year in interstate business, the court, I apprehend, would not have hesitated to pronounce it unconstitutional. But it seems that if the local authorities are discreet enough not to indicate in the ordinances under which they act their purpose to tax interstate business, they may successfully evade a constitutional provision designed to relieve commerce among the States from direct local burdens. The bond which Ficklen gave should not, in my opinion, be construed as embracing his commissions earned in business, upon which no tax can be constitutionally imposed by a State. . . .

MONONGAHELA, ETC. COMPANY *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1893.

[148 *U. S.* 312.][1]

BY an Act of Congress of Aug. 11, 1888, the Secretary of War was authorized to purchase at a specified price the Upper Lock and Dam, with their appurtenances, of the plaintiff, incorporated in 1836, under the laws of Pennsylvania. These were a part of the improvements in the waterway on the Monongahela River between Pittsburgh in Pennsylvania and a point near Morgantown in West Virginia. If no voluntary purchase could be made on these terms, the Secretary

[1] The statement of facts is shortened — ED.

was directed to obtain the lock and dam with their appurtenances by condemnation proceedings under a certain law of Pennsylvania. But jurisdiction was given to the Circuit Court of the United States for the Western District of Pennsylvania, with a right of appeal by either party to the Supreme Court of the United States. It was provided, however, that in estimating damages the franchise to collect tolls should not be estimated. Congress, in 1881, made a grant of money to aid in these improvements, conditioned upon the building of the lock and dam in question.

Condemnation proceedings were had and compensation was fixed, omitting all consideration of the franchises to take tolls. On an appeal and a new trial, under the Pennsylvania law, jury being waived, the court found about the same amount due "not considering or estimating in this decree the franchise of this company to collect tolls." The plaintiff brought the case to the Supreme Court both by writ of error and appeal.

Mr. Attorney-General and *Mr. Solicitor-General*, for appellees and defendants in error; *Mr. C. Newell* and *Mr. D. T. Watson*, also filed a brief for appellee.

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

It appears from the foregoing statement that the Monongahela Company had, under express authority from the State of Pennsylvania, expended large sums of money in improving the Monongahela River, by means of locks and dams; and that the particular lock and dam in controversy were built not only by virtue of this authority from the State of Pennsylvania, but also at the instance and suggestion of the United States. By means of these improvements, the Monongahela River, which theretofore was only navigable for boats of small tonnage, and at certain seasons of the year, now carries large steamboats at all seasons, and an extensive commerce by means thereof. The question presented is not whether the United States has the power to condemn and appropriate this property of the Monongahela Company, for that is conceded, but how much it must pay as compensation therefor. [Here follow observations on the limitations of the Right of Eminent Domain, which are placed in a footnote.[1]]

[1] [Brewer, J.] Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for in any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government. The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.

In the case of *Simnickson* v. *Johnson*, 17 N. J. L. (2 Harr.) 129, 145, cited in the case of *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, 178, it was said that "this

By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine

power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle." And in *Gardner* v. *Newburgh*, 2 Johns. Ch. 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to the affirmations lying behind it in the Declaration of Independence, for, in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses. And with respect to constitutional provisions of this nature, it was well said by Mr. Justice Bradley, speaking for the court, in *Boyd* v. *The United States*, 116 U. S. 616, 635: "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government, the last, the one in point here, being, "Nor shall private property be taken for public use without just compensation." The noun "compensation," standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken. This excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it, to stand as a declaration, that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.

We do not in this refer to the case where only a portion of a tract is taken, or express any opinion on the vexed question as to the extent to which the benefits or injuries to the portion not taken may be brought into consideration. This is a question which may arise possibly in this case, if the seven locks and dams belonging to

what private property is needed for public purposes — that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 571, Mr. Justice McLean in his opinion, referring to a provision for compensation found in the charter of the Warren Bridge, uses this language: "They [the legislature] provide that the new company shall pay annually to the college, in behalf of the old one, one hundred pounds. By this provision, it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do: assess the amount of compensation to which the complainants are entitled." See also the following authorities: *Commonwealth* v. *Pittsburgh & Connellsville Railroad*, 58 Penn. St. 26, 50; *Penn. Railroad* v. *Balt. & Ohio Railroad*, 60 Maryland, 263; *Isom* v. *Mississippi Central Railroad*, 36 Mississippi, 300. . . .

We are not, therefore, concluded by the declaration in the Act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property. . . .

Upon what does the right of Congress to interfere in the matter rest? Simply upon the power to regulate commerce. . . .

But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post-offices and post-roads; but, if Congress wishes to take private property upon which to build a post-office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. And if that property be improved under authority of a charter granted by the State, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation, such franchise must be taken into account. Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be said that just

the Navigation Company are so situated as to be fairly considered one property, a matter in respect to which the record before us furnishes no positive evidence. It seems to be assumed that each lock and dam by itself constitutes a separate structure and separate property, and the thoughts we have suggested are pertinent to such a case.

compensation for the property has been made. And that which is true in respect to a condemnation of property for a post-office is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property taken there can be as little doubt. If a man's house must be taken, that must be paid for; and, if the property is held and improved under a franchise from the State, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken. So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation. It should be noticed that here there is unquestionably a taking of the property, and not a mere destruction. It is not a case in which the government requires the removal of an obstruction. What differences would exist between the two cases, if any, it is unnecessary here to inquire. All that we need consider is the measure of compensation when the government, in the exercise of its sovereign power, takes the property.

And here it may be noticed that, after taking this property, the government will have the right to exact the same tolls the Navigation Company has been receiving. It would seem strange that if by asserting its right to take the property, the government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and, having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls. In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice.

Much reliance is placed upon the case of *Bridge Company* v. *United States*, 105 U. S. 470. But that was a case not of the taking, but of the destruction, of property. . . .

It is evident, therefore, that the point decided was that Congress had reserved the right to withdraw its assent to the construction of a bridge on the plan proposed, whenever, in its judgment, such bridge should become an obstruction to the navigation; that the Bridge Company entered upon the construction of the bridge in the light of this express reservation, and with the knowledge that Congress might at any time declare that the bridge constructed as proposed was an obstruction to navigation; and that Congress, exercising this reserved power, did not thereby subject the government to any liability for damages. There was no taking of private property for public uses; and while the company may have been deprived of property, it was deprived by due

process of law, because deprived under authority of an express reservation of power. Even this conclusion was reached with strong dissent, Mr. Justice Miller, Mr. Justice Field and Mr. Justice Bradley dissenting, and each writing a separate opinion. And those opinions only make more clear the fact that the case was rested in the judgment of the majority on the effect of the reservation.

In the case at bar there is no such reservation; there is no attempt to destroy property; there is simply a case of the taking by the government, for public uses, of the private property of the Navigation Company. Such an appropriation cannot be had without just compensation; and that, as we have seen, demands payment of the value of the property as it stands at the time of taking.

The theory of the government seems to be, that the right of the Navigation Company to have its property in the river, and the franchises given by the State to take tolls for the use thereof, are conditional only, and that whenever the government, in the exercise of its supreme power, assumes control of the river, it destroys both the right of the company to have its property there, and the franchise to take tolls. But this is a misconception. The franchise is a vested right. The State has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior, power exists in the national government. It may take it for public purposes, and take it even against the will of the State; but it can no more take the franchise which the State has given than it can any private property belonging to an individual.

Notice to what the opposite view would lead: A railroad between Columbus, Ohio, and Harrisburg, Pennsylvania, is an interstate highway, created under franchises granted by the two States of Ohio and Pennsylvania, franchises not merely to construct, but to take tolls for the carrying of passengers and freight. In its exercise of supreme power to regulate commerce, Congress may condemn and take that interstate highway; but in the exercise of that power, and in the taking of such property, may it ignore the franchises to take tolls, granted by the States, or must it not rather pay for them, as it pays for the rails, the bridges, and the tracks? The question seems to carry its own answer. It may be suggested that the cases are not parallel, in that in the present there is a natural highway; while in that suggested it is wholly artificial. But the power of Congress is not determined by the character of the highway. Nowhere in the Constitution is there given power in terms over highways, unless it be in that clause to establish post-offices and post-roads. The power which Congress possesses in respect to this taking of property springs from the grant of power to regulate commerce; and the regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway. . . .

It is also suggested that the government does not take this fran-

chise; that it does not need any authority from the State for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, and then either makes the use of it free to all, or exacts such tolls as it sees fit, or transfers the property to a new corporation of its own creation, with such a franchise to take tolls as it chooses to give. But this franchise goes with the property; and the Navigation Company, which owned it, is deprived of it. The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived.

Another contention is this: First, that the grant of right to the Navigation Company was a mere revocable license; secondly, that, if it was not, there was a right in the State to alter, amend or annul the charter; and, thirdly, that there was, by the 18th section thereof, reserved the right at any time after twenty-five years from the completion of the improvement to purchase the entire improvement and franchise by paying the original cost, together with six per cent interest thereon, deducting dividends theretofore declared and paid — a provision changed by section 8 of the Act of June 4, 1839, so as to require a payment of the expenses incurred in constructing and making repairs, with eight per cent per annum interest. But little need be said in reference to this line of argument. We do not understand that the Supreme Court of Pennsylvania has ever ruled that a grant like this is a mere revocable license. The cases referred to by counsel are those in which there was simply a permit; but here there was a chartered right created, — the right not merely to improve the river, but to exact tolls for the use of the improvement, — and such right created by an Act of incorporation, as long ago settled in this court in *Dartmouth College Trustees* v. *Woodward*, 4 Wheat. 518, is a contract which cannot be set aside by either party to it.

Again, the State has never assumed to exercise any rights reserved in the charter, or by any supplements thereto. So far as the State is concerned, all its grants and franchises remain unchallenged and undisturbed in the possession of the Navigation Company. The State has never transferred, even if it were possible for it to do so, its reserved rights to the United States government, and the latter is proceeding not as the assignee, successor in interest, or otherwise of the State, but by virtue of its own inherent supreme power. What the State might or might not do, is not here a matter of question, though doubtless the existence of this reserved right to take the property upon certain specified terms may often, and perhaps in the present case, materially affect the question of value. And, finally, there is no sug-

gestion on the part of Congress, and no proffer in these proceedings, of payment under the terms of the charter and supplementary Act of 1839, and no attempt to ascertain the amount which would be due to the company in accordance therewith.

These are all the questions presented in this case. Our conclusions are, that the Navigation Company rightfully placed this lock and dam in the Monongahela River; that, with the ownership of the tangible property, legally held in that place, it has a franchise to receive tolls for its use; that such franchise was as much a vested right of property as the ownership of the tangible property; that the right of the national government, under its grant of power to regulate commerce, to condemn and appropriate this lock and dam belonging to the Navigation Company, is subject to the limitations imposed by the Fifth Amendment, that private property shall not be taken for public uses without just compensation; that just compensation requires payment for the franchise to take tolls, as well as for the value of the tangible property; and that the assertion by Congress of its purpose to take the property does not destroy the State franchise.

The judgment, therefore, will be

Reversed, and the case remanded with instructions to grant a new trial.[1]

Mr. Justice Shiras, having been of counsel, and Mr. Justice Jackson, not having been a member of this court at the time of the argument, took no part in the consideration and decision of this case.

BRENNAN *v.* TITUSVILLE.

Supreme Court of the United States. 1894.

[153 *U. S.* 289.][2]

Error to the Supreme Court of Pennsylvania which had affirmed a judgment against the plaintiff for violating a city ordinance of the defendant which is sufficiently stated in the opinion. The plaintiff was agent of a maker of picture frames and portraits, who was a citizen and resident of Illinois and doing business there. The agent travelled about with samples and solicited orders which he sent to his principal, and the principal shipped the goods to the purchasers.

Mr. Roger Sherman, for plaintiff in error; *Mr. George A. Chase*, for defendant in error.

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

The question in this case is whether a manufacturer of goods, which are unquestionably legitimate subjects of commerce, who carries on his

[1] See *Stockton* v. *Balt. & N. Y. R. R. Co.*, 32 Fed. Rep. 9. — Ed.

[2] The statement of facts is shortened. — Ed.

business of manufacturing in one State can send an agent into another State to solicit orders for the products of his manufactory without paying to the latter State a tax for the privilege of thus trying to sell his goods.

It is true, in the present case, the tax is imposed only for selling to persons other than manufacturers and licensed merchants; but if the State can tax for the privilege of selling to one class, it can for selling to another, or to all. In either case it is a restriction on the right to sell, and a burden on lawful commerce between the citizens of two States. It is as much a burden upon commerce to tax for the privilege of selling to a minister as it is for that of selling to a merchant. It is true, also, that the tax imposed is for selling in a particular manner, but a regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling-house, is surely a regulation of commerce. It must be borne in mind that the goods which the defendant was engaged in selling, to wit, pictures and picture frames, are open to no condemnation, and are unchallenged subjects of commerce. There is no charge of dealing in obscene or indecent pictures, or that the pictures, or the frames, were in any manner dangerous to the health, morals, or general welfare of the community. It must also be borne in mind that the ordinance is not one designed to protect from imposition and wrong either minors, habitual drunkards, or persons under any other affliction or disability. There is no discrimination except between manufacturers and licensed merchants on the other hand, and the rest of the community on the other, and unless it be a matter of just police regulation to tax for the privilege of selling to manufacturers and merchants, it cannot be to tax for the privilege of selling to the rest of the community. The same observation may also be made in respect to the places and manner in which the sales were charged to have been made. It is as much within the scope of the police power to restrain parties from going to a store or manufactory as from going to a dwelling-house for the purposes of making a sale. We do not mean to say that none of these matters to which we have referred to are within the reach of the police power; but simply that the conditions on the one side are no more within its reach than those on the other, so that if, under the excuse of an exercise of the police power, this ordinance can be sustained, and sales in the manner therein named be restricted, by an equally legitimate exercise of that power almost any sale could be prevented.

But again, this license does not purport to be exacted in the exercise of the police, but rather of the taxing power. The statute under which the ordinance in question was passed is found in Laws of Pennsylvania, 1874, pages 230 to 271. Clause 4 of section 20, page 239, grants authority "to levy and collect license taxes on . . . hawkers, pedlers, . . . merchants of all kinds, . . . and regulate the same by ordinance."

The ordinance itself is entitled "An ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville," and the special section requires a license for transacting business, the license being graded in amount by the time for which it is obtained. This license, therefore, the failure to take out which is the offence complained of, and for which defendant was sentenced, is a license for "general revenue purposes" within the very declarations of the ordinance. Even if those declarations had been the reverse, and the license in terms been declared to be exacted as a police regulation, that would not conclude this question, for whatever may be the reason given to justify, or the power invoked to sustain the Act of the State, if that Act is one which trenches directly upon that which is within the exclusive jurisdiction of the national government, it cannot be sustained. Thus, in *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661, this court, by Mr. Justice Harlan, said:

"Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.

"Illustrations of interference with the rightful authority of the general government by State legislation which was defended upon the ground that it was enacted under the police power, are found in cases where enactments concerning the introduction of foreign paupers, convicts, and diseased persons, were held to be unconstitutional, as conflicting, by their necessary operation and effect, with the paramount authority of Congress to regulate commerce with foreign nations, and among the several States. In *Henderson, &c.* v. *Mayor of New York*, 92 U. S. 259, the court, speaking by Mr. Justice Miller, while declining to decide whether in the absence of action by Congress, the States can, or how far they may, by appropriate legislation, protect themselves against actual paupers, vagrants, criminals, and diseased persons, arriving from foreign countries, said, that no definition of the police power, 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,' p. 271. *Chy Lung* v. *Freeman*, 92 U. S. 275. And in *Railroad Co.* v. *Husen*, 95 U. S. 465, Mr. Justice Strong, delivering the opinion of the court, said that '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,' pp. 473, 474." . . . [Here follow passages to the same effect from other cases.]

Because a license may be required in the exercise of the police power, it does not follow that every license rests for its validity upon such police power. A State may legitimately make a license for the

privilege of doing a business one means of taxation, and that such was the purpose of this ordinance is obvious, not merely from the fact that in the title it is declared to be for general "revenue purposes," but also from the further fact that, so far as we are informed by any quotation from or references to any part of the ordinance, there is no provision for any supervision, control, or regulation of any business for which by the ordinance a license is required. In other words, so far as this record discloses, this ordinance sought simply to make the various classes of business named therein pay a certain tax for the general revenue of the city.

Even if it be that we are concluded by the opinion of the Supreme Court of the State that this ordinance was enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an Act held to be a police regulation, but which in fact affects interstate commerce, can be sustained. It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free.

That this license tax is a direct burden on interstate commerce is not open to question. . . . [Here follows a statement, with quotations, of several cases.]

Within the reasoning of these cases it must be held that the license tax imposed upon the defendant was a direct burden on interstate commerce, and was, therefore, beyond the power of the State.

The case of *Ficklen* v. *Shelby County*, 145 U. S. 1, is no departure from the rule of decision so firmly established by the prior cases. At least, no departure was intended, though as shown by the division in the court, and by the dissenting opinion of Mr. Justice Harlan, the case was near the boundary line of the State's power. . . .

The tax imposed was for the privilege of doing a general commission business within the State, and whatever were the results pecuniarily to the licensees, or the manner in which they carried on business, the fact remained unchanged that the State had, for a stipulated price, granted them this privilege. It was thought by a majority of the court that to release them from the obligations of their bonds on account of the accidental results of the year's business was refining too much, and that the plaintiffs who had sought the privilege of engaging in a general business should be bound by the contracts which they had made with the State therefor. In the opinion in that case, by the Chief Justice, the authorities which are referred to in this opinion were cited, and the general rule was announced as is here stated. We only refer thus at length to that case to show the

distinction between it and this case, and to notice that in the opinion was reaffirmed the proposition that "no State can levy 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 these reasons the judgment of the Supreme Court of the State of Pennsylvania is *Reversed.*[1]

In *Luxton* v. *The North River Bridge Co.*, 153 U. S. 525 (1894), on error to the United States Circuit Court for New Jersey, the defendant, incorporated by Act of Congress of July 11, 1890, petitioned, under the statute, for commissioners to assess damages for taking land for the approaches to its bridge across the Hudson and North river, between New York and New Jersey. The commissioners were appointed and made an award. The plaintiff in error objected to accepting the award, alleging the unconstitutionality of the Act; but the court gave judgment against her.

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

The validity of the Act of Congress incorporating the North River Bridge Company rests upon principles of constitutional law, now established beyond dispute.

The Congress of the United States, being empowered by the Constitution to regulate commerce among the several States, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end. . . . Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the States. *McCulloch* v. *Maryland*, 4 Wheat. 316, 411, 422; *Osborn* v. *Bank of United States*, 9 Wheat. 738, 861, 873; *Pacific Railroad Removal Cases*, 115 U. S. 1, 18; *California* v. *Pacific Railroad*, 127 U. S. 1, 39. Congress has likewise the power, exercised early in this century by successive Acts in the case of the Cumberland or National Road from the Potomac across the Alleghenies to the Ohio, to authorize the construction of a public highway connecting several States. See *Indiana* v. *United States*, 148 U. S 148. And whenever it becomes necessary, for the accomplishment of

[1] In *Com.* v. *Harmel*, 30 Atl. Rep. 1036 (Pa. 1895), the court (Williams, J.), after referring to the case in the text, remarks: "We submit, with great respect, that the control of no branch of retail trade has been confided exclusively to Congress by the Constitution, and that the interstate commerce clause was never intended to do more than keep the great channels of commerce open, and to guard against such obstructions as State custom-houses, State inspections, State taxes, and the like, on goods passing from manufacturer or wholesaler in one State to retail dealer or consumer in another." — Ed.

NOTE TO BRENNAN *v.* TITUSVILLE (p. 2161).

In the case of *Emert* v. *Missouri*, decided by the Supreme Court of the United States on March 4, 1895 (too late for insertion in this book), on error to the Supreme Court of Missouri (103 Mo. 241), a statute of that State was upheld which required pedlers to take out a license, and provided that there be "levied and paid on all pedlers' licenses a State tax" of varying amounts; in such a case as this, twenty dollars for every period of six months. The statute also allowed a county tax of an equal amount. The defendant had been convicted, under this statute, of selling a sewing-machine without a license, as agent for the Singer Manufacturing Company, a New Jersey corporation. In the course of a unanimous opinion, Gray, J., for the court, said: "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. The decision at October term, 1879, in the case reported as *Machine Co.* v. *Gage*, 100 U. S. 676, affirming the judgment of the Supreme Court of Tennessee in *Howe Machine Co.* v. *Gage*, 9 Baxter, 518, is directly in point."

The examination of the earlier and later cases, which follows the foregoing passage, is instructive. — Ed.

any object within the authority of Congress, to exercise the right of eminent domain and take private lands, making just compensation to the owners, Congress may do this, with or without a concurrent Act of the State in which the lands lie. *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 154, and cases cited; *Cherokee Nation* v. *Kansas Railway*, 135 U. S. 641, 656.

From these premises, the conclusion appears to be inevitable that, although Congress may, if it sees fit and as it has often done, recognize and approve bridges erected by authority of two States across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water. 1 Hare's Constitutional Law, 248, 249. See Acts of July 14, 1862, c. 167; 12 Stat. 569; February 17, 1865, c. 38; 13 Stat. 431; July 25, 1866, c. 246; 14 Stat. 244; March 3, 1871, c. 121, § 5; 16 Stat. 572, 573; June 16, 1886, c. 417; 24 Stat. 78.

The judicial opinions cited in support of the opposite view are not, having regard to the facts of the cases in which they were uttered, of controlling weight.

Mr. Justice McLean, indeed, in an opinion delivered by him in the Circuit Court, by which a bill by the United States to restrain the construction of a bridge across the Mississippi River was dismissed, no injury to property of the United States and no substantial obstruction to navigation being shown, and there having been no legislation by Congress upon the subject, took occasion to remark that "neither under the commercial power, nor under the power to establish post roads, can Congress construct a bridge over a navigable water;" that "if Congress can construct a bridge over a navigable water, under the power to regulate commerce or to establish post roads, on the same principle it may make turnpike or railroads throughout the entire country;" and that "the latter power has generally been considered as exhausted in the designation of roads on which the mails are to be transported; and the former by the regulation of commerce upon the high seas and upon our rivers and lakes." *United States* v. *Railroad Bridge Co.*, 6 McLean, 517, 524, 525.

The same learned justice repeated and enlarged upon that idea in his dissenting opinion in *Pennsylvania* v. *Wheeling Bridge*, 18 How. 421, 442, 443, where, after the Wheeling Bridge, constructed across the Ohio River under an Act of the State of Virginia, had by a decree of this court, at the suit of the State of Pennsylvania, been declared to be in its then condition an unlawful obstruction of the navigation of the river, and in conflict with the Acts of Congress regulating such navigation, and therefore ordered to be elevated or abated, Congress passed an Act, declaring the bridge to be a lawful structure in its then position and elevation, establishing it as a post road for the passage

of the mails of the United States, authorizing the corporation to have and maintain the bridge at that site and elevation, and requiring the captains and crews of all vessels and boats navigating the river to regulate the use thereof, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation and construction of the bridge. Act of August 31, 1852, c. 111, §§ 6, 7; 10 Stat. 112.

But the majority of this court in that case held that "the Act of Congress afforded full authority to the defendants to reconstruct the bridge." 18 How. 436. Mr. Justice Nelson, in delivering its opinion said: "We do not enter upon the question, whether or not Congress possess the power, under the authority of the Constitution to establish post offices and post roads, to legalize this bridge; for, conceding that no such powers can be derived from this clause, it must be admitted that it is, at least, necessarily included in the power conferred to regulate commerce among the several States. The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation; and that power, as we have seen, has been exercised consistently with the continuance of the bridge." 18 How. 431. And Mr. Justice Daniel, in a concurring opinion, sustaining the validity of the Act of Congress, said: "They have regulated this matter upon a scale by them conceived to be just and impartial, with reference to that commerce which pursues the course of the river, and to that which traverses its channel, and is broadly diffused through the country. They have at the same time, by what they have done, secured to the government, and to the public at large, the essential advantage of a safe and certain transit over the Ohio." 18 How. 458. A similar decision was made in *The Clinton Bridge*, 10 Wall. 454. See also *Miller* v. *New York*, 109 U. S. 385.

In the cases, cited at the bar, of *The Passaic Bridges*, 3 Wall. appx. 782, decided by Mr. Justice Grier in the Circuit Court, and of *Gilman* v. *Philadelphia*, 3 Wall. 713, and *Wright* v. *Nagle*, 101 U. S. 791, in this court, the bridge in question had been erected under authority of a State and was wholly within the State, and no question arose, or was considered, as to the power of Congress, in regulating interstate commerce, to authorize the erection of bridges between two States.

But in *Stockton* v. *Baltimore & New York Railroad*, 32 Fed. Rep. 9, Mr. Justice Bradley, sitting in the Circuit Court, upheld the constitutionality of the Act of Congress of June 16, 1886, c. 417, authorizing a corporation of New York and one of New Jersey to build and maintain a bridge, as therein directed, across the Staten Island Sound or Arthur Kill. 24 Stat. 78. The reasons upon which the decision in that case rested were, in substance, the same as were stated by that eminent judge in two opinions afterwards delivered by him in behalf of this court, in which the power of Congress, by its own legislation, to confer original authority to erect bridges over navigable waters, when-

ever Congress considers it necessary to do so to meet the demands of interstate commerce by land, is so clearly demonstrated as to render further discussion of the subject superfluous.

In *Willamette Bridge* v. *Hatch*, 125 U. S. 1, in which it was held that section 2 of the Act of February 14, 1859, c. 33 (11 Stat. 383), for the admission of Oregon into the Union, providing that "all the navigable waters of the said State shall be common highways, and forever free, as well to the inhabitants of said State as to all other citizens of the United States," did not prevent the State, in the absence of legislation by Congress, from authorizing the erection of a bridge over such a river, Mr. Justice Bradley, speaking for the whole court, said: "And although, until Congress acts, the States have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject-matter, that the consent of Congress is so frequently asked in the erection of bridges over navigable streams. It might itself give original authority for the erection of such bridges, when called for by the demands of interstate commerce by land; but in many, perhaps the majority of cases, its assent only is asked, and the primary authority is sought at the hands of the State." 125 U. S. 12, 13.

In *California* v. *Pacific Railroad*, 127 U. S. 1, it was directly adjudged that Congress has authority, in the exercise of its power to regulate commerce among the several States, to authorize corporations to construct railroads across the States, as well as the Territories of the United States; and Mr. Justice Bradley, again speaking for the court, and referring to the Acts of Congress establishing corporations to build railroads across the continent, said: "It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. 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. This power in former times was exerted to a very limited extent, the Cumberland or National Road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the

invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed, and led to the conclusion that Congress has plenary power over the whole subject. 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. 127 U. S. 39, 40.

The Act of Congress now in question declares the construction of the North River Bridge between the States of New York and New Jersey to be "in order to facilitate interstate commerce;" and it makes due provision for the condemnation of lands for the construction and maintenance of the bridge and its approaches, and for just compensation to the owners, which has been accordingly awarded to to the plaintiff in error.

In the light of the foregoing principles and authorities, the objection made to the constitutionality of this Act cannot be sustained.

Judgment affirmed.

COVINGTON AND CINCINNATI BRIDGE CO. *v.* KENTUCKY.

SUPREME COURT OF THE UNITED STATES. 1894.

[154 *U. S.* 204.][1]

ERROR to the Kentucky Court of Appeals. The plaintiff in error incorporated by Kentucky in February, 1846, was indicted for collecting illegal tolls, and for other acts in violation of a Kentucky statute of 1890. The Act of incorporation, by its third section, required a confirmation of the Act by Ohio, before books of subscription were opened. By its eighth section it gave the company the right to fix and collect tolls, with a duty of making certain returns to the Legislature of Kentucky, and of reducing rates, if necessary, so as to keep the net profits at a specified amount. In March, 1846, the company was incorporated by the Legislature of Ohio "with the same franchises, rights, and privileges, and subject to the same duties and liabilities" specified in the Kentucky incorporation; and with a further proviso that "nothing herein contained shall be construed to take away the jurisdiction of this State to the centre of the said bridge, nor in anywise to acknowledge the jurisdiction of the Commonwealth of Kentucky this side of the said centre." The Ohio Legislature in March, 1850, gave power to condemn

[1] The statement of facts is shortened. — ED.

the necessary lands on the Ohio side. The Legislature of Kentucky afterwards, by four statutes, in 1856, 1858, 1861, and 1865, authorized the increase of capital stock, and the issue of preferred stock, and by the last of these Acts reserved the right to change, alter, or amend the original charter, "but not so as to abridge, alter, or injure legal or equitable rights acquired thereunder;" but this reservation was repealed almost immediately, in the same year. By Act of Congress of February 16, 1865, the bridge was declared to be a lawful structure and a post road for the conveyance of the mails of the United States. 13 Stat. 431. The bridge was completed and opened for travel January 1, 1867.

In March, 1890, the Legislature of Kentucky passed an Act fixing maximum rates of toll, requiring the issue of tickets which should be good in either direction, the keeping of an office, in Kentucky, constantly open, and the conspicuous posting of the schedule of tolls.

The company failed to obey this last statute, and was indicted therefor. On demurrer to the indictment, accompanied by a statement of facts, the demurrer was sustained. The Court of Appeals reversed the judgment, and the case was thereupon heard below, without a jury. Judgment was given against the company, and was affirmed by the Court of Appeals; and, thereupon, the case was brought to this court by writ of error.

Mr. Solicitor-General for plaintiff in error; *Mr. William M. Ramsey*, *Mr. James W. Bryan*, *Mr. John F. Fisk*, and *Mr. Charles H. Fisk* were with him on his brief. *Mr. William J. Hendrick*, Attorney-General of the State of Kentucky, and *Mr. William Goebel*, for defendant in error.

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

This case involves the power of a State to regulate tolls upon a bridge connecting it with another State, without the assent of Congress, and without the concurrence of such other State in the proposed tariff.

The right of the Commonwealth of Kentucky to prescribe a schedule of charges in this instance is contested, not only upon the ground that such regulation is an interference with interstate commerce, but upon the further ground that it impairs the obligation of the contract contained in the original charter of the company.

The power of Congress over commerce between the States, and the corresponding power of individual States over such commerce have been the subject of such frequent adjudication in this court, and the relative powers of Congress and the States with respect thereto are so well defined, that each case, as it arises, must be determined upon principles already settled, as falling on one side or the other of the line of demarcation between the powers belonging exclusively to Congress, and those in which the action of the State may be concurrent. The adjudications of this court with respect to the power of the States over

the general subject of commerce are divisible into three classes. First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive, and the States cannot interfere at all.

The first class, including all those wherein the States have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the State, and while the regulations of the State may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Under this power, the States may authorize the construction of highways, turnpikes, railways, and canals between points in the same State, and regulate the tolls for the use of the same, *Railroad* v. *Maryland*, 21 Wall. 456; and may authorize the building of bridges over non-navigable streams, and otherwise regulate the navigation of the strictly internal waters of the State, — such as do not, by themselves or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other States or foreign countries. *Veazie* v. *Moor*, 14 How. 568; *The Montello*, 11 Wall. 411; s. c. 20 Wall. 430. This is true notwithstanding the fact that the goods or passengers carried or travelling over such highway between points in the same State may ultimately be destined for other States, and, to a slight extent, the State regulations may be said to interfere with interstate commerce. The States may also exact a bonus, or even a portion of the earnings of such corporation, as a condition to the granting of its charter. *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Hamilton Company* v. *Massachusetts*, 6 Wall. 632; *Railroad Company* v. *Maryland*, 21 Wall. 456; *Ashley* v. *Ryan*, 153 U. S. 436.

Congress has no power to interfere with police regulations relating exclusively to the internal trade of the States, *United States* v. *Dewitt*, 9 Wall. 41; *Patterson* v. *Kentucky*, 97 U. S. 501, nor can it by exacting a tax for carrying on a certain business thereby authorize such business to be carried on within the limits of a State. *License Tax Cases*, 5 Wall. 462, 470, 471. The remarks of the Chief Justice in this case contain the substance of the whole doctrine: "Over this," (the internal) "commerce and trade, Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject."

It was at one time thought that the admiralty jurisdiction of the United States did not extend to contracts of affreightment between ports of the United States, though the voyage were performed upon navigable waters of the United States. *Allen* v. *Newberry*, 21 How.

244. But later adjudications have ignored this distinction as applied to those waters. *The Belfast*, 7 Wall. 624, 641; *The Lottawanna*, 21 Wall. 558, 587; *Lord* v. *Steamship Co.*, 102 U. S. 541.

Under this power the States may also prescribe the form of all commercial contracts, as well as the terms and conditions upon which the internal trade of the State may be carried on. *The Trade Mark Cases*, 100 U. S. 82.

Within the second class of cases — those of what may be termed concurrent jurisdiction — are embraced laws for the regulation of pilots: *Cooley* v. *Philadelphia Board of Wardens*, 12 How. 299; *Steamship Company* v. *Joliffe*, 2 Wall. 450; *Ex parte McNiel*, 13 Wall. 236; *Wilson* v. *McNamee*, 102 U. S. 572; quarantine and inspection laws and the policing of harbors: *Gibbons* v. *Ogden*, 9 Wheat. 1, 203; *City of New York* v. *Miln*, 11 Pet. 102; *Turner* v. *Maryland*, 107 U. S. 38; *Morgan Steamship Co.* v. *Louisiana*, 118 U. S. 455; the improvement of navigable channels: *County of Mobile* v. *Kimball*, 102 U. S. 691; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Huse* v. *Glover*, 119 U. S. 543; the regulation of wharfs, piers, and docks: *Cannon* v. *New Orleans*, 20 Wall. 577; *Packet Company* v. *Keokuk*, 95 U. S. 80; *Packet Company* v. *St. Louis*, 100 U. S. 423; *Packet Company* v. *Catlettsburg*, 105 U. S. 559; *Transportation Company* v. *Parkersburg*, 107 U. S. 691; *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444; the construction of dams and bridges across the navigable waters of a State: *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Cardwell* v. *American Bridge Co.*, 113 U. S. 205; *Pound* v. *Turck*, 95 U. S. 459; and the establishment of ferries: *Conway* v. *Taylor's Executors*, 1 Black, 603.

Of this class of cases it was said by Mr. Justice Curtis in *Cooley* v. *Board of Wardens*, 12 How. 299, 318: "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." See also *Sturges* v. *Crowninshield*, 4 Wheat. 122, 193. But even in the matter of building a bridge, if Congress chooses to act, its action necessarily supersedes the action of the State. *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421. As matter of fact, the building of bridges over waters dividing two States is now usually done by Congressional sanction. Under this power the States may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax be not laid upon the commerce itself.

But wherever such laws, instead of being of a local nature and not affecting interstate commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammelled, and the case falls within the third class — of those laws wherein the jurisdiction of Congress is exclusive. *Brown* v. *Houston*, 114 U. S. 622; *Bowman* v. *Chicago, &c. Railway*, 125 U. S. 465. Subject to the exceptions above specified, as belonging to the first and second classes, the States have no right to impose restrictions, either by way of taxation, discrimination, or regulation, upon commerce between the States. That, while the States have the right to tax the instruments of such commerce as other property of like description is taxed, under the laws of the several States, they have no right to tax such commerce itself, is too well settled even to justify the citation of authorities. The proposition was first laid down in *Crandall* v. *Nevada*, 6 Wall. 35, and has been steadily adhered to since. That such power of regulation as they possess is limited to matters of a strictly local nature, and does not extend to fixing tariffs upon passengers or merchandise carried from one State to another, is also settled by more recent decisions, although it must be admitted that cases upon this point have not always been consistent.

The question of the power of the States to lay down a scale of charges, as distinguished from their power to impose taxes, was first squarely presented to the court in *Munn* v. *Illinois*, 94 U. S. 113. . . . That the decision does not necessarily imply a power in the States to prescribe similar regulations with regard to railroads and other corporations directly engaged in interstate commerce is evident from the remarks of the Chief Justice, p. 135, in delivering the opinion of the court. . . . The principle of this case has been recently affirmed in *Budd* v. *New York*, 143 U. S. 517, and reaffirmed in *Brass* v. *North Dakota*, 153 U. S. 391, though not without strong opposition from a minority of the court. . . . [Here follow statements of the cases of *C. B. & Q. R. R.* v. *Iowa*, *supra*, p. 1978 n.; *Peik* v. *C. & N. W. Ry.*, *supra*, p. 1975; *Ruggles* v. *Ill.*, 108 U. S. 526; *Hall* v. *De Cuir*, *supra*, p. 1981, and *R. R. Com. Cases*, *supra*, p. 1733.]

The prior cases were all reviewed, and the subject exhaustively considered in the *Wabash &c. Railway* v. *Illinois*, 118 U. S. 557. . . . The substance of the opinion was that, if the prior cases were to be considered as laying down the principle that the States might regulate the charges for interstate traffic, they must be considered as overruled. See also *Bowman* v. *Chicago, &c. Railway*, 125 U. S. 465. In none of the subsequent cases has any disposition been shown to limit or qualify the doctrine laid down in the *Wabash Case*, and to that doctrine we still adhere.

The real question involved here is whether this case can be distinguished from the *Wabash Case*. That involved the right of a single State to fix the charge for transportation from the interior of such State to places in other States. This case involves the right of one State

to fix charges for the transportation of persons and property over a bridge connecting it with another State, without the assent of Congress or such other State, and thus involving the further inquiries, first, whether such traffic across the river is interstate commerce; and, second, whether a bridge can be considered an instrument of such commerce.

The first question must be answered in the affirmative upon the authority of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, in which the State of Pennsylvania attempted to tax the capital stock of a corporation whose entire business consisted in ferrying passengers and freight over the river Delaware between Philadelphia, in Pennsylvania, and Gloucester, in New Jersey. This traffic was held to be interstate commerce, and, inasmuch as it appeared that the ferry boats were registered in New Jersey and were taxable there, it was held that there was no property held by the company which could be the subject of taxation in Pennsylvania, except the lease of a wharf in that State. "Congress alone," said the court (page 204), "therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by State legislation. Otherwise, there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products and against those of other States." If, as was intimated in that case, interstate commerce means simply commerce between the States, it must apply to all commerce which crosses the State line, regardless of the distance from which it comes or to which it is bound, before or after crossing such State line, — in other words, if it be commerce to send goods from Cincinnati, in Ohio, to Lexington, in Kentucky, it is equally such to send goods or to travel in person from Cincinnati to Covington; and while the reasons which influenced this court to hold in the *Wabash Case* that Illinois could not fix rates between Peoria and New York may not impress the mind so strongly when applied to fixing the rates of toll upon a bridge or ferry, the principle is identically the same, and, at least in the absence of mutual or reciprocal legislation between the two States, it is impossible for either to fix a tariff of charges.

With reference to the second question, an attempt is made to distinguish a bridge from a ferry boat, and to argue that while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. Commerce was defined in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, to be "intercourse," and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the

commerce across a river. A tax laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier.

Let us examine some of the cases which are supposed to countenance the doctrine that ferries and bridges connecting two States are not instruments of commerce between such States in such sense as to exempt them from State control. In *Conway* v. *Taylor's Executors,* 1 Black, 603, a ferry franchise on the Ohio was held to be grantable under the laws of Kentucky to a citizen of that State who was a riparian owner on the Kentucky side. It was said not to be necessary to the validity of the grant that the grantee should have the right of landing on the other side, or beyond the jurisdiction of the State. The opinion, however, did not pass upon the question of the right of one State to regulate the charge for ferriage, nor does it follow that because a State may authorize a ferry or bridge from its own territory to that of another State, it may regulate the charges upon such bridge or ferry. A State may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it would hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such foreign ports would not be a regulation of commerce and beyond the constitutional power of the State. It is true the States have assumed the right in a number of instances, since the adoption of the Constitution, to fix the rates or tolls upon interstate ferries and bridges, and perhaps in some instances have been recognized as having the authority to do so by the courts of the several States. But we are not aware of any case in this court where such right has been recognized. Of recent years it has been the custom to obtain the consent of Congress for the construction of bridges over navigable waters, and by the seventh section of the Act of September 19, 1890, c. 907, 26 Stat. 426, 454, it is made unlawful to begin the construction of any bridge over navigable waters, until the location and plan of such bridge have been approved by the Secretary of War, who has also been in frequent instances authorized to regulate the tolls upon such bridges, where they connected two States. So, too, in *Wiggins Ferry Company* v. *East St. Louis*, 107 U. S. 365, it was held that a State had the power to impose a license fee, either directly or through one of its municipal corporations, upon ferry-keepers living in the State, for boats which they owned and used in conveying from a landing in the State passengers and goods across a navigable river to another State. It was said that "the levying of a tax upon vessels or other water-craft, or the exaction of a license fee by the State within which the property subject to the exaction has its *situs*, is not a regulation of commerce within the meaning of the Constitution of the United States." Obviously the case does not touch the question here involved. Upon the other hand, however, it was held in *Moran* v. *New Orleans*, 112 U. S. 69, that a municipal ordinance of New Orleans imposing a

license tax upon persons owning and running tow-boats to and from the Gulf of Mexico was void as a regulation of commerce.

It is clear that the State of Kentucky, by the statute in question, attempts to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky, a right which practically nullifies the corresponding right of Ohio to fix tolls from her own State. It is obvious that the bridge could not have been built without the consent of Ohio, since the north end of the bridge and its abutments rest upon Ohio soil; and without authority from that State to exercise the right of eminent domain, no land could have been acquired for that purpose. It follows that, if the State of Kentucky has the right to regulate the travel upon such bridge and fix the tolls, the State of Ohio has the same right, and so long as their action is harmonious there may be no room for friction between the States; but it would scarcely be consonant with good sense to say that separate regulations and separate tariffs may be adopted by each State (if the subject be one for State regulation), and made applicable to that portion of the bridge within its own territory. So far as the matter of construction is concerned, each State may proceed separately by authorizing the company to condemn land within its own territory, but in the operation of the bridge their action must be joint or great confusion is likely to result. It may be for the interest of Kentucky to add to its own population by encouraging residents of Cincinnati to purchase homes in Covington, and to do this by fixing the tolls at such a rate as to induce citizens of Ohio to reside within her borders. It might be equally for the interest of Ohio to prescribe a higher rate of toll to induce her citizens to remain and fix their homes within their own State, and as persons living in one State and doing business in another would necessarily have to cross the bridge at least twice a day, the rates of toll might become a serious question to them. Congress, and Congress alone, possesses the requisite power to harmonize such differences, and to enact a uniform scale of charges which will be operative in both directions. The authority of the State, so frequently recognized by this court, to fix tolls for the use of wharves, piers, elevators, and improved channels of navigation, has always been limited to such as were exclusively within the territory of a single State, thus affecting interstate commerce but incidentally, and cannot be extended to structures connecting two States without involving a liability of controversies of a serious nature. For instance, suppose the agent of the Bridge Company in Cincinnati should refuse to recognize tickets sold upon the Kentucky side, enabling the person holding the ticket to pass from Ohio to Kentucky, it would be a mere *brutum fulmen* to attempt to punish such agent under the laws of Kentucky. Or, suppose the State of Ohio should authorize such agent to refuse a passage to persons coming from Kentucky who had not paid the toll required by the Ohio statute; or that Kentucky should enact that all persons crossing from Kentucky to Ohio should be entitled to a

free passage, and thus attempt to throw the whole burden upon persons crossing in the opposite direction. It might be an advantage to one State to make the charge for foot passengers very low and the charge for merchandise very high, and for the other side to adopt a converse system. One scale of charges might be advantageous to Kentucky in this instance, where the larger city is upon the north side of the river, while a wholly different system might be to her advantage at Louisville, where the larger city is upon the south side.

We do not wish to be understood as saying that, in the absence of Congressional legislation or mutual legislation of the two States, the company has the right to fix tolls at its own discretion. There is always an implied understanding with reference to these structures that the charges shall be reasonable, and the question of reasonableness must be settled as other questions of a judicial nature are settled, by the evidence in the particular case. As was said in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 217, "freedom from such impositions does not of course imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the States secured under the commercial power of Congress." Nor are we to be understood as passing upon the question whether, in the absence of legislation by Congress, the States may by reciprocal action fix upon a tariff which shall be operative upon both sides of the river.

We do hold, however, that the statute of the Commonwealth of Kentucky in question in this case is an attempted regulation of commerce which it is not within the power of the State to make. As was said by Mr. Justice Miller in the *Wabash Case:* "It is impossible to see any distinction in its effects upon commerce of either class between a statute which regulates the charges for transportation and a statute which levies a tax for the benefit of the State upon the same transportation."

The judgment of the court of appeals of Kentucky is therefore reversed, and the case remanded to that court for further proceedings in conformity with this opinion.

Mr. Chief Justice Fuller, Mr. Justice Field, Mr. Justice Gray, and Mr. Justice White concurred in the judgment of reversal, for the following reasons: —

The several States have the power to establish and regulate ferries and bridges, and the rates of toll thereon, whether within one State, or between two adjoining States, subject to the paramount authority of Congress over interstate commerce.

By the concurrent Acts of the Legislature of Kentucky in 1846, and of the Legislature of Ohio in 1849, this bridge company was made a corporation of each State, and authorized to fix rates of toll.

Congress, by the Act of February 17, 1865, c. 39, declared this bridge "to be, when completed in accordance with the laws of the States of Ohio and Kentucky, a lawful structure;" but made no provision as to tolls; and thereby manifested the intention of Congress that the rates of toll should be as established by the two States. 13 Stat. 431.

The original Acts of incorporation constituted a contract between the corporation and both States, which could not be altered by the one State without the consent of the other.

PLUMLEY *v.* THE COMMONWEALTH OF MASSACHUSETTS.

SUPREME COURT OF THE UNITED STATES. 1894.

[15 *Supreme Court Reporter*, 154.][1]

R. M. Morse, *A. H. Veeder*, and *Wm. J. Campbell*, for plaintiff in error; *A. E. Pillsbury*, Atty.-Gen., for the Commonwealth.

MR. JUSTICE HARLAN delivered the opinion of the court.

Plumley, the plaintiff in error, was convicted in the Municipal Court of Boston upon the charge of having sold in that city on the 6th day of October, 1891, in violation of the law of Massachusetts, a certain article, product, and compound known as "oleomargarine," made partly of fats, oils, and oleaginous substances and compounds thereof, not produced from unadulterated milk or cream, but manufactured in imitation of yellow butter produced from pure unadulterated milk and cream.

The prosecution was based upon a statute of that Commonwealth approved March 10, 1891, and entitled "An Act to prevent deception in the manufacture and sale of imitation butter." By that statute it is provided as follows: . . . [The statute forbids, under penalties, rendering, manufacturing, selling, offering, or exposing for sale, or having in possession with intent to sell, anything made wholly or partly of any fat, oil, or oleaginous substance or compound thereof, not produced from unadulterated milk or cream from the same, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream of the same; with a proviso excepting oleomargarine in a separate and distinct form and in a manner that will advise of its real character, free from coloration or ingredient causing it to look like butter. Inspectors of milk are required to institute complaints and are authorized to enter places where butter or imitations of it are kept for sale and take specimens for analysis. This statute is not to interfere with the enforcement of those previously enacted. Stat. Mass. 1891, c. 58.]

[1] The statement of the case is omitted. This case will appear in 155 U. S. 461.— ED.

The defendant was found guilty of the offence charged. The court adjudged that he pay a fine of $100, and on default thereof stand committed in the common jail of Suffolk County until the fine was paid. Such default having occurred, a writ of commitment was issued, under which he was taken for the purpose of imprisoning him in jail until the fine was paid. He sued out a writ of *habeas corpus* from the Supreme Judicial Court of Massachusetts upon the ground that he was restrained of his liberty in violation of the Constitution and laws of the United States.

In his petition for the writ the accused set forth, in substance, that at the time and place charged he offered for sale and sold one package containing 10 pounds of oleomargarine, manufactured from pure animal fats or substances, and designed to take the place of butter produced from pure, unadulterated milk or cream. He also alleged that the oleomargarine in question was manufactured by a firm of which he was an agent, and the members of which were citizens and residents of Illinois, engaged at the city of Chicago in the business of manufacturing that article, and shipping it to various cities, towns, and places in Illinois and in other States, and there selling the same; and that all oleomargarine manufactured by that firm and by other leading manufacturers was a wholesome, nutritious, palatable article of food, in no way deleterious to the public health or welfare.

The petitioner claimed that the statute of Massachusetts was repugnant to the clause of the Constitution providing that the Congress shall have power to regulate commerce among the several States; to the clause declaring that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States; to the clause providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor 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; to the clause declaring that private property shall not be taken for public purposes; and to the Act of Congress of August 2, 1886, entitled "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine" (24 Stat. 209, c. 840; Supp. Rev. St. 505).

The case was heard before one of the justices of that court, and was reported to the full court on the petition and on the following facts and offer of proof:

"The proceedings are as alleged in the petition. The article sold by the petitioner was the article the sale of which is forbidden by chapter 58 of the Acts of 1891. Oleomargarine has naturally a light, yellowish color, but the article sold by the petitioner was artificially colored in imitation of yellow butter.

"The allegations concerning the quality or wholesome character of the article sold are not admitted. The petitioner offers to prove the allegations of the petition in respect to the character and qualities of

the article, and the Commonwealth objects to such proofs as immaterial, and the petitioner is to have the benefit of his offer if found material.

"It is admitted that the article sold was sent by the manufacturers thereof in the State of Illinois to the petitioner, their agent in Massachusetts, and was sold by him in the original package, and that in respect to the article sold the importers and the petitioner had complied with all the requirements of the Act of Congress regulating the sale of oleomargarine, and it was marked and distinguished by all the marks, words, and stamps required of oleomargarine by the laws of this Commonwealth."

It was adjudged that the prisoner be remanded to the custody of the keeper of the common jail, to be therein confined, the opinion of that court being that the statute of Massachusetts was not in violation of the Constitution or laws of the United States, and, consequently, that the petitioner was not illegally restrained of his liberty. 156 Mass. 236. The present writ of error brings up that judgment for review.

The learned counsel for the appellant states that Congress, in the Act of August 2, 1886, has legislated fully on the subject of oleomargarine. This may be true, so far as the purposes of that Act are concerned. But there is no ground to suppose that Congress intended in that enactment to interfere with the exercise by the States of any authority they could rightfully exercise over the sale within their respective limits of the article defined as "oleomargarine." The statute imposed certain special taxes upon manufacturers of oleomargarine, as well as upon wholesale and retail dealers in that compound. And it is expressly declared (section 3) that sections 3232–3241, inclusive, and section 3243, of the Revised Statutes, title "Internal Revenue," "are, so far as applicable, made to extend to and include and apply to the special taxes" so imposed, "and to the persons upon whom they are imposed." Section 3243 of the Revised Statutes is in these words: "The payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes." It is manifest that this section was incorporated into the Act of August 2, 1886, to make it clear that Congress had no purpose to restrict the power of the States over the subject of the manufacture and sale of oleomargarine within their respective limits. The taxes prescribed by that Act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State which lawfully forbade such manufacture or sale, or to disregard any regulations which a State might lawfully prescribe in

reference to that article. *License Tax Cases,* 5 Wall. 462, 474; *Pervear* v. *Com.,* Id. 475; *U. S.* v. *Dewitt,* 9 Wall. 41.

Nor was the Act of Congress relating to oleomargarine intended as a regulation of commerce among the States. Its provisions do not have special application to the transfer of oleomargarine from one State of the Union to another. They relieve the manufacturer or seller, if he conforms to the regulations prescribed by Congress, or by the commissioner of internal revenue under the authority conferred upon him in that regard, from penalty or punishment so far as the general government is concerned, but they do not interfere with the exercise by the States of any authority they possess of preventing deception or fraud in the sales of property within their respective limits.

The vital question in this case is, therefore, unaffected by the Act of Congress, or by any regulations that have been established in execution of its provisions. That question is whether, as contended by the petitioner, the statute under examination, in its application to sales of oleomargarine brought into Massachusetts from other States, is in conflict with the clause of the Constitution of the United States investing Congress with power to regulate commerce among the several States. This is the only question the learned counsel for the petitioner urges upon our attention, and, in view of the decision in *Powell* v. *Pennsylvania,* 127 U. S. 678, is the only one that we need consider.

It will be observed that the statute of Massachusetts which is alleged to be repugnant to the commerce clause of the Constitution does not prohibit the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure unadulterated milk or cream of such milk. If free from coloration or ingredient that "causes it to look like butter," the right to sell it "in a separate and distinct form, and in such manner as will advise the consumer of its real character," is neither restricted nor prohibited. It appears in this case that oleomargarine, in its natural condition, is of "a light, yellowish color," and that the article sold by the accused was artificially colored "in imitation of yellow butter." Now, the real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear to be what it is not, and thus induce unwary purchasers, who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from unadulterated milk, or cream from such milk. The suggestion that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded, by such coloration, into believing that they are getting genuine butter. If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty, under the statute of Massachusetts, to manufacture it in that State, or to sell it there in such manner as to inform the customer of its real character. He is only forbidden to practice, in such matters, a fraud upon the general

public. The statute seeks to suppress false pretences and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practise a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?

Several cases in this court were cited in argument to support the contention that the grant of power to Congress to regulate interstate commerce extended to such legislation as that enacted by the Commonwealth of Massachusetts. Let us see whether those cases announce any principle that compels this court to adjudge that the States have surrendered to the general government the power to prevent fraud in the sales of property. [Here follow summaries (with quotations) of the cases of *R. R. Co.* v. *Husen, supra*, p. 753, *Minn.* v. *Barber*, *supra*, p. 2112, *Brimmer* v. *Rebman*, *supra*, p. 2118 n., *Voight* v. *Wright, supra*, p. 2119, and *Walling* v. *People*, *supra*, p. 2028.]

It is obvious that none of the above cases presented the question now before us. Each of them involved the question whether one State could burden interstate commerce by means of discriminations enforced for the benefit of its own products and industries at the expense of the products and industries of other States. It did not become material in any of them to inquire, nor did this court inquire, whether a State in the exercise of its police powers, may protect the public against the deception and fraud that would be involved in the sale within its limits, for purposes of food, of a compound that had been so prepared as to make it appear to be what it was not. While in each of those cases it was held that the reserved police powers of the States could not control the prohibitions of the Federal Constitution nor the powers of the government it created (*New Orleans Gas-Light Co.* v. *Louisiana Light & Heat Producing & Manuf'g Co.*, 115 U. S. 650), it was distinctly stated that the grant to Congress of authority to regulate foreign and interstate commerce did not involve a surrender by the States of their police powers. If the statute of Massachusetts had been so framed as to be applicable only to oleomargarine manufactured in other States, and which had been made in imitation of pure butter, the case would have been wholly different. But we have seen that it is not of that character, but is aimed at all oleomargarine artificially colored so as to cause it to look like genuine butter, and offered for sale in Massachusetts.

In none of the above cases is there to be found a suggestion or intimation that the Constitution of the United States took from the States the power of preventing deception and fraud in the sale, within their respective limits, of articles, in whatever State manufactured, or that

that instrument secured to any one the privilege of committing a wrong against society.

Referring to the general body of the law, from whatever source derived, existing in each State of the Union, and regulating the rights and duties of all within its jurisdiction, even those engaged in interstate commerce, this court, speaking by Mr. Justice Matthews, said in *Smith* v. *Alabama*, 124 U. S. 465, 476, that "it was in contemplation of the continued existence of this separate system of law in each State that the Constitution of the United States was framed and ordained with such legislative powers as are therein granted expressly or by reasonable implication." It was consequently held in that case that a State may enact laws and prescribe regulations, applicable to carriers engaged in interstate and foreign commerce, to insure the safety of persons carried by them, as well as the safety of persons and things liable to be affected by their acts while they were within the territorial jurisdiction of the State. So in *Dent* v. *State*, 129 U. S. 114, 122, which involved the validity of a State enactment making it a public offence for any one to practise medicine in West Virginia without complying with certain prescribed conditions, this court, speaking by Mr. Justice Field, said: "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 deception and fraud."

If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which, it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States. For, as said by this court in *Sherlock* v. *Alling*, 93 U. S. 99, 103, "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. . . . And it may be said generally that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

But the case most relied on by the petitioner to support the proposition that oleomargarine, being a recognized article of commerce, may

be introduced into a State, and there sold in original packages, without any restriction being imposed by the State upon such sale, is *Leisy* v. *Hardin*, 135 U. S. 100.

The majority of the court in that case held that ardent spirits, distilled liquors, ale, and beer were subjects of exchange, barter, and traffic, and, being articles of commerce, their sale while in the original packages in which they are carried from one State to another State could not, without the assent of Congress, be forbidden by the latter State; that the parties in that case, who took beer from Illinois into Iowa, had the right, under the Constitution of the United States, to sell it in Iowa in such original packages, any statute of that State to the contrary notwithstanding; and that Iowa had no control over such beer until the original packages were broken, and the beer in them became mingled in the common mass of property within its limits. "Up to that point of time," the court said, "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." Page 124, 135 U. S.

It is sufficient to say of *Leisy* v. *Hardin* that it did not in form or in substance present the particular question now under consideration. The article which the majority of the court in that case held could be sold in Iowa in original packages, the statute of that State to the contrary notwithstanding, was beer manufactured in Illinois, and shipped to the former State, to be there sold in such packages. So far as the record disclosed, and so far as the contentions of the parties were concerned, the article there in question was what it appeared to be, namely, genuine beer, and not a liquid or drink colored artificially so as to cause it to look like beer. The language we have quoted from *Leisy* v. *Hardin* must be restrained in its application to the case actually presented for determination, and does not justify the broad contention that a State is powerless to prevent the sale of articles manufactured in or brought from another State, and subjects of traffic and commerce, if their sale may cheat the people into purchasing something they do not intend to buy, and which is wholly different from what its condition and appearance import. At the term succeeding the decision in *Leisy* v. *Hardin*, this court, in *Rahrer's Case*, 140 U. S. 545, 546, sustained the validity of the Act of Congress of August 8, 1890 (26 Stat. 313, c. 728), known as the "Wilson Act," and in the light of the decision in *Leisy* v. *Hardin* said, by the chief justice, that "the power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity 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," and that "it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, and cannot be assumed by the national government."

The judgment of the court below is supported by many well-considered cases. In *People* v. *Arensberg*, 105 N. Y. 123, 129, 130, the precise question now before us came before the Court of Appeals of New York. That court, after referring to its decision in *People* v. *Marx*, 99 N. Y. 377, 385, adjudging a statute of New York relating to the manufacture of oleomargarine to be in violation of the fundamental right and privilege of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, said: "Assuming, as is claimed, that butter made from animal fat or oil is as wholesome, nutritious, and suitable for food as dairy butter; that it is composed of the same elements, and is substantially the same article, except as regards its origin, and that it is cheaper; and that it would be a violation of the constitutional rights and liberties of the people to prohibit them from manufacturing or dealing in it, for the mere purpose of protecting the producers of dairy butter against competition, — yet it cannot be claimed that the producers of butter made from animal fat or oils have any constitutional right to resort to devices for the purpose of making their product resemble in appearance the more expensive article known as 'dairy butter,' or that it is beyond the power of the legislature to enact such laws as they may deem necessary to prevent the simulated article being put upon the market in such a form and manner as to be calculated to deceive. If it possesses," continued the court, "the merits which are claimed for it, and is innocuous, those making and dealing in it would be protected in the enjoyment of liberty in those respects; but they may legally be required to sell it for and as what it actually is, and upon its own merits, and are not entitled to the benefit of any additional market value which may be imparted to it by resorting to artificial means to make it resemble dairy butter in appearance. It may be butter, but it is not butter made from cream; and the difference in cost or market value, if no other, would make it a fraud to pass off one article for the other." Again: "The statutory prohibition is aimed at a designed and intentional imitation of dairy butter, in manufacturing the new product, and not at a resemblance in qualities inherent in the articles themselves and common to both." The court therefore held that artificial coloring of oleomargarine for the mere purpose of making it resemble dairy butter came within the statutory prohibition against imitation, and "that such prohibition is within the power of the legislature, and rests upon the same principle which would sustain a prohibition of coloring winter dairy butter for the purpose of enhancing its market price by making it resemble summer dairy butter, should the legislature deem such a prohibition necessary or expedient."

In *McAllister* v. *State*, 72 Md. 390, the Court of Appeals of Maryland sustained the validity of a statute of that State declaring it unlawful to offer for sale as an article of food an article in imitation and semblance of natural butter. The object of the statute being to protect purchasers against fraud and deception, the power of the legisla-

ture, the court said, following the previous decision in *Pierce* v. *State*, 63 Md. 596, was too plain to be questioned.

In *Waterbury* v. *Newton*, 50 N. J. Law, 534, the New Jersey Supreme Court sustained the validity of an Act that forbade the sale of oleomargarine colored with annotto. In response to the suggestion that oleomargarine colored with annotto was a wholesome article of food, the sale of which could not be prohibited, the court said: "If the sole basis for this statute were the protection of the public health, this objection would be pertinent, and might require us to consider the delicate questions whether and how far the judiciary can pass upon the adaptability of the means which the legislature has proposed for the accomplishment of its legitimate ends. But, as already intimated, this provision is not aimed at the protection of the public health. Its object is to secure to dairymen and to the public at large a fuller and fairer enjoyment of their property, by excluding from the market a commodity prepared with a view to deceive those purchasing it. It is not pretended that annotto has any other function in the manufacture of oleomargarine than to make it a counterfeit of butter, which is more generally esteemed, and commands a higher price. That the legislature may repress such counterfeits does not admit, I think, of substantial question. Laws of like character have of late years been frequently assailed before the courts, but always without success." It was further held by the court that the statute of New Jersey was not repugnant to the clause of the Constitution empowering Congress to regulate commerce among the States, but that the package there in question, and which had been brought from Indiana, became, on its delivery in Jersey City, subject to the laws of New Jersey relating generally to articles of that nature. 50 N. J. Law, 535, 537.

So in *State* v. *Marshall*, 64 N. H. 549, 551, 552, arising under a statute of New Hampshire, relating to the sale of imitation butter, the court said: "Butter is a necessary article of food, of almost universal consumption; and if an article compounded from cheaper ingredients, which many people would not purchase or use if they knew what it was, can be made so closely to resemble butter that ordinary persons cannot distinguish it from genuine butter, the liability to deception is such that the protection of the public requires those dealing in the article in some way to designate its real character. . . . The prohibition of the statute being directed against imposition in selling or exposing for sale artificial compounds resembling butter in appearance and flavor, and liable to be mistaken for genuine butter, it is no defence that the article sold or exposed for sale is free from impurity and unwholesome ingredients, and healthy and nutritious as an article of food."

In *State* v. *Addington*, 77 Mo. 110, 118, the court, referring to a statute prohibiting the manufacture and sale of oleaginous substances, or compounds of the same, in imitation of dairy products, said: "The central idea of the statute before us seems very manifest. It was, in our opinion, the prevention of facilities for selling or manufacturing a

spurious article of butter, resembling the genuine article so closely in its external appearance as to render it easy to deceive purchasers into buying that which they would not buy but for the deception. The history of legislation on this subject, as well as the phraseology of the Act itself, very strongly tends to confirm this view. If this was the purpose of the enactment now under discussion, we discover nothing in its provisions which enables us, in the light of the authorities, to say that the legislature, when passing the Act, exceeded the power confided to that department of the government; and, unless we can say this, we cannot hold the Act as being anything else than valid."

To the same effect are *Powell* v. *Commonwealth*, 114 Pa. St. 265; *Butler* v. *Chambers*, 36 Minn. 69, 30 N. W. 308; and *Weideman* v. *State* (Minn.), 56 N. W. 688.

In *Railroad Co.* v. *Husen*, above cited, the court, speaking generally, said that the police power of a State extended to the making of regulations "promotive of domestic order, morals, health, and safety." It was there held, among other things, to 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," and that "the police powers of a State justified the adoption of precautionary measures against social evils," and the enactment of such laws as would have "immediate connection with the protection of persons and property against the noxious acts of others."

It has therefore been adjudged that the States may legislate to prevent the spread of crime, and may exclude from their limits paupers, convicts, persons likely to become a public charge, and persons afflicted with contagious or infectious diseases. These and other like things having immediate connection with the health, morals, and safety of the people may be done by the States in the exercise of the right of self-defence. And yet it is supposed that the owners of a compound which has been put in a condition to cheat the public into believing that it is a particular article of food in daily use, and eagerly sought by people in every condition of life, are protected by the Constitution in making a sale of it against the will of the State in which it is offered for sale, because of the circumstance that it is in an original package, and has become a subject of ordinary traffic. We are unwilling to accept this view. We are of opinion that it is within the power of a State to exclude from its markets any compound manufactured in another State, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure to any one the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offence against society; and the States are as competent to protect their people against such offences or wrongs

as they are to protect them against crimes or wrongs of more serious character. And this protection may be given without violating any right secured by the national Constitution, and without infringing the authority of the general government. A State enactment forbidding the sale of deceitful imitations of articles of food in general use among the people does not abridge any privilege secured to citizens of the United States, nor, in any just sense, interfere with the freedom of commerce among the several States. It is legislation which "can be most advantageously exercised by the States themselves." *Gibbons* v. *Ogden*, 9 Wheat. 203.

We are not unmindful of the fact — indeed, this court has often had occasion to observe — that the acknowledged power of the States to protect the morals, the health, and safety of their people by appropriate legislation sometimes touches, in its exercise, the line separating the respective domains of national and State authority. But in view of the complex system of government which exists in this country, "presenting," as this court, speaking by Chief Justice Marshall, has said, "the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous State governments, which retain and exercise all powers not delegated to the Union," the judiciary of the United States should not strike down a legislative enactment of a State — especially if it has direct connection with the social order, the health, and the morals of its people — unless such legislation plainly and palpably violates some right granted or secured by the national Constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern.

We cannot so adjudge in reference to the statute of Massachusetts, and, as the court below correctly held that the plaintiff in error was not restrained of his liberty in violation of the Constitution of the United States, the judgment must be affirmed.

Mr. Justice Jackson, now absent, was present at the argument, and participated in the decision of this case. He concurs in this opinion.

Judgment affirmed.

Mr. Chief Justice Fuller, dissenting.

The power vested in Congress to regulate commerce among the several States is the power to prescribe the rule by which that commerce is to be governed; and, as that commerce 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 to do so, it thereby indicates its will that such commerce shall be free and untrammelled. Manifestly, whenever State legislation comes in conflict with that will, it must give way.

In whatever language such legislation may be framed, its purpose must be determined by its natural and reasonable effect; and the presumption that it was enacted in good faith cannot control the determination of the question whether it is or is not repugnant to the Constitution of the United States.

Upon this record oleomargarine is conceded to be a wholesome, palatable, and nutritious article of food, in no way deleterious to the public health or welfare. It is of the natural color of butter, and looks like butter, and is often colored, as butter is, by harmless ingredients, a deeper yellow, to render it more attractive to consumers. The assumption that it is thus colored to make it appear to be a different article, generically, than it is, has no legal basis in this case to rest on. It cannot be denied that oleomargarine is a recognized article of commerce, and, moreover, it is regulated as such, for revenue purposes, by the Act of Congress of August 2, 1886 (24 Stat. 209, c. 840); *U. S.* v. *Eaton*, 144 U. S. 677.

The Act under consideration prohibits its sale if "in imitation of yellow butter," though it may be sold "in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter." This prohibits its sale in its natural state of light yellow, or when colored a deeper yellow, because in either case it looks like butter. The statute is not limited to imitations made for a fraudulent purpose; that is, intentionally made to deceive. The Act of Congress requiring, under penalty, oleomargarine to be sold only in designated packages, marked, stamped, and branded as prescribed, and numerous Acts of Massachusetts, minutely providing against deception in that respect (Pub. St. Mass. c. 56; St. 1884, c. 310; St. 1886, c. 317; St. 1891, c. 412), amply protect the public from the danger of being induced to purchase oleomargarine for butter. The natural and reasonable effect of this statute is to prevent the sale of oleomargarine because it looks like butter. How this resemblance, although it might possibly mislead a purchaser, renders it any the less an article of commerce, it is difficult to see.

I deny that a State may exclude from commerce legitimate subjects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities.

In the language of Knowlton, J., in the dissenting opinion below, I am not "prepared to hold that no cloth whose fabric is so carded and spun and woven and finished as to give it the appearance of being wholly wool, when in fact it is in part cotton, can be a subject of commercial transactions, or that no jewelry which is not gold, but is made to resemble gold, and no imitations of precious stones, however desirable they may be considered by those who wish to wear them, shall be deemed articles of merchandise in regard to which Congress may make commercial regulations."

Other illustrations will readily suggest themselves. The concession involves a serious circumscription of the realm of trade, and destroys the rule by an unnecessary exception.

The right to import, export, or sell oleomargarine in the original package under the regulations prescribed by Congress cannot be inhibited by such legislation as that before us. Fluctuation in decision

in respect of so vital a power as that to regulate commerce among the several States is to be deprecated, and the opinion and judgment in this case seem to me clearly inconsistent with settled principles. I dissent from opinion and judgment, and am authorized to say that MR. JUSTICE FIELD and MR. JUSTICE BREWER concur with me in so doing.

UNITED STATES *v.* E. C. KNIGHT COMPANY ET AL

SUPREME COURT OF THE UNITED STATES. 1895.

[15 *Sup. Court Rep.* 249.][1]

THIS was a bill filed by the United States against E. C. Knight Company and others, in the Circuit Court of the United States for the Eastern District of Pennsylvania, charging that the defendants had violated 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, c. 647), "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." . . . Answers were filed and evidence taken. . . . The Circuit Court held that the facts did not show a contract, combination, or conspiracy to restrain or monopolize trade or commerce "among the several States or with foreign nations," and dismissed the bill. 60 Fed. Rep. 306. The cause was taken to the Circuit Court of Appeals for the Third Circuit, and the decree affirmed. 60 Fed. Rep. 934. This appeal was then prosecuted. . . .

Atty.-Gen. Olney, *Sol.-Gen. Maxwell*, and *S. F Phillips*, for appellant; *John G. Johnson* and *John E. Parsons*, for appellees.

MR. CHIEF JUSTICE FULLER . . . 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

[1] This case will appear in 156 U. S. 1. — ED.

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 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, aggregations 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 a 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 the 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. . . . That which belongs to commerce 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, 210; *Brown* v. *Maryland*, 12 Wheat. 419, 448; *The License Cases*, 5 How. 599; *Mobile* v. *Kimball*, 102 U. S. 691; *Bowman* v. *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, 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, 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. [Here follows a quotation from the opinion of the court in this case.] 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 re-

strain 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 Pennsylvania, 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 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 Circuit Court declined, upon the pleadings and proofs, to grant the relief prayed, and dismissed the bill, and we are of opinion that the Circuit Court of Appeals did not err in affirming that decree.

Decree affirmed.

The dissenting opinion of HARLAN, J., is omitted.

NOTE.

THE subject of the present chapter has unusual complications. There exist not merely the common difficulties in constitutional questions about accommodating the just extent of judicial control to that of legislative power, — such difficulties, *e. g.*, as appear in revising a legislative determination of what are reasonable railroad rates (*supra*, p. 672; and *Reagan* v. *Farmers, &c. Trust Co.*, *supra*, p. 1745); but other embarrassments, also, arising out of the necessity of adjusting the relative powers of two legislative bodies, the local and the national. It is Congress and not the courts, to whom is intrusted the regulation of that portion of commerce which is interstate, foreign, and with the Indian tribes; and, primarily, it would appear to be the office of the Federal legislature, and not of the Federal courts, to supervise and moderate the action of the local legislatures, where it touches these parts of commerce.

The present state of the decisions seems to invite one or two more suggestions. The principal difficulties seem now to lie in that region of the general subject as to which it is said that when a matter admits only of one uniform system or plan of regulation the power of Congress is exclusive; and where again, it is said that when Congress is silent this silence is, virtually, a regulation, — a declaration that the given subject shall remain as it is.

Now the question whether or not a given subject admits of only one uniform system or plan of regulation is primarily a legislative question, not a judicial one. For it involves a consideration of what, on practical grounds, is expedient, possible, or desirable; and whether, being so at one time or place, it is so at another: as in the cases of quarantine and pilotage laws, and laws regulating the bringing in and sale of particular articles, such as intoxicating liquors or opium. As regards the last-named drug, the desirable rule for California, where there are many Chinamen, and for Vermont, where they are few, may conceivably be different. It is not in the language itself of the clause of the Constitution now in question, or in any necessary construction of it, that any requirement of uniformity is found, in any case whatever. That can only be declared necessary, in any given case, as being the determination of some one's practical judgment. The question, then, appears to be a legislative one; it is for Congress and not for the courts, — except, indeed, in the sense that the courts may control a legislative decision, so far as to keep it within the bounds of reason, of rational opinion.

If this be so, then no judicial determination of the question can stand against a reasonable enactment of Congress to the contrary; such, for example, as was made in the "Wilson Bill" (see *In re Rahrer*, *supra*, p. 2123), by which a determination of the

court in *Leisy* v. *Hardin* was superseded. Compare *Pa.* v. *Wheeling, &c. Bridge Co.*, *supra*, p. 1889. It would seem to follow that the courts should abstain from interference, except in cases so clear that the legislature cannot legitimately supersede its determinations; for the fact that the legislature may do this, in any given case, shows plainly that the question is legislative and not judicial.

But if it be said, leaving aside any inquiry as to whether or not a uniform rule is required, that the courts have merely been construing the silence and non-action of Congress as being a declaration that no rule is required, and enforcing that, we do not really escape from the difficulty just mentioned. As regards State regulations of commerce in matters which do not require uniformity of rule, it is admitted that the silence of Congress is not conclusive against them; some positive intervention of Congress is required (*Cooley* v. *Port Wardens*, *supra*, p. 1879). If, then, the courts would know, in any given case of a regulation of commerce, what the silence of Congress means, how are they to tell, unless they first determine under which head the given regulation belongs, that of regulations requiring a uniform rule, or of those which do not? But that, as we have seen, they cannot settle without passing on a legislative question, except in cases so clear that there cannot reasonably be two opinions.

It may then be conjectured that the decisions of the Federal courts are likely to incline, as time goes on, to the side of leaving it to Congress to check such legislation of the States as may be challenged on the ground now in question, and of limiting its own action, in respect to such cases, to that class of State enactments which is so clearly unconstitutional that no consent of Congress could help the matter out. An illustration of this method may be observed in the case of *Neilson* v. *Garza*, *supra*, p. 1969, in considering the question whether a law of Texas was an inspection law, and if so, whether it transgressed the constitutional limit in laying, without the consent of Congress, a duty or impost on imports or exports beyond what was absolutely necessary for executing the inspection law. Mr. Justice Bradley, after remarking that the right to make inspection laws is not granted to Congress but is reserved to the States, — with this limitation as to the means of executing them, that duties on imports or exports, not passed upon by Congress, must be absolutely necessary, — went on to say, as to who shall determine whether a duty is excessive or not, that the question is for Congress, "the duty must stand until Congress shall see fit to alter it."

In like manner, accepting the approved principle of *Cooley* v. *Port Wardens*, *supra*, p. 1879, that subjects of interstate and foreign commerce which require one uniform rule are exclusively for Congress, it can make no difference whether this principle be stated in express terms in the Constitution, like the qualification about inspection laws, or be only a just implication. To the question, Who shall say whether one uniform rule is required? as well as to the other question, Who shall say whether the inspection duty is absolutely necessary? the answer is the same: that question is for Congress, and the State regulation "must stand until Congress shall see fit to alter it." And so Mr. Justice Curtis, in giving the court's opinion in *Cooley* v. *Port Wardens* (*supra*, p. 1887), points to the legislative character of the question when he says: "The Act of 1789 contains a clear and authoritative declaration by the first Congress that the nature of this subject (pilotage) is such that . . . it is local and not national."

If it be thought that Congress will very likely be dilatory or negligent, or that it may even purposely allow, and connive at, what should be forbidden, — that is quite possible. But the objection is a criticism upon the arrangements of the Constitution itself, in giving so much power to the legislature and so little to the courts. It should be observed, however, that the great thing which the makers of the Constitution had in view, as to this subject, was to secure power and control to a single hand, the general government, the common representative of all, instead of leaving it divided and scattered among the States; and that this object is clearly accomplished. It is also to be remembered that much in State action, which may not be reached by the courts under the present head, may yet be controlled by them under other parts of the Constitution, as in such cases as *Crandall* v. *Nevada*, *supra*, p. 1364, and *Corfield* v. *Coryell*, *supra*, p. 453. — Ed.

CHAPTER XI.

MONEY. — WEIGHTS AND MEASURES.

THE MIANTINOMI.

UNITED STATES CIRCUIT COURT, THIRD CIRCUIT. 1855.

[3 *Wallace, Junior*, 46.]

THE Constitution of the United States, Art. 1, sect. 8, cl. 5, gives to Congress the power "to fix the standard of weights," a power which, however, it has never exercised, except by an Act of May 19, 1828, in which it declares that a certain "brass troy pound weight," then in the custody of the director of the mint of the United States, shall be the standard troy pound of the mint. In this state of Federal inaction, the Legislature of Pennsylvania, by an "Act to fix the standards and denominations of measures and weights" in that Commonwealth, enacted (§ 13), on the 15th April, 1834, that the standard of weight shall be a pound, to be computed upon the troy pound of the mint of the United States, referred to in the Act of Congress of May 19, 1828, to wit: "The troy pound of this Commonwealth shall be equal to the troy pound of the mint aforesaid, and the avoirdupois pound of this Commonwealth shall be greater than the troy pound aforesaid in the proportion of 7,000 to 5,760;" and enacted further (§ 17), that "the denominations of weight of this Commonwealth, whereof the pound avoirdupois, as heretofore provided, is the standard unit, shall be: 16 drams make one ounce, 16 ounces make one pound, 25 pounds make one quarter, 4 quarters make one hundred, 20 hundreds make one ton."

Notwithstanding this law, the ton of coal (the ton weight being the unit by which coal is always bought in Philadelphia), as perhaps of other things, was popularly regarded as being 2,240 pounds. To the great majority of people the existence of the Pennsylvania Act was unknown. But towards the close of the year 1853, — coal having been then lately very much, as it continued afterwards, on the rise in price, — almost all the vendors of coal of Philadelphia met together in a public way, and having made agreement with one another to this effect, publicly, and in a body, "*Resolved*, that on and after December 1st, 1853, the weight for a ton of coal shall be 2,000 pounds; and that the price be reduced in proportion to the weight." These proceedings of the coal dealers were matters of great publicity, and known to most persons who burn coal and read the city newspapers. From that time the coal-deal-

ers, when furnishing coal in the city, furnished but 2,000 pounds as a ton.

In this state of facts, one Holt had contracted, previously to these resolutions, to furnish the steamer "Miantinomi" with several hundred "tons" of coal at the market prices, and furnished that part of his "tons," which he delivered after the resolutions at the rate of 2,000 pounds. He had given no notice to the parties with whom he had contracted that he was, after the resolutions, furnishing 2,000 pounds as a ton, and it did not appear that they knew of the resolutions. As a fact, they discovered the change in the kind of "tons" only by observing that the new tons did not burn so long nor propel the boat so far as the old ones; in other words, that 2,000 pounds would not have the effect of 2,240 pounds. In regard to price, while there was nothing to show that, compared with the subsequent still rising rates, the libellants had not reduced the price of the short tons in proportion to the reduction of the unit, it was clear that with the still rising prices the defendants were charged more for one of the short tons than under the old prices they had been for the large ones. And there was nothing which showed that they knew about rising prices at all. Holt having libelled the steamer for his claim, the owners of the vessel alleged in defence that he "had rendered false weights to the amount of many hundred of pounds," and claimed a deduction to be made for these "tons" of 2,000 pounds.

Grier, J. It is almost superfluous to remark that as it requires the assent of both parties to make a contract, it also requires the same consent to change it. It may be said, that as two multiplied by three will have the same product as three multiplied by two, the result will be the same either way, provided the price be diminished in proportion to the quantity. This is undoubtedly true; but it is not the case before us. The defendants, finding the price increasing every few days, continue to pay the apparent market value under the supposition that they are receiving their coal according to the unit of quantity and valuation when they made the contract. If notice had been given them that eleven per cent was to be added secretly to the price by this contrivance of diminishing the quantity, they might not have assented to it. And until they can be shown to have assented to it they cannot be made its victim.

If the grocers in a particular street, finding that it would add much to their profit in times of scarcity and high prices, to deliver flour and other provisions at the pound troy instead of the pound avoirdupois, as heretofore, and should conspire together to deliver thereafter but twelve ounces to the pound instead of sixteen, such conduct would receive no countenance from the public thus imposed upon, and in courts of justice would be treated as a fraud, and receive that appellation without seeking for a milder synonym.

Coal is a necessary of life in this climate, and unfortunately for the consumers, the demand has increased to such an extent as to put it in

the power of those who supply it to extort their own price. When its price was moderate, and the profits of the vendor merely remunerative, there were no schemes to reduce the quantity by changing the meaning of words to suit the rapacity of speculators. This scheme of reducing the quantity by ten per cent was not concocted till after prices had increased twenty-five per cent, and were proceeding up to fifty. When it was discovered that competition could not check speculation on a necessary of life, the public were made the victims of this agreement, contrivance, conspiracy, or whatsoever it may be called.

My attention has been turned to an Act of the Pennsylvania Assembly, passed in April, 1834, on the subject of "weights and measures." For the purpose of the present case it may not be necessary to decide upon the power of any State legislature to make such an enactment. It was probably intended for the convenience of the officers on their public works. As approximating decimal divisions it is much more convenient for calculation when the pound is made the unit on which to compute price or value. In very many cases the pound and its decimal multiples have been adopted almost entirely instead of the old quarters, hundred weights, and tons; just as 25 feet has been adopted by engineers as the cubic yard instead of 27. But in all those cases a change of language is made to suit this convenient change of multiple. Thus the engineer would state on a contract for excavation the price at so much "per cubic yard of 25 feet." So the term "per 100 lbs.," or "hundred neat," are substituted for "cwt.," which represents 112 pounds. And when the ton is used to represent, for convenience of calculation, 2,000 pounds, the contract should and usually does so state it as "per ton of 2,000 pounds," or "per ton neat." But as coal and other cheap and heavy articles have never been sold by the pound as a unit for calculating its price, but by the ton, convenience of calculation has never required, nor has custom sanctioned, any reform (so called) or change in the amount so represented by this unit. Accordingly, notwithstanding that this Act of the legislature was passed more than twenty years ago, it has never been adopted in practice in the sale of coal and other heavy articles whose unit of calculation is usually by the ton, and not by the pound.

The Congress of the United States having the power to regulate commerce between the several States, it was of great importance that the value of money and the standard of weights and measures should be uniform. Accordingly, their regulation is entrusted to Congress. Every change or innovation by the several States would tend only to increase confusion and difficulty. This duty, intrusted to Congress, seems apparently to have been much neglected. I find no legislation on the subject by Congress, except in the Act of May 19, 1828, c. 67, where it is enacted that "the brass troy pound weight, procured by the Minister of the United States at London, in the year 1827, for the use of the mint, and now in the custody of the director thereof, shall be the standard troy pound of the mint of the United States." As the English standard of weights and measures had been adopted by long

custom in every State, it was, perhaps, unnecessary for Congress to interfere further than it has done. For as the standard of the London Tower weights, and the English terms or denominations used to represent their fractions and multiples, were universally adopted in the United States, and of course uniform, nothing was required of Congress, unless it entirely changed its standard and introduced decimal fractions and multiples for greater facility of calculation, as it has done in our coin. Whether this uniformity of weights and measures has been established by custom or Congressional legislation, it is evident that any interference of State legislation to change either the standard of weights or the meaning of the terms used to represent its multiples or fractions, is not only useless but injurious. Accordingly, the provisions of this Act of Assembly have remained a dead letter, and it is practically obsolete so far as concerns the standard ton. It compels no one, nor could it do so, to adopt its use of language. Men may contract either with or without its sanction to make the pound their unit, and to sell at so much per 100 pounds; or so much for 2,000, and they may call it, or any other multiple of a pound, a ton, if the parties to the contract agree to do so. But this Act, if it have any efficacy whatever (which, as I have intimated, is doubtful), cannot be invoked to change the terms of a contract contrary to the consent of one of the parties, or to authorize vendors who buy coal at one standard of weight to sell it at another, and thus extort from purchasers an increased price for a diminished quantity.

A deduction must be made as claimed by the defendants on their theory that 2,240 pounds, and not 2,000, are a ton.[1]

[1] Compare *Evans* v. *Myers*, 25 Pa. 114 (1855), and *Weaver* v. *Fegely et al.*, 29 Pa. 27 (1857). In the last named case, in affirming the validity of the statute discussed in the case of the "Miantinomi," LEWIS, C. J., for the court, said: "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 incompatibility.' 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 operation 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*, Id. 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 John. 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 John. 267. Congress have power to provide for the reception 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

THE POWER TO EMIT BILLS.

"The specifications of the power about money, given to the Congress of the United States in the Constitution, are two: power is given to coin money and to borrow it. Art. 1, sect. 8, clause 2, reads: [The Congress shall have power] 'to borrow money on the credit of the United States.' In clause 5 the power is given 'to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.' Provisions corresponding to these are found in Art. 9, sects. 4 and 5, of the Articles of Confederation; and the language there used accounts in part for that of the Constitution. The clauses above quoted originally stood, in Pinckney's Plan of a Federal Constitution (5 Ell. Deb. 130), as follows: 'The Legislature of the United States shall have the power to borrow money and emit bills of credit; . . . to coin money, and regulate the value of all coins, and fix the standard of weights and measures.' The plan was referred to a committee. In the draft of the Constitution reported by the committee of detail (Id. 378) on August 6, after more than two months, the first clause stood nearly as before, while the other one read thus: 'to coin money, to regulate the value of foreign coin.' There was now no difficulty in regard to the clause about coining money; it passed without opposition, taking on at some later stage the shape in which it now stands, namely, that which is first quoted above. As regards the other clause, that part of it was stricken out which authorized Congress to emit bills, and it was left thus: 'to borrow money on the credit of the United States.' In the Articles of Confederation it had been: 'to borrow money or emit bills on the credit of the United States;' and now, in the final result, they merely struck out, 'or emit bills.' . . . Now, as regards the States. In Pinckney's Plan, Art. XI. (Id. 131), they were forbidden, 'without the consent of the Legislature of the United States . . . [to] emit bills of credit, [or] make anything but gold, silver, or copper a tender in payment of debts.' By the report of the committee of detail (Id. 381) they were forbidden absolutely to coin money; and the previous prohibition, 'without the consent of the Legislature of the United States,' was continued as to the clause about emitting

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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.*"

From 2 Story, *Com. Const.*, 5th ed. §§ 1120–1122: "It will be hereafter seen that this [coining money] is an exclusive power in Congress, the States being expressly prohibited from coining money. And it has been said by an eminent statesman [Mr. Webster], that it is difficult to maintain, on the face of the Constitution itself and independent of long-continued practice, the doctrine that the States, not being at liberty to coin money, can authorize the circulation of bank paper, as currency, at all. . . . Whatever may be the force of this reasoning, it is probably too late to correct the error, if error there be, in the assumption of this power by the States, since it has an inveterate practice in its favor, through a very long period, and indeed ever since the adoption of the Constitution.

"The other power, 'to fix the standard of weights and measures,' was, doubtless, given from like motives of public policy, for the sake of uniformity, and the convenience of commerce. *The Federalist*, No. 42. Hitherto, however, it has remained a dormant power, from the many difficulties attendant upon the subject, although it has been repeatedly brought to the attention of Congress in most elaborate reports. Until Congress shall fix a standard, the understanding seems to be that the States possess the power to fix their own weights and measures; or, at least, the existing standards at the adoption of the Constitution remain in full force. Under the Confederation Congress possessed the like exclusive power."

The foregoing passages stand in the same form in the first edition, published early in the year 1833. Compare *Craig* v. *Mo.*, 4 Pet. 410 (1830), and STORY, J. (dissenting), in *Briscoe* v. *Bk. Ky.*, 11 Pet. 257 (1837). — ED.

bills of credit, or making anything but specie a tender in payment of debts. This condition was afterwards stricken out (Id. 484, 485), and the whole provision on the subject, as regards the States, finally took its present form of an absolute prohibition.

"As things stood, therefore, when the instrument was launched, and as they stand now: *first*, both the Union and the States could borrow money; *second*, the States could not coin money, and they could not give the quality of 'a tender in payment of debts' to anything but gold and silver coin; *third*, the Union could 'coin money, regulate the value thereof, and of foreign coin.' It was not restricted as to the metal it should coin. It was not given any express power to give or to withhold from its own coin or any other the quality of a legal tender in payment of debts; and it was not denied any usual or naturally implied power of this sort; *fourth*, the States could not emit bills, and, of course, they could not borrow by the aid of such bills; *fifth*, as to the power of Congress to emit bills, to supply a paper currency, or to make it a legal tender, the Constitution was silent. . . .

"Let us see just what took place in the Convention as regards bills of credit, and what was then thought to be the effect of its action. What actually took place may be seen (so far as we have any report of it) by looking at pages 434 and 435 of the fifth volume of Elliott's Debates. The Convention was discussing, on August 16, the draft of a constitution submitted ten days before by the committee of detail: —

"'Mr. Gouverneur Morris moved to strike out "and emit bills on the credit of the United States." If the United States had credit, such bills would be unnecessary; if they had not, unjust and useless. — Mr. Butler seconded the motion. — Mr. Madison. Will it not be sufficient to prohibit making them a *tender?* This will remove the temptation to emit them with unjust views; and promissory notes, in that shape, may in some emergencies be best. — Mr. Gouverneur Morris. Striking out the words will leave room still for notes of a *responsible* minister, which will do all the good without the mischief. The moneyed interest will oppose the plan of government, if paper emissions be not prohibited. — Mr. Gorham was for striking out without inserting any prohibition. If the words stand, they may suggest and lead to the measure. — Mr. Mason had doubts on the subject. Congress, he thought, would not have the power unless it were expressed. Though he had a mortal hatred to paper money, yet, as he could not foresee all emergencies, he was unwilling to tie the hands of the legislature. He observed that the late war could not have been carried on, had such a prohibition existed. — Mr. Gorham. The power as far as it will be necessary or safe is involved in that of borrowing. — Mr. Mercer was a friend to paper money, though, in the present state of temper of America, he should neither propose nor approve of such a measure. He was, consequently, opposed to a prohibition of it altogether. It will stamp suspicion on the government, to deny it a discretion on this point. It was impolitic, also, to excite the opposition of all those who were friends to paper money. The people of property would be sure to be on the side of the plan, and it was impolitic to purchase their further attachment with the loss of the opposite class of citizens. — Mr. Ellsworth thought this a favorable moment to shut and bar the door against paper money. The mischiefs of the various experiments which had been made were now fresh in the public mind, and had excited the disgust of all the respectable part of America. By withholding the power from the new government, more friends of influence would be gained to it than by almost anything else. Paper money can in no case be necessary. Give the government credit, and other resources will offer. The power may do harm, never good. — Mr. Randolph, notwithstanding his antipathy to paper money, could not agree to strike out the words, as he could not foresee all the occasions that might arise. — Mr. Wilson. It will have a most salutary influence on the credit of the United States to remove the possibility of paper money. This expedient can never succeed whilst its mischiefs are remembered; and, as long as it can be resorted to, it will be a bar to other resources. — Mr. Butler remarked that paper was a legal tender in no country in Europe. He was urgent for disarming the government of such a power. — Mr. Mason was still averse to tying the hands of the legislature *altogether*. If there was no example in Europe, as just remarked, it might be observed, on the other side, that there was none in which the government was restrained on this head. — Mr. Read thought the words, if not struck out, would be as

alarming as the mark of the beast in Revelation. — Mr. Langdon had rather reject the whole plan than retain the three words "and emit bills."'

"Morris's motion to strike out was then carried by a vote of nine States to two. In a note at the bottom of page 435, in accounting for the vote of Virginia, Madison says: 'This vote in the affirmative by Virginia was occasioned by the acquiescence of Mr. Madison, who became satisfied that the striking out of 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.' . . .

"Such was the action of the framers of the Constitution as to the power to emit bills and the closely related topic of making them a legal tender. Turn now and consider that it is the established law of the country that Congress may emit bills. . . . Chief Justice Chase, in delivering the opinion of the Supreme Court of the United States in *Veazie Bank* v. *Fenno* (8 Wall. 533, 548) said: . . . '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.'" — *Legal Tender*, 1 Harv. Law Review, 73–79.

CRAIG ET AL. *v.* THE STATE OF MISSOURI.

Supreme Court of the United States. 1830.

[4 *Peters*, 410.][1]

Sheffey, for the plaintiffs; *Benton*, *contra*.

Marshall, C. J., delivered the opinion of the court; Justices Thompson, Johnson, and M'Lean dissenting.

This is a writ of error to a judgment rendered in the court of last resort, in the State of Missouri; affirming a judgment obtained by the State in one of its inferior courts against Hiram Craig and others, on a promissory note. . . .

The declaration is on a promissory note, dated on the first day of August, 1822, promising to pay to the State of Missouri, on the first day of November, 1822, at the loan office in Chariton, the sum of one hundred and ninety-nine dollars ninety-nine cents, and the two per cent per annum, the interest accruing on the certificates borrowed from the 1st of October, 1821. This note is obviously given for certificates loaned under the Act, "for the establishment of loan offices." That Act directs that loans on personal securities shall be made of sums less than two hundred dollars. This note is for one hundred and ninety-nine dollars and ninety-nine cents. The Act directs that the certificates issued by the State shall carry two per cent interest from the date, which interest shall be calculated in the amount of the loan. The note promises to repay the sum, with the two per cent interest accruing on the certificates borrowed, from the first day of October, 1821. It cannot be doubted that the declaration is on a note given in pursuance of the Act which has been mentioned.

Neither can it be doubted that the plea of non-assumpsit allowed the defendants to draw into question at the trial the validity of the con-

[1] The statement of the case is omitted. — Ed.

sideration on which the note was given. Everything which disaffirms the contract, everything which shows it to be void, may be given in evidence on the general issue in an action of assumpsit. The defendants, therefore, were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated. . . .

The case is, we think, within the twenty-fifth section of the Judicial Act, and consequently within the jurisdiction of this court.

This brings us to the great question in the cause: Is the Act of the Legislature of Missouri repugnant to the Constitution of the United States? The counsel for the plaintiffs in error maintain, that it is repugnant to the Constitution, because its object is the emission of bills of credit contrary to the express prohibition contained in the tenth section of the first article.

The Act under the authority of which the certificates loaned to the plaintiffs in error were issued, was passed on the 26th of June, 1821, and is entitled "An Act for the establishment of loan offices." The provisions that are material to the present inquiry are comprehended in the third, thirteenth, fifteenth, sixteenth, twenty-third, and twenty-fourth sections of the Act, which are in these words: —

Section the third enacts: "that the auditor of public accounts and treasurer, under the direction of the governor, shall, and they are hereby required to issue certificates, signed by the said auditor and treasurer, to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents (to bear such devices as they may deem the most safe), in the following form, to wit: '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, for the sum of $——, with interest for the same, at the rate of two per centum per annum from this date, the —— day of —— 182 .'"

The thirteenth section declares: "that the certificates of the said loan office shall be receivable at the treasury of the State, and by all tax gatherers and other public officers, in payment of taxes or other moneys now due to the State or to any county or town therein, and the said certificates shall also be received by all officers civil and military in the State, in the discharge of salaries and fees of office."

The fifteenth section provides: "that the commissioners of the said loan offices shall have power to make loans of the said certificates, to citizens of this State, residing within their respective districts only, and in each district a proportion shall be loaned to the citizens of each county therein, according to the number thereof," &c.

Section sixteenth. "That the said commissioners of each of the said offices are further authorized to make loans on personal securities by them deemed good and sufficient, for sums less than two hundred dollars; which securities shall be jointly and severally bound for the payment of the amount so loaned, with interest thereon," &c.

Section twenty-third. "That the General Assembly shall, as soon as may be, cause the salt springs and lands attached thereto, given by Congress to this State, to be leased out, and it shall always be the fundamental condition in such leases, that the lessee or lessees shall receive the certificates hereby required to be issued, in payment for salt, at a price not exceeding that which may be prescribed by law; and all the proceeds of the said salt springs, the interest accruing to the State, and all estates purchased by officers of the said several offices under the provisions of this Act, and all the debts now due or hereafter to be due to this State, are hereby pledged and constituted a fund for the redemption of the certificates hereby required to be issued, and the faith of the State is hereby also pledged for the same purpose."

Section twenty-fourth. "That it shall be the duty of the said auditor and treasurer to withdraw annually from circulation, one-tenth part of the certificates which are hereby required to be issued," &c.

The clause in the Constitution which this Act is supposed to violate is in these words: "No State shall . . . emit bills of credit."

What is a bill of credit? What did the Constitution mean to forbid?

In its enlarged, and perhaps its literal sense, the term "bill of credit" may comprehend any instrument by which a State engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated "bills of credit." To "emit bills of credit," conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood.

At a very early period of our colonial history, the attempt to supply the want of the precious metals by a paper medium was made to a considerable extent; and the bills emitted for this purpose have been frequently denominated bills of credit. During the war of our Revolution, we were driven to this expedient; and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning; and "bills of credit" signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all; the people declared in their Constitution, that no State should emit bills of credit. If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium, by a State government, for the purpose of common circulation.

What is the character of the certificates issued by authority of the Act under consideration? What office are they to perform? Certificates signed by the auditor and treasurer of the State, are to be issued by those officers to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents. The paper purports on its face to be receivable at the treasury, or at any loan office of the State of Missouri, in discharge of taxes or debts due to the State.

The law makes them receivable in discharge of all taxes, or debts due to the State, or any county or town therein; and of all salaries and fees of office, to all officers civil and military within the State; and for salt sold by the lessees of the public salt works. It also pledges the faith and funds of the State for their redemption.

It seems impossible to doubt the intention of the legislature in passing this Act, or to mistake the character of these certificates, or the office they were to perform. The denominations of the bills, from ten dollars to fifty cents, fitted them for the purpose of ordinary circulation; and their reception in payment of taxes, and debts to the government and to corporations, and of salaries and fees, would give them currency. They were to be put into circulation; that is, emitted by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character; and directs the auditor and treasurer to withdraw annually one-tenth of them from circulation. Had they been termed "bills of credit," instead of "certificates," nothing would have been wanting to bring them within the prohibitory words of the Constitution.

And can this make any real difference? Is the proposition to be maintained, that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this Act are as entirely bills of credit as if they had been so denominated in the Act itself.

But it is contended, that though these certificates should be deemed bills of credit, according to the common acceptation of the term, they are not so in the sense of the Constitution; because they are not made a legal tender.

The Constitution itself furnishes no countenance to this distinction. The prohibition is general. It extends to all bills of credit, not to bills of a particular description. That tribunal must be bold indeed, which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case, because the same clause of the Constitution contains a substantive prohibition to the enactment of tender laws. The Constitution, therefore, considers the emission of bills of credit, and the enactment of tender laws, as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one, because it is not also the other; to say that bills of credit may be emitted, if they be not made a tender in payment of debts, — is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted. We are not at liberty to do this.

The history of paper money has been referred to, for the purpose of showing that its great mischief consists in being made a tender; and that therefore the general words of the Constitution may be restrained to a particular intent.

Was it even true, that the evils of paper money resulted solely from the quality of its being made a tender, this court would not feel itself authorized to disregard the plain meaning of words, in search of a conjectural intent to which we are not conducted by the language of any part of the instrument. But we do not think that the history of our country proves either, that being made a tender in payment of debts is an essential quality of bills of credit, or the only mischief resulting from them. It may, indeed, be the most pernicious; but that will not authorize a court to convert a general into a particular prohibition.

We learn from Hutchinson's "History of Massachusetts," vol. i., p. 402, that bills of credit were emitted for the first time in that colony in 1690. An army returning unexpectedly from an expedition against Canada, which had proved as disastrous as the plan was magnificent, found the government totally unprepared to meet their claims. Bills of credit were resorted to, for relief from this embarrassment. They do not appear to have been made a tender; but they were not on that account the less bills of credit, nor were they absolutely harmless. The emission, however, not being considerable, and the bills being soon redeemed, the experiment would have been productive of not much mischief, had it not been followed by repeated emissions to a much larger amount. The subsequent history of Massachusetts abounds with proofs of the evils with which paper money is fraught, whether it be or be not a legal tender.

Paper money was also issued in other colonies, both in the North and South; and whether made a tender or not, was productive of evils in proportion to the quantity emitted. In the war which commenced in America in 1755, Virginia issued paper money at several successive sessions, under the appellation of treasury notes. This was made a tender. Emissions were afterwards made in 1769, in 1771, and in 1773. These were not made a tender; but they circulated together; were equally bills of credit; and were productive of the same effects. In 1775 a considerable emission was made for the purposes of the war. The bills were declared to be current, but were not made a tender. In 1776 an additional emission was made, and the bills were declared to be a tender. The bills of 1775 and 1776 circulated together; were equally bills of credit; and were productive of the same consequences.

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. In May, 1777, the Legislature of Virginia passed an Act for the first time making the bills of credit issued under the authority of Congress a tender so far as to extinguish interest. It was not until March, 1781, that Virginia passed an Act making all the bills of credit which had been emitted by Congress, and all which had been emitted

by the State, a legal tender in payment of debts. Yet they were in every sense of the word bills of credit, previous to that time; and were productive of all the consequences of paper money. We cannot then assent to the proposition, that the history of our country furnishes any just argument in favor of that restricted construction of the Constitution, for which the counsel for the defendant in error contends.

The certificates for which this note was given, being in truth "bills of credit" in the sense of the Constitution, we are brought to the inquiry: — Is the note valid of which they form the consideration?

It has been long settled, that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned, that an act forbidden by the Constitution of the United States, which is the supreme law, is against law. Now the Constitution forbids a State to "emit bills of credit." The loan of these certificates is the very act which is forbidden. It is not the making of them while they lie in the loan offices; but the issuing of them, the putting them into circulation, which is the act of emission, the act that is forbidden by the Constitution. The consideration of this note is the emission of bills of credit by the State. The very act which constitutes the consideration, is the act of emitting bills of credit, in the mode prescribed by the law of Missouri; which act is prohibited by the Constitution of the United States.

Cases which we cannot distinguish from this in principle have been decided in State courts of great respectability; and in this court. In the case of the *Springfield Bank* v. *Merrick et al.*, 14 Mass. Rep. 322, a note was made payable in certain bills, the loaning or negotiating of which was prohibited by statute, inflicting a penalty for its violation. The note was held to be void. Had this note been made in consideration of these bills, instead of being made payable in them, it would not have been less repugnant to the statute; and would consequently have been equally void. . . . [Here follows a statement of *Hunt* v. *Knickerbocker*, 5 Johns. 327, and *Patton* v. *Nicholson*, 3 Wheat. 204, illustrating the same point.]

A majority of the court feels constrained to say that the consideration on which the note in this case was given, is against the highest law of the land, and that the note itself is utterly void. In rendering judgment for the plaintiff, the court for the State of Missouri decided in favor of the validity of a law which is repugnant to the Constitution of the United States.

In the argument, we have been reminded by one side of the dignity of a sovereign State, of the humiliation of her submitting herself to this tribunal, of the dangers which may result from inflicting a wound on that dignity; by the other, of the still superior dignity of the people of the United States, who have spoken their will in terms which we cannot misunderstand.

To these admonitions, we can only answer: that if the exercise of that jurisdiction which has been imposed upon us by the Constitution

and laws of the United States, shall be calculated to bring on those dangers which have been indicated; or if it shall be indispensable to the preservation of the Union, and consequently of the independence and liberty of these States, — these are considerations which address themselves to those departments which may with perfect propriety be influenced by them. This department can listen only to the mandates of law; and can tread only that path which is marked out by duty.

The judgment of the Supreme Court of the State of Missouri, for the First Judicial District is reversed; and the cause remanded, with directions *To enter judgment for the defendants.*

[Dissenting opinions by JUSTICES JOHNSON, THOMPSON, and M'LEAN, are omitted.] [1]

[1] In the course of these dissenting opinions, the following things were said, in the nature of a description or definition of the term "bills of credit": —

JOHNSON, J., said: "The terms 'bills of credit' are in themselves vague and general, and, at the present day, almost dismissed from our language. It is then only by resorting to the nomenclature of the day of the Constitution, that we can hope to get at the idea which the framers of the Constitution attached to it. The quotation from Hutchinson's 'History of Massachusetts,' therefore, was a proper one for this purpose; inasmuch as the sense in which a word is used by a distinguished historian, and a man in public life in our own country, not long before the Revolution, furnishes a satisfactory criterion for a definition. It is there used as synonymous with paper money; and we will find it distinctly used in the same sense by the first Congress which met under the present Constitution. The whole history and legislation of the time prove that, by bills of credit, the framers of the Constitution meant paper money, with reference to that which had been used in the States from the commencement of the century, down to the time when it ceased to pass, before reduced to its innate worthlessness."

THOMPSON, J., said: "The precise meaning and interpretation of the terms 'bills of credit' has nowhere been settled; or if it has, it has not fallen within my knowledge. As used in the Constitution, it certainly cannot be applied to all obligations, or vouchers, given by, or under the authority of a State for the payment of money. The right of a State to borrow money cannot be questioned; and this necessarily implies the right of giving some voucher for the repayment: and it would seem to me difficult to maintain the proposition, that such voucher cannot legally and constitutionally assume a negotiable character; and as such, to a certain extent, pass as, or become a substitute for money. The Act does not profess to make these certificates a circulating medium, or substitute for money. They are (except as relates to public officers) made receivable only for taxes and debts due to the State, and for salt sold by the lessees of salt springs belonging to the State. These are special and limited objects; and these certificates cannot answer the purpose of a circulating medium to any considerable extent.

"A simple promise to pay a sum of money, a bond or other security given for the payment of the same, cannot be considered a bill of credit, within the sense of the Constitution. Such a construction would take from the States all power to borrow money, or execute any obligation for the repayment. The natural and literal meaning of the terms import a bill drawn on credit merely, and not bottomed upon any real or substantial fund for its redemption. There is a material and well known distinction between a bill drawn upon a fund, and one drawn upon credit only. A bill of credit may therefore be considered a bill drawn and resting merely upon the credit of the drawer; as contradistinguished from a fund constituted or pledged for the payment of the bill. . . .

"If these certificates are bills of credit inhibited by the Constitution, it appears to me difficult to escape the conclusion, that all bank notes, issued either by the States,

or under their authority and permission, are bills of credit falling within the prohibition. They are certainly, in point of form, as much bills of credit; and if being used as a circulating medium, or substitute for money, makes these certificates bills of credit, bank notes are more emphatically such. And not only the notes of banks directly under the management and control of a State, of which description of banks there are several in the United States, but all notes of banks established under the authority of a State, must fall within the prohibition. For the States cannot certainly do that indirectly which they cannot do directly. And, if they cannot issue bank notes because they are bills of credit, they cannot authorize others to do it. If this circuitous mode of doing the business would take the case out of the prohibition, it would equally apply to the Missouri certificates; for they were issued by persons acting under the authority of the State, and indeed could be issued in no other way."

M'LEAN, J., said: "The bills issued during the Revolution were denominated bills of credit. In 1780, the United States guarantied the payment of bills emitted by the States. They all contained a promise of payment at a future day; and where they were not made a legal tender, creditors were often compelled to receive them in payment of debts, or subject themselves to great inconvenience and peril.

"The character of these bills, and the evils which resulted from their circulation, give the true definition of a bill of credit, within the meaning of the Constitution; and of the mischiefs against which the Constitution provides.

"The following is the form of the bills emitted in 1780, under the guarantee of Congress. 'The possessor of this bill shall be paid —— Spanish milled dollars by the 31st day of December, 1786, with interest, in like money, at the rate of five per cent per annum, by the State of ——, according to an Act,' &c.

"Bills of credit were denominated current money; and were often referred to in the proceedings of Congress by that title, in contradistinction to loan office certificates. It is reasonable to suppose that in using the term 'bills of credit' in the Constitution, such bills were meant as were known at the time by that denomination. If the term be susceptible of a broader signification, it would not be safe so to construe it; as it would extend the provision beyond the evil intended to be prevented, and instead of operating as a salutary restraint, might be productive of serious mischief. The words of the Constitution must always be construed according to their plain import, looking at their connection and the object in view. Under this rule of construction, I have come to the conclusion, that 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. . . .

"Where money is borrowed by a State, it issues script which contains a promise to pay according to the terms of the contract. If the lender, for his own convenience, prefers this script in small denominations, may not the State accommodate him? This may be made a condition of the loan. If a State shall think proper to borrow money of its own citizens, in sums of five, ten, or twenty dollars, may it not do so? If it be unable to meet the claims of its creditors, shall it be prohibited from acknowledging the claims, and promising payment with interest at a future day? The principles of justice and sound policy alike require this; and unless the right of the State to do so be clearly inhibited, it must be admitted. In the adjustment of claims against a county, orders are issued on the county treasury; and it is common for these to circulate, by delivery or assignment, as bank notes or bills of exchange.

"May a State do, indirectly, that which the Constitution prohibits it from doing directly? If it cannot issue a bill or note which may be put into circulation as a substitute for money, can it, by an Act of Incorporation, authorize a company to issue bank bills on the capital of the State? It will thus be seen, that if an extended construction be given to the term 'bills of credit,' as used in the Constitution, it may be made to embrace almost every description of paper issued by a State."

BRISCOE ET AL. *v.* THE PRESIDENT, ETC., OF THE BANK OF THE COMMONWEALTH OF KENTUCKY.

SUPREME COURT OF THE UNITED STATES. 1837.

[11 *Peters*, 257.][1]

[ERROR to the Kentucky Court of Appeals.]

White and *Southard*, for the plaintiffs; *Hardin* and *Clay*, *contra*.

M'LEAN, J., delivered the opinion of the court. . . . 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 dollars 37 cents, 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.

This cause is approached, under a full sense of its magnitude. Important as have been the great questions brought before this tribunal for investigation and decision, none have exceeded, if they have equalled, the importance of that which arises in this case. The amount of property involved in the principle is very large; but this amount, however great, could not give to the case the deep interest which is connected with its political aspect. . . .

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

[1] The statement of facts is omitted. See *supra*, p. 1840, n. 2. — ED.

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 Peters, 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. . . . [Here follows a statement of the suggestions of the dissenting judges in *Craig* v. *Mo.*]

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. . . . [Here follows an abstract of the charter showing that the bank was established "in the name and behalf" of the State, under the direction of a president and twelve directors to be chosen on joint ballot by the two houses of the legislature. These persons are incorporated with usual powers. The stock is to be exclusively the property of the State, and no individual is to own any of it. The corporation may issue notes. Its capital stock of $2,000,000, to be increased to $3,000,000, is to be made up by the State Treasurer's paying in all the proceeds of the State's vacant land, of the sale of land warrants, of the sale of vacant lands west of Tennessee River, and the capital stock owned by the State in the Bank of Kentucky. The bank might take money on deposit, make loans on good personal security, or on mortgages, and its debts were not to exceed twice its capital. Certain arrangements are provided for limiting loans to individuals, apportioning to different parts of the State the bank accommodations, for securing a regular report to the legislature, &c. Notes of the bank were payable in gold and silver, and receivable for taxes and other dues to the State. Another statute, in 1821, authorized the State Treasurer to receive the bank dividends.]

The notes issued by the bank were in the usual form of bank notes, in which the Bank of the Commonwealth promised to pay to the bearer on demand the sum specified on the face of the note.

There is no evidence of any part of the capital having been paid into the bank; and as the pleas, to which the demurrers were filed, aver that no part of the capital was paid, the fact averred is admitted on the record. It is to be regretted that any technical point arising on the pleadings should be relied on in this case, which involves principles and interests of such deep importance. Had the bank pleaded over and stated the amount actually paid into it by the State, under the charter, the ground on which it stands would have been strengthened. . . .

But the main grounds on which the counsel for the plaintiffs rely is that the Bank of the Commonwealth, in emitting the bills in question, acted as the agent of the State; and that, consequently, the bills were issued by the State. That, as a State is prohibited from issuing bills of credit, it cannot do indirectly what it is prohibited from doing directly. That the Constitution intended to place the regulation of the currency under the control of the Federal government; and that the Act of Kentucky is not only in violation of the spirit of the Constitution, but

repugnant to its letter. These topics have been ably discussed at the bar and in a printed argument on behalf of the plaintiffs.

That by the Constitution the currency, so far as it is composed of gold and silver, is placed under the exclusive control of Congress is clear; and it is contended from the inhibition on the States to emit bills of credit, that the paper medium was intended to be made subject to the same power. If this argument be correct, and the position that a State cannot do indirectly what it is prohibited from doing directly be a sound one, then it must follow, as a necessary consequence, that all banks incorporated by a State are unconstitutional. And this, in the printed argument, is earnestly maintained, though it is admitted not to be necessary to sustain the ground assumed for the plaintiffs. The counsel of the plaintiffs, who have argued the case at the bar, do not carry the argument to this extent.

This doctrine is startling, as it strikes a fatal blow against the State banks, which have a capital of near four hundred millions of dollars, and which supply almost the entire circulating medium of the country. But let us for a moment examine it dispassionately.

The Federal government is one of delegated powers. All powers not delegated to it, or inhibited to the States, are reserved to the States or to the people. A State cannot emit bills of credit; or, in other words, it cannot issue that description of paper to answer the purposes of money, which was denominated, before the adoption of the Constitution, bills of credit. But a State may grant Acts of incorporation for the attainment of those objects which are essential to the interests of society. This power is incident to sovereignty; and there is no limitation in the Federal Constitution on its exercise by the States, in respect to the incorporation of banks.

At the time the Constitution was adopted, the Bank of North America, and the Massachusetts Bank, and some others, were in operation. It cannot, therefore, be supposed that the notes of these banks were intended to be inhibited by the Constitution, or that they were considered as bills of credit within the meaning of that instrument. In fact, in many of their most distinguishing characteristics, they were essentially different from bills of credit, in any of the various forms in which they were issued.

If, then, the powers not delegated to the Federal government, nor denied to the States, are retained by the States or the people, and by a fair construction of the terms bills of credit, as used in the Constitution, they do not include ordinary bank notes, does it not follow that the power to incorporate banks to issue these notes may be exercised by a State? A uniform course of action, involving the right to the exercise of an important power by the State governments for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightfully exercised. But this inquiry, though embraced in the printed argument, does not belong to the case, and is abandoned at the bar.

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 to 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 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. . . .

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*. . . .

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* 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. . . . [Here follow quotations from the opinions of the court in *Bank U. S.* v. *Planters' Bank*, 9 Wheat. 904, and *Bank Ky.* v. *Wister*, 3 Pet. 318.] 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 possess 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. . . . [THOMPSON, J., delivered a short concurring opinion, and STORY, J., an elaborate dissenting one.] [1]

[1] In his concurring opinion, THOMPSON, J., said: "If I considered these bank notes as bills of credit, within the sense and meaning of the constitutional prohibition,

STORY, J., in his dissenting opinion, said: "When this cause was formerly argued before this court [in 1834 (8 Pet. 118), when, two judges being absent and a majority of all the judges not concurring, a reargument was ordered] a majority of the judges who then heard it were decidedly of opinion that the Act of Kentucky establishing this bank was unconstitutional and void, as amounting to an authority to emit bills of credit, for and on behalf of the State, within the prohibition of the Constitution of the United States. In principle it was thought to be decided by the case of *Craig* v. *The State of Missouri*, 4 Pet. 410. Among that majority was the late Mr. Chief Justice Marshall, a name never to be pronounced without reverence. The cause has been again argued, and precisely upon the same grounds as at the former argument. A majority of my brethren have now pronounced the Act of Kentucky to be constitutional. I dissent from that opinion. . . . I hope that I have shown that there were solid grounds on which to rest his [C. J. MARSHALL'S] exposition of the Constitution. *His saltem accumulem donis, et fungar inani munere.*"

BRONSON *v.* RODES.

SUPREME COURT OF THE UNITED STATES. 1868.

[7 *Wall.* 229.][1]

ERROR to the Court of Appeals of the State of New York. Metz, in December, 1851, borrowed of Bronson, executor of the estate of Arthur Bronson, fourteen hundred dollars, giving his bond and mortgage for repayment on January 18, 1857, with interest, in gold and silver coin, lawful money of the United States. Payment of the principal was not made or demanded, but interest was paid, until January, 1864. A year later Rodes, who had become owner of the mortgaged property, tendered full payment of principal and interest in United States legal tender notes. At that time the relative value, in the market, of gold and legal tender notes was, as one to two and a quarter. The tender was refused, and Rodes filed a bill in equity to relieve his estate of the mortgage, and to compel the execution of an acknowledgment of its discharge. The bill was dismissed in the Supreme Court; on appeal

I could not concur in opinion with the majority of the court that they were not emitted by the State. The State is the sole owner of the stock of the bank, and all private interest in it is expressly excluded. The State has the sole and exclusive management and direction of all its concerns. The corporation is the mere creature of the State, and entirely subject to its control; and I cannot bring myself to the conclusion that such an important provision in the Constitution may be evaded by mere form."

See *Nathan* v. *La.*, 8 How. 73, 81; *Woodruff* v. *Trapnall*, 10 How. 190; *Darrington* v. *State Bank*, 13 How. 12 (1851). — ED.

[1] The statement of facts is shortened. — ED.

to the General Term this decree was reversed, and this reversal was affirmed in the Court of Appeals.

C. N. Potter, for plaintiff in error; also brief filed by *J. J. Townsend*. *S. S. Rogers* filed a brief, *contra*.

The Chief Justice delivered the opinion of the court.

The question which we have to consider is this: Was Bronson bound by law to accept from Rodes United States notes equal in nominal amount to the sum due him as full performance and satisfaction of a contract which stipulated for the payment of that sum in gold and silver coin, lawful money of the United States?

It is not pretended that any real payment and satisfaction of an obligation to pay fifteen hundred and seven coined dollars can be made by the tender of paper money worth in the market only six hundred and seventy coined dollars. The question is, Does the law compel the acceptance of such a tender for such a debt?

It is the appropriate function of courts of justice to enforce contracts according to the lawful intent and understanding of the parties. We must, therefore, inquire what was the intent and understanding of Frederick Bronson and Christian Metz when they entered into the contract under consideration in December, 1851. And this inquiry will be assisted by reference to the circumstances under which the contract was made.

Bronson was an executor, charged as a trustee with the administration of an estate. Metz was a borrower from the estate. It was the clear duty of the former to take security for the full repayment of the money loaned to the latter.

The currency of the country, at that time, consisted mainly of the circulating notes of State banks, convertible, under the laws of the States, into coin on demand. This convertibility, though far from perfect, together with the Acts of Congress which required the use of coin for all receipts and disbursements of the National government, insured the presence of some coin in the general circulation; but the business of the people was transacted almost entirely through the medium of bank notes. The State banks had recently emerged from a condition of great depreciation and discredit, the effects of which were still widely felt, and the recurrence of a like condition was not unreasonably apprehended by many. This apprehension was, in fact, realized by the general suspension of coin payments, which took place in 1857, shortly after the bond of Metz became due.

It is not to be doubted, then, that it was to guard against the possibility of loss to the estate, through an attempt to force the acceptance of a fluctuating and perhaps irredeemable currency in payment, that the express stipulation for payment in gold and silver coin was put into the bond. There was no necessity in law for such a stipulation, for at that time no money, except of gold or silver, had been made a legal tender. The bond without any stipulation to that effect would have been legally payable only in coin. The terms of the contract

must have been selected, therefore, to fix definitely the contract between the parties, and to guard against any possible claim that payment, in the ordinary currency, ought to be accepted. The intent of the parties is, therefore, clear. Whatever might be the forms or the fluctuations of the note currency, this contract was not to be affected by them. It was to be paid, at all events, in coined lawful money.

We have just adverted to the fact that the legal obligation of payment in coin was perfect without express stipulation. It will be useful to consider somewhat further the precise import in law of the phrase "dollars payable in gold and silver coin, lawful money of the United States." To form a correct judgment on this point, it will be necessary to look into the statutes regulating coinage. It would be instructive, doubtless, to review the history of coinage in the United States, and the succession of statutes by which the weight, purity, forms, and impressions of the gold and silver coins have been regulated; but it will be sufficient for our purpose if we examine three only, the Acts of April 2, 1792, 1 Stat. at Large, 246, of January 18, 1837, 5 Id. 136, and March 3, 1849, 9 Id. 397.

The Act of 1792 established a mint for the purpose of a national coinage. It was the result of very careful and thorough investigations of the whole subject, in which Jefferson and Hamilton took the greatest parts; and its general principles have controlled all subsequent legislation. It provided that the gold of coinage, or standard gold, should consist of eleven parts fine and one part alloy, which alloy was to be of silver and copper in convenient proportions, not exceeding one-half silver; and that the silver of coinage should consist of fourteen hundred and eighty-five parts fine, and one hundred and seventy-nine parts of an alloy wholly of copper.

The same Act established the dollar as the money unit, and required that it should contain four hundred and sixteen grains of standard silver. It provided further for the coinage of half-dollars, quarter-dollars, dimes, and half-dimes, also of standard silver, and weighing respectively a half, a quarter, a tenth, and a twentieth of the weight of the dollar. Provision was also made for a gold coinage, consisting of eagles, half-eagles, and quarter-eagles, containing, respectively, two hundred and ninety, one hundred and thirty-five, and sixty-seven and a half grains of standard gold, and being of the value, respectively, of ten dollars, five dollars, and two-and-a-half dollars.

These coins were made a lawful tender in all payments according to their respective weights of silver or gold; if of full weight, at their declared values, and if of less, at proportional values. And this regulation as to tender remained in full force until 1837.

The rule prescribing the composition of alloy has never been changed; but the proportion of alloy to fine gold and silver, and the absolute weight of coins, have undergone some alteration, partly with a view to the better adjustment of the gold and silver circulations to each other, and partly for the convenience of commerce.

The only change of sufficient importance to require notice, was that made by the Act of 1837. 5 Stat. at Large, 137. That Act directed that standard gold, and standard silver also, should thenceforth consist of nine parts pure and one part alloy; that the weight of standard gold in the eagle should be two hundred and fifty-eight grains, and in the half-eagle and quarter-eagle, respectively, one-half and one-quarter of that weight precisely; and that the weight of standard silver should be in the dollar four hundred twelve and a half grains, and in the half-dollar, quarter-dollar, dimes, and half-dimes, exactly one-half, one-quarter, one-tenth, and one-twentieth of that weight.

The Act of 1849, 9 Id. 397, authorized the coinage of gold double-eagles and gold dollars conformably in all respects to the established standards, and, therefore, of the weights respectively of five hundred and sixteen grains and twenty-five and eight-tenths of a grain.

The methods and machinery of coinage had been so improved before the Act of 1837 was passed, that unavoidable deviations from the prescribed weight became almost inappreciable; and the most stringent regulations were enforced to secure the utmost attainable exactness, both in weight and purity of metal. In single coins the greatest deviation tolerated in the gold coins was half a grain in the double-eagle, eagle, or half-eagle, and a quarter of a grain in the quarter eagle or gold dollar, 9 Stat. at Large, 398; and in the silver coins, a grain and a half in the dollar and half-dollar, and a grain in the quarter-dollar, and half a grain in the dime and half-dime. 5 Id. 140.

In 1849 the limit of deviation in weighing large numbers of coins on delivery by the chief coiner to the treasurer, and by the treasurer to depositors, was still further narrowed.

With these and other precautions against the emission of any piece inferior in weight or purity to the prescribed standard, it was thought safe to make the gold and silver coins of the United States legal tender in all payments according to their nominal or declared values. This was done by the Act of 1837. Some regulations as to the tender, for small loans, of coins of less weight and purity, have been made; but no other provision than that made in 1837, making coined money a legal tender in all payments, now exists upon the statute-books.

The design of all this minuteness and strictness in the regulation of coinage is easily seen. It indicates the intention of the legislature to give a sure guaranty to the people that the coins made current in payments contain the precise weight of gold or silver of the precise degree of purity declared by the statute. It recognizes the fact, accepted by all men throughout the world, that value is inherent in the precious metals; that gold and silver are in themselves values, and being such, and being in other respects best adapted to the purpose, are the only proper measures of value; that these values are determined by weight and purity; and that form and impress are simply certificates of value, worthy of absolute reliance only because of the known integrity and good faith of the government which gives them.

The propositions just stated are believed to be incontestable. If they are so in fact, the inquiry concerning the legal import of the phrase "dollars payable in gold and silver coin, lawful money of the United States," may be answered without much difficulty. Every such dollar is a piece of gold or silver, certified to be of a certain weight and purity, by the form and impress given to it at the mint of the United States, and therefore declared to be legal tender in payments. Any number of such dollars is the number of grains of standard gold or silver in one dollar multiplied by the given number.

Payment of money is delivery by the debtor to the creditor of the amount due. A contract to pay a certain number of dollars in gold or silver coins is, therefore, in legal import, nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight. It is not distinguishable, as we think, in principle, from a contract to deliver an equal weight of bullion of equal fineness. It is distinguishable, in circumstance, only by the fact that the sufficiency of the amount to be tendered in payment must be ascertained, in the case of bullion, by assay and the scales, while in the case of coin it may be ascertained by count.

We cannot suppose that it was intended by the provisions of the currency Acts to enforce satisfaction of either contract by the tender of depreciated currency of any description equivalent only in nominal amount to the real value of the bullion or of the coined dollars. Our conclusion, therefore, upon this part of the case is, that the bond under consideration was in legal import precisely what it was in the understanding of the parties, a valid obligation to be satisfied by a tender of actual payment according to its terms, and not by an offer of mere nominal payment. Its intent was that the debtor should deliver to the creditor a certain weight of gold and silver of a certain fineness, ascertainable by count of coins made legal tender by statute; and this intent was lawful.

Arguments and illustrations of much force and value in support of this conclusion might be drawn from the possible case of the repeal of the legal tender laws relating to coin, and the consequent reduction of coined money to the legal condition of bullion, and also from the actual condition of partial demonetization to which gold and silver money was reduced by the introduction into circulation of the United States notes and National bank currency; but we think it unnecessary to pursue this branch of the discussion further.

Nor do we think it necessary now to examine the question whether the clauses of the currency Acts, making the United States notes a legal tender, are warranted by the Constitution.

But we will proceed to inquire whether, upon the assumption that those clauses are so warranted, and upon the further assumption that engagements to pay coined dollars may be regarded as ordinary contracts to pay money rather than as contracts to deliver certain weights

of standard gold, it can be maintained that a contract to pay coined money may be satisfied by a tender of United States notes.

Is this a performance of the contract within the true intent of the Acts? It must be observed that the laws for the coinage of gold and silver have never been repealed or modified. They remain on the statute-book in full force. And the emission of gold and silver coins from the mint continues; the actual coinage during the last fiscal year having exceeded, according to the report of the director of the mint, nineteen millions of dollars. Nor have those provisions of law which make these coins a legal tender in all payments been repealed or modified.

It follows that there were two descriptions of money in use at the time the tender under consideration was made, both authorized by law, and both made legal tender in payments. The statute denomination of both descriptions was dollars; but they were essentially unlike in nature. The coined dollar was, as we have said, a piece of gold or silver of a prescribed degree of purity, weighing a prescribed number of grains. The note dollar was a promise to pay a coined dollar; but it was not a promise to pay on demand nor at any fixed time, nor was it, in fact, convertible into a coined dollar. It was impossible, in the nature of things, that these two dollars should be the actual equivalents of each other, nor was there anything in the currency Acts purporting to make them such. How far they were, at that time, from being actual equivalents has been already stated.

If, then, no express provision to the contrary be found in the Acts of Congress, it is a just if not a necessary inference, from the fact that both descriptions of money were issued by the same government, that contracts to pay in either were equally sanctioned by law. It is, indeed, difficult to see how any question can be made on this point. Doubt concerning it can only spring from that confusion of ideas which always attends the introduction of varying and uncertain measures of value into circulation as money.

The several statutes relating to money and legal tender must be construed together. Let it be supposed then that the statutes providing for the coinage of gold and silver dollars are found among the statutes of the same Congress which enacted the laws for the fabrication and issue of note dollars, and that the coinage and note Acts, respectively, make coined dollars and note dollars legal tender in all payments, as they actually do. Coined dollars are now worth more than note dollars; but it is not impossible that note dollars, actually convertible into coin at the chief commercial centres, receivable everywhere, for all public dues, and made, moreover, a legal tender, everywhere, for all debts, may become, at some points, worth more than coined dollars. What reason can be assigned now for saying that a contract to pay coined dollars must be satisfied by the tender of an equal number of note dollars, which will not be equally valid then, for saying that a contract to pay note dollars must be satisfied by the tender of an equal number of coined dollars?

It is not easy to see how difficulties of this sort can be avoided, except by the admission that the tender must be according to the terms of the contract.

But we are not left to gather the intent of these currency Acts from mere comparison with the coinage Acts. The currency Acts themselves provide for payments in coin. Duties on imports must be paid in coin, and interest on the public debt, in the absence of other express provisions, must also be paid in coin. And it hardly requires argument to prove that these positive requirements cannot be fulfilled if contracts between individuals to pay coin dollars can be satisfied by offers to pay their nominal equivalent in note dollars. The merchant who is to pay duties in coin must contract for the coin which he requires; the bank which receives the coin on deposit contracts to repay coin on demand; the messenger who is sent to the bank or the custom-house contracts to pay or deliver the coin according to his instructions. These are all contracts, either express or implied, to pay coin. Is it not plain that duties cannot be paid in coin if these contracts cannot be enforced?

An instructive illustration may be derived from another provision of the same Acts. It is expressly provided that all dues to the government, except for duties on imports, may be paid in United States notes. If, then, the government, needing more coin than can be collected from duties, contracts with some bank or individual for the needed amount, to be paid at a certain day, can this contract for coin be performed by the tender of an equal amount in note dollars? Assuredly it may if the note dollars are a legal tender to the government for all dues except duties on imports. And yet a construction which will support such a tender will defeat a very important intent of the Act.

Another illustration, not less instructive, may be found in the contracts of the government with depositors of bullion at the mint to pay them the ascertained value of their deposits in coin. These are demands against the government other than for interest on the public debt; and the letter of the Acts certainly makes United States notes payable for all demands against the government except such interest. But can any such construction of the Act be maintained? Can judicial sanction be given to the proposition that the government may discharge its obligation to the depositors of bullion by tendering them a number of note dollars equal to the number of gold or silver dollars which it has contracted by law to pay?

But we need not pursue the subject further. It seems to us clear beyond controversy that the Act must receive the reasonable construction, not only warranted, but required by the comparison of its provisions with the provisions of other Acts, and with each other; and that upon such reasonable construction it must be held to sustain the proposition that express contracts to pay coined dollars can only be satisfied by the payment of coined dollars. They are not "*debts*" which may be satisfied by the tender of United States notes. It follows that the tender under consideration was not sufficient in law, and that the decree directing satisfaction of the mortgage was erroneous.

Some difficulty has been felt in regard to the judgments proper to be entered upon contracts for the payment of coin. The difficulty arises from the supposition that damages can be assessed only in one description of money. But the Act of 1792 provides that "the money of account of the United States shall be expressed in dollars, dimes, cents, and mills, and that all accounts in the public offices, and all proceedings in the Courts of the United States, shall be kept and had in conformity to these regulations."

This regulation is part of the first coinage Act, and doubtless has reference to the coins provided for by it. But it is a general regulation, and relates to all accounts and all judicial proceedings. When, therefore, two descriptions of money are sanctioned by law, both expressed in dollars, and both made current in payments, it is necessary, in order to avoid ambiguity and prevent a failure of justice, to regard this regulation as applicable alike to both. When, therefore, contracts made payable in coin are sued upon, judgments may be entered for coined dollars and parts of dollars; and when contracts have been made payable in dollars generally, without specifying in what description of currency payment is to be made, judgments may be entered generally, without such specification.

We have already adopted this rule as to judgments for duties by affirming a judgment of the Circuit Court for the District of California, *Cheang-Kee* v. *United States*, 3 Wall. 320, in favor of the United States, for thirteen hundred and eighty-eight dollars and ten cents, payable in gold and silver coin, and judgments for express contracts between individuals for the payment of coin may be entered in like manner.

It results that the decree of the Court of Appeals of New York must be reversed, and the cause remanded to that Court for further proceedings.[1]

[DAVIS, J., and SWAYNE, J., gave brief concurring opinions, limited narrowly to the case of an express agreement of the kind here considered. These and the dissenting opinion of MILLER, J., are omitted.]

HEPBURN *v.* GRISWOLD.

SUPREME COURT OF THE UNITED STATES. 1870.

[8 *Wall.* 603.][2]

ERROR to the Court of Appeals of Kentucky. Griswold sued Mrs. Hepburn, in March, 1864, for $12,270, principal and interest, due

[1] And so in a case where a note given in June, 1861, was made payable "in specie." *Trebilcock* v. *Wilson*, 12 Wall. 687 (1871), Justices BRADLEY and MILLER dissenting. — ED.

[2] The statement of facts is shortened. — ED

on a promissory note given in June, 1860, and payable Feb. 20, 1862. She tendered United States legal tender notes; they were refused, and were thereupon paid into court. The tender was held good, in the Louisville Chancery Court, but this judgment was reversed in the Court of Appeals.

The notes were issued under an Act of Congress of February 25, 1862 [see *supra*, p. 1336], and were made receivable for all amounts payable to the United States, except duties on imports, and all demands against the United States, except interest payable in coin; and it was further provided that they should be "lawful money and a legal tender in payment of all debts, public and private, within the United States," except as aforesaid.[1]

The CHIEF JUSTICE delivered the opinion of the court.

The question presented for our determination by the record in this case is, whether or not the payee or assignee of a note, made before the 25th of February, 1862, is obliged by law to accept in payment United States notes, equal in nominal amount to the sum due according to its terms, when tendered by the maker or other party bound to pay it? . . . We are now to determine whether this description ["debts, public and private"] embraces debts contracted before as well as after the date of the Act.

It is an established rule for the construction of statutes, that the terms employed by the legislature are not to receive an interpretation which conflicts with acknowledged principles of justice and equity, if another sense, consonant with those principles, can be given to them. But this rule cannot prevail where the intent is clear. Except in the scarcely supposable case where a statute sets at naught the plainest precepts of morality and social obligation, courts must give effect to the clearly ascertained legislative intent, if not repugnant to the fundamental law ordained in the Constitution.

[1] The Reporter says: "The cause was first argued at the Term of December, 1867, upon printed briefs submitted by Mr. Preston for the plaintiff in error, and Mr. Griswold, *contra*. Subsequently, upon the suggestion of Mr. Stanbery, then Attorney-General, as to the great public importance of the question, the court ordered the cause and other causes involving, incidentally, the same question, to stand over to December Term, 1868, for reargument, with leave to the government to be heard. Accordingly, at that term the constitutionality of the provision in the Act making the notes above described a legal tender, was elaborately argued by Mr. B. R. Curtis (counsel for the plaintiff in error, in *Willard* v. *Tayloe*), and by Mr. Evarts, Attorney-General, for the United States, in support of the provision, and by Mr. Clarkson N. Potter (of counsel for the defendant in error in this case), against the provision.

"And the constitutionality of the provision had been argued at different times, by other counsel, in five other cases, which it was supposed by their counsel might depend on it, but four of which were decided on other grounds; to wit, in support of the constitutionality by Mr. Carlisle, Mr. W. S. Cox, Mr. Williams, Mr. S. S. Rogers, Mr. B. R. Curtis, Mr. L. P. Poland, Mr. Howe, and against it by Mr. Bradley, Mr. Wilson, Mr. Johnson, Mr. John J. Townsend, Mr. McPherson, Mr. Wills, in *Thomson* v. *Riggs*, 5 Wallace, 663, in *Lane County* v. *Oregon*, 7 Id. 73, in *Bronson* v. *Rodes*, Id. 229, in *Willard* v. *Tayloe* [8 Wall.], 557, in *Broderick* v. *Magraw* [8 Wall.], 639. The question was therefore thoroughly argued. And it was held long under advisement." — ED.

Applying the rule just stated to the Act under consideration, there appears to be strong reason for construing the word "debts" as having reference only to debts contracted subsequent to the enactment of the law. For no one will question that the United States notes, which the Act makes a legal tender in payment, are essentially unlike in nature, and, being irredeemable in coin, are necessarily unlike in value, to the lawful money intended by parties to contracts for the payment of money made before its passage. The lawful money then in use and made a legal tender in payment, consisted of gold and silver coin. The currency in use under the Act, and declared by its terms to be lawful money and a legal tender, consists of notes or promises to pay impressed upon paper, prepared in convenient form for circulation, and protected against counterfeiting by suitable devices and penalties. The former possess intrinsic value, determined by the weight and fineness of the metal; the latter have no intrinsic value, but a purchasing value, determined by the quantity in circulation, by general consent to its currency in payments, and by opinion as to the probability of redemption in coin. Both derive, in different degrees, a certain additional value from their adaptation to circulation by the form and impress given to them under national authority, and from the Acts making them respectively a legal tender.

Contracts for the payment of money, made before the Act of 1862, had reference to coined money, and could not be discharged, unless by consent, otherwise than by tender of the sum due in coin. Every such contract, therefore, was, in legal import, a contract for the payment of coin.

There is a well-known law of currency, that notes or promises to pay, unless made conveniently and promptly convertible into coin at the will of the holder, can never, except under unusual and abnormal conditions, be at par in circulation with coin. It is an equally well known law, that depreciation of notes must increase with the increase of the quantity put in circulation and the diminution of confidence in the ability or disposition to redeem. Their appreciation follows the reversal of these conditions. No Act making them a legal tender can change materially the operation of these laws. Their force has been strikingly exemplified in the history of the United States notes. Beginning with a very slight depreciation when first issued, in March, 1862, they sank in July, 1864, to the rate of two dollars and eighty-five cents for a dollar in gold, and then rose until recently a dollar and twenty cents in paper became equal to a gold dollar.

Admitting, then, that prior contracts are within the intention of the Act, and assuming that the Act is warranted by the Constitution, it follows that the holder of a promissory note, made before the Act, for a thousand dollars, payable, as we have just seen, according to the law and according to the intent of the parties, in coin, was required, when depreciation reached its lowest point, to accept in payment a thousand note dollars, although with the thousand coin dollars, due under the

contract, he could have purchased on that day two thousand eight hundred and fifty such dollars. Every payment, since the passage of the Act, of a note of earlier date, has presented similar, though less striking features.

Now, it certainly needs no argument to prove that an Act, compelling acceptance in satisfaction of any other than stipulated payment, alters arbitrarily the terms of the contract, and impairs its obligation, and that the extent of impairment is in the proportion of the inequality of the payment accepted under the constraint of the law to the payment due under the contract. Nor does it need argument to prove that the practical operation of such an Act is contrary to justice and equity. It follows that no construction which attributes such practical operation to an Act of Congress is to be favored, or indeed to be admitted, if any other can be reconciled with the manifest intent of the legislature.

What, then, is that manifest intent? Are we at liberty, upon a fair and reasonable construction of the Act, to say that Congress meant that the word "debts" used in the Act should not include debts contracted prior to its passage?

In the case of *Bronson* v. *Rodes*, we thought ourselves warranted in holding that this word, as used in the statute, does not include obligations created by express contracts for the payment of gold and silver, whether coined or in bullion. This conclusion rested, however, mainly on the terms of the Act, which not only allow, but require payments in coin by or to the government, and may be fairly considered, independently of considerations belonging to the law of contracts for the delivery of specified articles, as sanctioning special private contracts for like payments; without which, indeed, the provisions relating to government payments could hardly have practical effect. This consideration, however, does not apply to the matter now before us. There is nothing in the terms of the Act which looks to any difference in its operation on different descriptions of debts payable generally in money, — that is to say, in dollars and parts of a dollar. These terms, on the contrary, in their obvious import, include equally all debts not specially expressed to be payable in gold or silver, whether arising under past contracts and already due, or arising under such contracts and to become due at a future day, or arising and becoming due under subsequent contracts. A strict and literal construction indeed would, as suggested by Mr. Justice Story (1 Story on the Constitution, § 921), in respect to the same word used in the Constitution, limit the word "debts" to debts existing; and if this construction cannot be accepted because the limitation sanctioned by it cannot be reconciled with the obvious scope and purpose of the Act, it is certainly conclusive against any interpretation which will exclude existing debts from its operation. The same conclusion results from the exception of interest on loans and duties on imports from the effect of the legal tender clause. This exception affords an irresistible implication that no description of debts, whenever contracted, can be withdrawn from the effect of the Act if

not included within the terms or the reasonable intent of the exception. And it is worthy of observation in this connection, that in all the debates to which the Act gave occasion in Congress, no suggestion was ever made that the legal tender clause did not apply as fully to contracts made before as to contracts made after its passage.

These considerations seem to us conclusive. We do not think ourselves at liberty, therefore, to say that Congress did not intend to make the notes authorized by it a legal tender in payment of debts contracted before the passage of the Act.

We are thus brought to the question, whether Congress has power to make notes issued under its authority a legal tender in payment of debts, which, when contracted, were payable by law in gold and silver coin.

The delicacy and importance of this question has not been overstated in the argument. This court always approaches the consideration of questions of this nature reluctantly; and its constant rule of decision has been, and is, that Acts of Congress must be regarded as constitutional, unless clearly shown to be otherwise.

But the Constitution is the fundamental law of the United States. By it the people have created a government, defined its powers, prescribed their limits, distributed them among the different departments, and directed, in general, the manner of their exercise. No department of the government has any other powers than those thus delegated to it by the people. All the legislative power granted by the Constitution belongs to Congress; but it has no legislative power which is not thus granted. And the same observation is equally true in its application to the executive and judicial powers granted respectively to the President and the courts. All these powers differ in kind, but not in source or in limitation. They all arise from the Constitution, and are limited by its terms.

It is the function of the judiciary to interpret and apply the law to cases between parties as they arise for judgment. It can only declare what the law is, and enforce by proper process the law thus declared. But, in ascertaining the respective rights of parties, it frequently becomes necessary to consult the Constitution. For there can be no law inconsistent with the fundamental law. No enactment not in pursuance of the authority conferred by it can create obligations or confer rights. For such is the express declaration of the Constitution itself in these words: "The 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 of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Not every Act of Congress, then, is to be regarded as the supreme law of the land; nor is it by every Act of Congress that the judges are bound. This character and this force belong only to such Acts as are "made in pursuance of the Constitution."

When, therefore, a case arises for judicial determination, and the decision depends on the alleged inconsistency of a legislative provision with the fundamental law, it is the plain duty of the court to compare the Act with the Constitution, and if the former cannot, upon a fair construction, be reconciled with the latter, to give effect to the Constitution rather than the statute. This seems so plain that it is impossible to make it plainer by argument. If it be otherwise, the Constitution is not the supreme law; it is neither necessary or useful, in any case, to inquire whether or not any Act of Congress was passed in pursuance of it; and the oath which every member of this court is required to take, that he "will administer justice without respect to persons, and do equal right to the poor and the rich, and faithfully perform the duties incumbent upon him to the best of his ability and understanding, agreeably to the Constitution and laws of the United States," becomes an idle and unmeaning form.

The case before us is one of private right. . . . Thus two questions were directly presented: Were the defendants relieved by the Act from the obligation assumed in the contract? Could the plaintiff be compelled, by a judgment of the court, to receive in payment a currency of different nature and value from that which was in the contemplation of the parties when the contract was made? The Court of Appeals resolved both questions in the negative, and the defendants, in the original suit, seek the reversal of that judgment by writ of error. It becomes our duty, therefore, to determine whether the Act of February 25, 1862, so far as it makes United States notes a legal tender in payment of debts contracted prior to its passage, is constitutional and valid or otherwise. Under a deep sense of our obligation to perform this duty to the best of our ability and understanding, we shall proceed to dispose of the case presented by the record.

We have already said, and it is generally, if not universally, conceded, that the government of the United States is one of limited powers, and that no department possesses any authority not granted by the Constitution.

It is not necessary, however, in order to prove the existence of a particular authority, to show a particular and express grant. The design of the Constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and, at the same time, to mark, by sufficiently definite lines, the sphere of its operations. To this end it was needful only to make express grants of general powers, coupled with a further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. These powers are necessarily extensive. It has been found, indeed, in the practical administration of the government, that a very large part, if not the largest part, of its functions have been performed in the exercise of powers thus implied.

But the extension of power by implication was regarded with some apprehension by the wise men who framed, and by the intelligent citi-

zens who adopted, the Constitution. This apprehension is manifest in the terms by which the grant of incidental and auxiliary powers is made. All powers of this nature are included under the description of "power to make all laws necessary and proper for carrying into execution the powers expressly granted to Congress or vested by the Constitution in the government or in any of its departments or officers."

The same apprehension is equally apparent in the tenth article of the amendments, 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 or the people."

We do not mean to say that either of these constitutional provisions is to be taken as restricting any exercise of power fairly warranted by legitimate derivation from one of the enumerated or express powers. The first was undoubtedly introduced to exclude all doubt in respect to the existence of implied powers; while the words "necessary and proper" were intended to have a "sense," to use the words of Mr. Justice Story, "at once admonitory and directory," and to require that the means used in the execution of an express power "should be *bona fide* appropriate to the end." 2 Story on the Constitution, p. 142, § 1253. The second provision was intended to have a like admonitory and directory sense, and to restrain the limited government established under the Constitution from the exercise of powers not clearly delegated, or derived by just inference from powers so delegated.

It has not been maintained in argument, nor indeed, would any one, however slightly conversant with constitutional law, think of maintaining that there is in the Constitution any express grant of legislative power to make any description of credit currency a legal tender in payment of debts. We must inquire then whether this can be done in the exercise of an implied power.

The rule for determining whether a legislative enactment can be supported as an exercise of an implied power was stated by Chief Justice Marshall, speaking for the whole court, in the case of *M'Cullough* v. *The State of Maryland*, 4 Wheaton, 421; and the statement then made has ever since been accepted as a correct exposition of the Constitution. His words were these: "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 consistent with the letter and spirit of the Constitution, are constitutional." And in another part of the same opinion the practical application of this rule was thus illustrated: "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 be 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 govern-

ment, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and tread on legislative ground." 4 Wheaton, 423.

It must be taken then as finally settled, so far as judicial decisions can settle anything, that the words "all laws necessary and proper for carrying into execution" powers expressly granted or vested, have, in the Constitution a sense equivalent to that of the words, laws, not absolutely necessary indeed, but appropriate, plainly adapted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to effect objects intrusted to the government.

The question before us, then, resolves itself into this: "Is the clause which makes United States notes a legal tender for debts contracted prior to its enactment, a law of the description stated in the rule?"

It is not doubted that the power to establish a standard of value by which all other values may be measured, or, in other words, to determine what shall be lawful money and a legal tender, is in its nature, and of necessity, a governmental power. It is in all countries exercised by the government. In the United States, so far as it relates to the precious metals, it is vested in Congress by the grant of the power to coin money. But can a power to impart these qualities to notes, or promises to pay money, when offered in discharge of pre-existing debts, be derived from the coinage power, or from any other power expressly given?

It is certainly not the same power as the power to coin money. Nor is it in any reasonable or satisfactory sense an appropriate or plainly adapted means to the exercise of that power. Nor is there more reason for saying that it is implied in, or incidental to, the power to regulate the value of coined money of the United States, or of foreign coins. This power of regulation is a power to determine the weight, purity, form, impression, and denomination of the several coins, and their relation to each other, and the relations of foreign coins to the monetary unit of the United States.

Nor is the power to make notes a legal tender the same as the power to issue notes to be used as currency. The old Congress, under the Articles of Confederation, was clothed by express grant with the power to emit bills of credit, which are in fact notes for circulation as currency; and yet that Congress was not clothed with the power to make these bills a legal tender in payment. And this court has recently held that the Congress, under the Constitution, possesses, as incidental to other powers, the same power as the old Congress to emit bills or notes; but it was expressly declared at the same time that this decision concluded nothing on the question of legal tender. Indeed, we are not aware that it has ever been claimed that the power to issue bills or notes has any identity with the power to make them a legal tender. On the contrary, the whole history of the country refutes that notion. The States have always been held to possess the power to authorize and regulate the

issue of bills for circulation by banks or individuals, subject, as has been lately determined, to the control of Congress, for the purpose of establishing and securing a National currency; and yet the States are expressly prohibited by the Constitution from making anything but gold and silver coin a legal tender. This seems decisive on the point that the power to issue notes and the power to make them a legal tender are not the same power, and that they have no necessary connection with each other.

But it has been maintained in argument that the power to make United States notes a legal tender in payment of all debts is a means appropriate and plainly adapted to the execution of the power to carry on war, of the power to regulate commerce, and of the power to borrow money. If it is, and is not prohibited, nor inconsistent with the letter or spirit of the Constitution, then the Act which makes them such legal tender must be held to be constitutional.

Let us, then, first inquire whether it is an appropriate and plainly adapted means for carrying on war? The affirmative argument may be thus stated: Congress has power to declare and provide for carrying on war; Congress has also power to emit bills of credit, or circulating notes receivable for government dues and payable, so far at least as parties are willing to receive them, in discharge of government obligations; it will facilitate the use of such notes in disbursements to make them a legal tender in payment of existing debts; therefore Congress may make such notes a legal tender.

It is difficult to say to what express power the authority to make notes a legal tender in payment of pre-existing debts may not be upheld as incidental, upon the principles of this argument. Is there any power which does not involve the use of money? And is there any doubt that Congress may issue and use bills of credit as money in the execution of any power? The power to establish post-offices and post-roads, for example, involves the collection and disbursement of a great revenue. Is not the power to make notes a legal tender as clearly incidental to this power as to the war power?

The answer to this question does not appear to us doubtful. The argument, therefore, seems to prove too much. It carries the doctrine of implied powers very far beyond any extent hitherto given to it. It asserts that whatever in any degree promotes an end within the scope of a general power, whether, in the correct sense of the word, appropriate or not, may be done in the exercise of an implied power.

Can this proposition be maintained?

It is said that this is not a question for the court deciding a cause, but for Congress exercising the power. But the decisive answer to this is that the admission of a legislative power to determine finally what powers have the described relation as means to the execution of other powers plainly granted, and, then, to exercise absolutely and without liability to question, in cases involving private rights, the powers thus determined to have that relation, would completely change the nature

of American government. It would convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers. It would confuse the boundaries which separate the executive and judicial from the legislative authority. It would obliterate every criterion which this court, speaking through the venerated Chief Justice in the case already cited, established for the determination of the question whether legislative Acts are constitutional or unconstitutional.

Undoubtedly among means appropriate, plainly adapted, really calculated, the legislature has unrestricted choice. But there can be no implied power to use means not within the description.

Now, then, let it be considered what has actually been done in the provision of a National currency. In July and August, 1861, and February, 1862, the issue of sixty millions of dollars in United States notes, payable on demand, was authorized. (12 Stat. at Large, 259, 313, and 338.) They were made receivable in payments, but were not declared a legal tender until March, 1862 (Ib. 370), when the amount in circulation had been greatly reduced by receipt and cancellation. In 1862 and 1863 (Ib. 345, 532, and 709), the issue of four hundred and fifty millions in United States notes, payable, not on demand, but, in effect, at the convenience of the government, was authorized, subject to certain restrictions as to fifty millions. These notes were made receivable for the bonds of the National loans, for all debts due to or from the United States, except duties on imports and interest on the public debt, and were also declared a legal tender. In March, 1863 (Ib. 711), the issue of notes for parts of a dollar was authorized to an amount not exceeding fifty millions of dollars. These notes were not declared a legal tender, but were made redeemable under regulations to be prescribed by the Secretary of the Treasury. In February, 1863 (12 Stat. at Large, 669), the issue of three hundred millions of dollars in notes of the National banking associations was authorized. These notes were made receivable to the same extent as United States notes, and provision was made to secure their redemption, but they were not made a legal tender.

The several descriptions of notes have since constituted, under the various Acts of Congress, the common currency of the United States. The notes which were not declared a legal tender have circulated with those which were so declared without unfavorable discrimination.

It may be added as a part of the history that other issues, bearing interest at various rates, were authorized and made a legal tender, except in redemption of bank notes, for face amount exclusive of interest. Such were the one and two years five per cent notes and three years compound interest notes. (13 Ib. 218, 425.) These notes never entered largely or permanently into the circulation; and there is no reason to think that their utility was increased or diminished by the Act which declared them a legal tender for face amount. They need not be further considered here. They serve only to illustrate the tendency remarked

by all who have investigated the subject of paper money, to increase the volume of irredeemable issues, and to extend indefinitely the application of the quality of legal tender. That it was carried no farther during the recent civil war, and has been carried no farther since, is due to circumstances, the consideration of which does not belong to this discussion.

We recur, then, to the question under consideration. No one questions the general constitutionality, and not very many perhaps, the general expediency of the legislation by which a note currency has been authorized in recent years. The doubt is as to the power to declare a particular class of these notes to be a legal tender in payment of pre-existing debts.

The only ground upon which this power is asserted is, not that the issue of notes was an appropriate and plainly adapted means for carrying on the war, for that is admitted; but that the making of them a legal tender to the extent mentioned was such a means.

Now, we have seen that of all the notes issued those not declared a legal tender at all constituted a very large proportion, and that they circulated freely and without discount.

It may be said that their equality in circulation and credit was due to the provision made by law for the redemption of this paper in legal tender notes. But this provision, if at all useful in this respect, was of trifling importance compared with that which made them receivable for government dues. All modern history testifies that, in time of war especially, when taxes are augmented, large loans negotiated, and heavy disbursements made, notes issued by the authority of the government, and made receivable for dues of the government, always obtain at first a ready circulation; and even when not redeemable in coin, on demand, are as little and usually less subject to depreciation than any other description of notes, for the redemption of which no better provision is made. And the history of the legislation under consideration is, that it was upon this quality of receivability, and not upon the quality of legal tender, that reliance for circulation was originally placed; for the receivability clause appears to have been in the original draft of the bill, while the legal tender clause seems to have been introduced at a later stage of its progress.

These facts certainly are not without weight as evidence that all the useful purposes of the notes would have been fully answered without making them a legal tender for pre-existing debts. It is denied, indeed, by eminent writers, that the quality of legal tender adds anything at all to the credit or usefulness of government notes. They insist, on the contrary, that it impairs both. However this may be, it must be remembered that it is as a means to an end to be attained by the action of the government, that the implied power of making notes a legal tender in all payments is claimed under the Constitution. Now, how far is the government helped by this means? Certainly it cannot obtain new supplies or services at a cheaper rate, for no one will take the

notes for more than they are worth at the time of the new contract. The price will rise in the ratio of the depreciation, and this is all that could happen if the notes were not made a legal tender. But it may be said that the depreciation will be less to him who takes them from the government, if the government will pledge to him its power to compel his creditors to receive them at par in payments. This is, as we have seen, by no means certain. If the quantity issued be excessive, and redemption uncertain and remote, great depreciation will take place; if, on the other hand, the quantity is only adequate to the demands of business, and confidence in early redemption is strong, the notes will circulate freely, whether made a legal tender or not.

But if it be admitted that some increase of availability is derived from making the notes a legal tender under new contracts, it by no means follows that any appreciable advantage is gained by compelling creditors to receive them in satisfaction of pre-existing debts. And there is abundant evidence, that whatever benefit is possible from that compulsion to some individuals or to the government, is far more than outweighed by the losses of property, the derangement of business, the fluctuations of currency and values, and the increase of prices to the people and the government, and the long train of evils which flow from the use of irredeemable paper money. It is true that these evils are not to be attributed altogether to making it a legal tender. But this increases these evils. It certainly widens their extent and protracts their continuance.

We are unable to persuade ourselves that an expedient of this sort is an appropriate and plainly adapted means for the execution of the power to declare and carry on war. If it adds nothing to the utility of the notes, it cannot be upheld as a means to the end in furtherance of which the notes are issued. Nor can it, in our judgment, be upheld as such, if, while facilitating in some degree the circulation of the notes, it debases and injures the currency in its proper use to a much greater degree. And these considerations seem to us equally applicable to the powers to regulate commerce and to borrow money. Both powers necessarily involve the use of money by the people and by the government, but neither, as we think, carries with it as an appropriate and plainly adapted means to its exercise, the power of making circulating notes a legal tender in payment of pre-existing debts.

But there is another view, which seems to us decisive, to whatever express power the supposed implied power in question may be referred. In the rule stated by Chief Justice Marshall, the words appropriate, plainly adapted, really calculated, are qualified by the limitation that the means must be not prohibited, but consistent with the letter and spirit of the Constitution. Nothing so prohibited or inconsistent can be regarded as appropriate, or plainly adapted, or really calculated means to any end.

Let us inquire, then, first, whether making bills of credit a legal tender, to the extent indicated, is consistent with the spirit of the

Constitution. Among the great cardinal principles of that instrument, no one is more conspicuous or more venerable than the establishment of justice. And what was intended by the establishment of justice in the minds of the people who ordained it is, happily, not a matter of disputation. It is not left to inference or conjecture, especially in its relations to contracts.

When the Constitution was undergoing discussion in the Convention, the Congress of the Confederation was engaged in the consideration of the ordinance for the government of the territory northwest of the Ohio, — the only territory subject at that time to its regulation and control. By this ordinance certain fundamental articles of compact were established between the original States and the people and States of the territory, for the purpose, to use its own language, "of extending the fundamental principles of civil and religious liberty, whereon these republics" (the States united under the Confederation), "their laws and constitutions are erected." Among these fundamental principles was this: "And in the just preservation of rights and property it is understood and declared that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with or affect private contracts or engagements *bona fide* and without fraud previously formed."

The same principle found more condensed expression in that most valuable provision of the Constitution of the United States, ever recognized as an efficient safeguard against injustice, that "no State shall pass any law impairing the obligation of contracts."

It is true that this prohibition is not applied in terms to the government of the United States. Congress has express power to enact bankrupt laws, and we do not say that a law made in the execution of any other express power, which, incidentally only, impairs the obligation of a contract, can be held to be unconstitutional for that reason.

But we think it clear that those who framed and those who adopted the Constitution, intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution.

Another provision found, in the fifth amendment, must be considered in this connection. We refer to that which ordains that private property shall not be taken for public use without compensation. This provision is kindred in spirit to that which forbids legislation impairing the obligation of contracts; but, unlike that, it is addressed directly and solely to the National government. It does not, in terms, prohibit legislation which appropriates the private property of one class of citizens to the use of another class; but if such property cannot be taken for the benefit of all, without compensation, it is difficult to understand

how it can be so taken for the benefit of a part without violating the spirit of the prohibition.

But there is another provision in the same amendment, which, in our judgment, cannot have its full and intended effect unless construed as a direct prohibition of the legislation which we have been considering. It is that which declares that "no person shall be deprived of life, liberty, or property, without due process of law."

It is not doubted that all the provisions of this amendment operate directly in limitation and restraint of the legislative powers conferred by the Constitution. The only question is, whether an Act which compels all those who hold contracts for the payment of gold and silver money to accept in payment a currency of inferior value deprives such persons of property without due process of law.

It is quite clear, that whatever may be the operation of such an Act, due process of law makes no part of it. Does it deprive any person of property? A very large proportion of the property of civilized men exists in the form of contracts. These contracts almost invariably stipulate for the payment of money. And we have already seen that contracts in the United States, prior to the Act under consideration, for the payment of money, were contracts to pay the sum specified in gold and silver coin. And it is beyond doubt that the holders of these contracts were and are as fully entitled to the protection of this constitutional provision as the holders of any other description of property.

But it may be said that the holders of no description of property are protected by it from legislation which incidentally only impairs its value. And it may be urged in illustration that the holders of stock in a turnpike, a bridge, or a manufacturing corporation, or an insurance company, or a bank, cannot invoke its protection against legislation, which, by authorizing similar works or corporations, reduces its price in the market. But all this does not appear to meet the real difficulty. In the cases mentioned the injury is purely contingent and incidental. In the case we are considering it is direct and inevitable.

If in the cases mentioned the holders of the stock were required by law to convey it on demand to any one who should think fit to offer half its value for it, the analogy would be more obvious. No one probably could be found to contend that an Act enforcing the acceptance of fifty or seventy-five acres of land in satisfaction of a contract to convey a hundred would not come within the prohibition against arbitrary privation of property.

We confess ourselves unable to perceive any solid distinction between such an Act and an Act compelling all citizens to accept, in satisfaction of all contracts for money, half or three quarters or any other proportion less than the whole of the value actually due, according to their terms. It is difficult to conceive what Act would take private property without process of law if such an Act would not.

We are obliged to conclude that an Act making mere promises to pay dollars a legal tender in payment of debts previously contracted, is

not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress; that such an Act is inconsistent with the spirit of the Constitution; and that it is prohibited by the Constitution.

It is not surprising that amid the tumult of the late Civil War, and under the influence of apprehensions for the safety of the Republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted yielded their doubts; many who did not doubt were silent. Some who were strongly averse to making government notes a legal tender felt themselves constrained to acquiesce in the views of the advocates of the measure. Not a few who then insisted upon its necessity, or acquiesced in that view, have, since the return of peace, and under the influence of the calmer time, reconsidered their conclusions, and now concur in those which we have just announced. These conclusions seem to us to be fully sanctioned by the letter and spirit of the Constitution.

We are obliged, therefore, to hold that the defendant in error was not bound to receive from the plaintiffs the currency tendered to him in payment of their note, made before the passage of the Act of February 25, 1862. It follows that the judgment of the Court of Appeals of Kentucky must be affirmed.

It is proper to say that Mr. Justice Grier, who was a member of the court when this cause was decided in conference, November 27, 1869, and when this opinion was directed to be read, January 29, 1870, stated his judgment to be that the legal tender clause, properly construed, has no application to debts contracted prior to its enactment; but that upon the construction given to the Act by the other judges he concurred in the opinion that the clause, so far as it makes United States notes a legal tender for such debts, is not warranted by the Constitution. *Judgment affirmed.*[1]

[The dissenting opinion of MILLER, J., with whom JUSTICES SWAYNE and DAVIS concurred, is omitted.]

[1] It is instructive to recur to the expressions of the Chief Justice when the Act here declared unconstitutional was pending. At that time he was Secretary of the Treasury; and, on February 4, 1862, he wrote to William Cullen Bryant, then Editor of the New York "Evening Post," as follows: "Your feelings of repugnance to the legal tender clause can hardly be greater than my own; but I am convinced that, as a temporary measure, it is indispensably necessary. From various motives — some honorable, and some not honorable — a considerable number, though a small minority of the business men or people, are indisposed to sustain the United States notes by receiving and paying them as money. This minority, in the absence of any legal tender clause, may control the majority to all practical intents. To prevent this, which would at this time be disastrous in the extreme, I yield my general views for a particular exception. To yield does not violate any obligation to the people, for the great majority, willing now to receive and pay their notes, desire that the minority may not be allowed

LEGAL TENDER CASES.

KNOX *v.* LEE. PARKER *v.* DAVIS.

SUPREME COURT OF THE UNITED STATES. 1872.

[12 *Wall.* 457.][1]

THESE were two suits; the first a writ of error to the Circuit Court for the Western District of Texas, the second an appeal from a decree in equity in the Supreme Judicial Court of Massachusetts.

In the first case, Mrs. Lee, a citizen of Pennsylvania, sued Knox for the conversion of a flock of sheep, in Texas, in March, 1863, belonging to the plaintiff. In ascertaining the damages, the court refused to allow the plaintiff to show the difference in value between United States coin, and legal tender notes; and in charging the jury told them to recollect that whatever amount they gave in damages could be discharged in legal tender notes. Verdict and judgment for the plaintiff for $7,368. The defendant brought the case up, assuming that the value, determined as of March, 1863, was the value in gold, and that the charge allowed the jury to increase the nominal amount of the damages, because they could be discharged in notes.

Paschall (*Senior*) and *Paschall* (*Junior*), for Knox; *Wills*, for Lee.

In the second case, before the date of the Legal Tender Acts, Davis, in Massachusetts, filed a bill in equity to compel specific performance by Parker of an agreement to convey land upon payment of a certain sum of money, and a decree ordering this was made by the Supreme Judicial Court of Massachusetts in February, 1867. Davis paid the amount into court in legal tender notes. Parker refused to execute the conveyance, and demanded coin. The court, upon a further hearing, made a decree supporting the contention of Davis.

to reap special advantages from their refusal to do so; and our government is not only a government of the people, but is bound, in an exigency like the present, to act on the maxim: *Salus populi suprema est lex.*

"It is only, however, on condition that a tax adequate to interest, reduction of debt, and ordinary expenditures, be provided, and that a uniform banking system be authorized, founded on United States securities, and, with proper safeguards for specie payments, securing at once a uniform and convertible currency for the people, and a demand for national securities which will sustain their market value and facilitate loans. It is only on this condition, I say, I consent to the expedient of United States notes, in limited amount, made a legal tender.

"In giving this consent, I feel that I am treading the path of duty, and shall cheerfully, as I have always done, abide the consequences. I dare not say that I care nothing for personal consequences, but I think I may say truly that I care little for them in comparison with my obligation to do whatever the safety of the country may require." — 2 *Godwin's Life of Bryant*, 165.

See also Mr. Chase's statements to a committee of the House of Representatives, in 110 U. S. p. 423. — ED.

[1] The statement of facts is shortened. — ED.

B. F. Thomas, for plaintiff in error, and *Akerman*, Attorney-General, on the same side; *B. F. Butler*, and *Potter*, *contra*.

Mr. Justice Strong delivered the opinion of the court.[1]

The controlling questions in these cases are the following: Are the Acts of Congress, known as the Legal Tender Acts, constitutional when applied to contracts made before their passage; and, secondly, are they valid as applicable to debts contracted since their enactment? These questions have been elaborately argued, and they have received from the court that consideration which their great importance demands. It would be difficult to overestimate the consequences which must follow our decision. They will affect the entire business of the country, and take hold of the possible continued existence of the government. If it be held by this court that Congress has no constitutional power, under any circumstances, or in any emergency, to make treasury notes a legal tender for the payment of all debts (a power confessedly possessed by every independent sovereignty other than the United States), the government is without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable, even if they were not when the Acts of Congress now called in question were enacted. It is also clear that if we hold the Acts invalid as applicable to debts incurred, or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derangement, widespread distress, and the rankest injustice. The debts which have been contracted since February 25th, 1862, constitute, doubtless, by far the greatest portion of the existing indebtedness of the country. They have been contracted in view of the Acts of Congress declaring treasury notes a legal tender, and in reliance upon that declaration. Men have bought and sold, borrowed and lent, and assumed every variety of obligations contemplating that payment might be made with such notes. Indeed, legal tender treasury notes have become the universal measure of values. If now, by our decision, it be established that these debts and obligations can be discharged only by gold coin; if, contrary to the expectation of all parties to these contracts, legal tender notes are rendered unavailable, the government has become an instrument of the grossest injustice; all debtors are loaded with an obligation it was never contemplated they should assume; a large percentage is added to every debt, and such must become the demand for gold to satisfy contracts, that ruinous sacrifices, general distress, and bankruptcy may be expected. These consequences are too obvious to admit of question. And there is no well-founded distinction to be made between the constitutional validity of an Act of Congress declaring treasury notes a legal tender for the payment of debts contracted after

[1] The reporter states that on May 1, 1871, the judgment and decree in these cases were affirmed; and on the 15th January, 1872, — till which time, in order to promote the convenience of some of the dissentient members of the court, the matter had been deferred, — the opinion of the court, with concurring or dissenting opinions from the Chief Justice and different Associate Justices, was delivered. — Ed.

its passage and that of an Act making them a legal tender for the discharge of all debts, as well those incurred before as those made after its enactment. There may be a difference in the effects produced by the Acts, and in the hardship of their operation, but in both cases the fundamental question, that which tests the validity of the legislation, is, can Congress constitutionally give to treasury notes the character and qualities of money? Can such notes be constituted a legitimate circulating medium, having a defined legal value? If they can, then such notes must be available to fulfil all contracts (not expressly excepted) solvable in money, without reference to the time when the contracts were made. Hence it is not strange that those who hold the Legal Tender Acts unconstitutional when applied to contracts made before February, 1862, find themselves compelled also to hold that the Acts are invalid as to debts created after that time, and to hold that both classes of debts alike can be discharged only by gold and silver coin.

The consequences of which we have spoken, serious as they are, must be accepted, if there is a clear incompatibility between the Constitution and the Legal Tender Acts. But we are unwilling to precipitate them upon the country unless such an incompatibility plainly appears. A decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress — all the members of which act under the obligation of an oath of fidelity to the Constitution. Such has always been the rule. In *Commonwealth* v. *Smith*, 4 Binney, 123, the language of the court was, "It must be remembered that, for weighty reasons, it has been assumed as a principle, in construing constitutions, by the Supreme Court of the United States, by this court, and by every other court of reputation in the United States, that an Act of the Legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt;" and, in *Fletcher* v. *Peck*, 6 Cranch, 87, Chief Justice Marshall said, "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its Acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." It is incumbent, therefore, upon those who affirm the unconstitutionality of an Act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt.

Nor can it be questioned that, when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction applied alike to statutes, wills, contracts, and constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose, and so as to subserve it. In no other way

can the intent of the framers of the instrument be discovered. And there are more urgent reasons for looking to the ultimate purpose in examining the powers conferred by a constitution than there are in construing a statute, a will, or a contract. We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines. In *Martin* v. *Hunter*, 1 Wheaton, 326, it was said, "The Constitution unavoidably deals in general language. It did not suit the purpose 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." And with singular clearness was it said by Chief Justice Marshall, in *M'Culloch* v. *The State of Maryland*, 4 Id. 405, "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 it may be carried into execution, would partake of the prolixity of a political code, and would 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." If these are correct principles, if they are proper views of the manner in which the Constitution is to be understood, the powers conferred upon Congress must be regarded as related to each other, and all means for a common end. Each is but part of a system, a constituent of one whole. No single power is the ultimate end for which the Constitution was adopted. It may, in a very proper sense, be treated as a means for the accomplishment of a subordinate object, but that object is itself a means designed for an ulterior purpose. Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies, or to provide for and maintain a navy, are instruments for the paramount object, which was to establish a government, sovereign within its sphere, with capability of self-preservation, thereby forming a union more perfect than that which existed under the old Confederacy.

The same may be asserted also of all the non-enumerated powers included in the authority expressly given "to make all laws which shall be necessary and proper for carrying into execution the specified powers vested in Congress, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof." It is impossible to know what those non-enumerated powers are, and what is their nature and extent, without considering the purposes they were intended to subserve. Those purposes, it must be noted, reach beyond the mere execution of all powers definitely intrusted to Congress and mentioned in detail. They embrace the execution of all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. It certainly was intended to confer upon the government the power of self-preserva-

tion. Said Chief Justice Marshall, in *Cohens* v. *The Bank of Virginia*, 6 Wheaton, 414, "America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete; for all these objects it is supreme. It can then, in effecting these objects, legitimately control all individuals or governments within the American territory." He added, in the same case, "A constitution is framed for ages to come, and is designed to approach immortality as near as mortality can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it is sure to encounter." That would appear, then, to be a most unreasonable construction of the Constitution which denies to the government created by it, the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfilment of its acknowledged duties. Such a right, we hold, was given by the last clause of the eighth section of its first article. The means or instrumentalities referred to in that clause, and authorized, are not enumerated or defined. In the nature of things enumeration and specification were impossible. But they were left to the discretion of Congress, subject only to the restrictions that they be not prohibited, and be necessary and proper for carrying into execution the enumerated powers given to Congress, and all other powers vested in the government of the United States, or in any department or officer thereof.

And here it is to be observed it is not indispensable to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Such a treatment of the Constitution is recognized by its own provisions. This is well illustrated in its language respecting the writ of *habeas corpus*. The power to suspend the privilege of that writ is not expressly given, nor can it be deduced from any one of the particularized grants of power. Yet it is provided that the privileges of the writ shall not be suspended except in certain defined contingencies. This is no express grant of power. It is a restriction. But it shows irresistibly that somewhere in the Constitution power to suspend the privilege of the writ was granted, either by some one or more of the specifications of power, or by them all combined. And, that important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments. The first ten of these were suggested in the conventions of the States, and proposed at the first session of the first Congress, before any complaint was made of a disposition to assume doubtful

powers. The preamble to the resolution submitting them for adoption recited that the "conventions of a number of the States had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and *restrictive* clauses should be added." This was the origin of the amendments, and they are significant. They tend plainly to show that, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story, in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given. The oath required by law from officers of the government is one. So is building a capitol or a presidential mansion, and so also is the penal code. This last is worthy of brief notice. Congress is expressly authorized "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 laws of nations." It is also empowered to declare the punishment of treason, and provision is made for impeachments. This is the extent of power to punish crime expressly conferred. It might be argued that the expression of these limited powers implies an exclusion of all other subjects of criminal legislation. Such is the argument in the present cases. It is said because Congress is authorized to coin money and regulate its value, it cannot declare anything other than gold and silver to be money, or make it a legal tender. Yet Congress, by the Act of April 30, 1790, entitled "An Act more effectually to provide for the punishment of certain crimes against the United States," and the supplementary Act of March 3, 1825, defined and provided for the punishment of a large class of crimes other than those mentioned in the Constitution, and some of the punishments prescribed are manifestly not in aid of any single substantive power. No one doubts that this was rightfully done, and the power thus exercised has been affirmed by this court in *United States* v. *Marigold*, 9 Howard, 560. This case shows that a power may exist as an aid to the execution of an express power, or an aggregate of such powers, though there is another express power given relating in part to the same subject but less extensive.

Another illustration of this may be found in connection with the provisions respecting a census. The Constitution orders an enumeration of free persons in the different States every ten years. The direction extends no further. Yet Congress has repeatedly directed an enumeration not only of free persons in the States, but of free persons in the Territories, and not only an enumeration of persons but the collection of statistics respecting age, sex, and production. Who questions the power to do this?

Indeed, the whole history of the government and of Congressional legislation has exhibited the use of a very wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed, and this discretion has generally been unquestioned, or, if questioned, sanctioned by this court. This is true not only when an attempt has been made to execute a single power specifically given, but equally true when the means adopted have been appropriate to the execution, not of a single authority, but of all the powers created by the Constitution. Under the power to establish post-offices and post-roads Congress has provided for carrying the mails, punishing theft of letters and mail robberies, and even for transporting the mails to foreign countries. Under the power to regulate commerce, provision has been made by law for the improvement of harbors, the establishment of observatories, the erection of lighthouses, breakwaters, and buoys, the registry, enrolment, and construction of ships, and a code has been enacted for the government of seamen. Under the same power and other powers over the revenue and the currency of the country, for the convenience of the treasury and internal commerce, a corporation known as the United States Bank was early created. To its capital the government subscribed one-fifth of its stock. But the corporation was a private one, doing business for its own profit. Its incorporation was a constitutional exercise of Congressional power for no other reason than that it was deemed to be a convenient instrument or means for accomplishing one or more of the ends for which the government was established, or, in the language of the first article, already quoted, "necessary and proper" for carrying into execution some or all the powers vested in the government. Clearly this necessity, if any existed, was not a direct and obvious one. Yet this court, in *M'Culloch* v. *Maryland*, 4 Wheaton, 416, unanimously ruled that in authorizing the bank, Congress had not transcended its powers. So debts due to the United States have been declared by Acts of Congress entitled to priority of payment over debts due to other creditors, and this court has held such acts warranted by the Constitution. *Fisher* v. *Blight*, 2 Cranch, 358.

This is enough to show how, from the earliest period of our existence as a nation, the powers conferred by the Constitution have been construed by Congress and by this court whenever such action by Congress has been called in question. Happily the true meaning of the clause authorizing

the enactment of all laws necessary and proper for carrying into execution the express powers conferred upon Congress, and all other powers vested in the government of the United States, or in any of its departments or officers, has long since been settled. In *Fisher* v. *Blight*, 2 Cranch, 358, this court, speaking by Chief Justice Marshall, said that in construing it "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," said this court, "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 most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe." It was in this case, as we have already remarked, that a law giving priority to debts due to the United States was ruled to be constitutional for the reason that it appeared to Congress to be an eligible means to enable the government to pay the debts of the Union.

It was, however, in *M'Culloch* v. *Maryland* that the fullest consideration was given to this clause of the Constitution granting auxiliary powers, and a construction adopted that has ever since been accepted as determining its true meaning. . . . It is hardly necessary to say that these principles are received with universal assent. Even in *Hepburn* v. *Griswold*, 8 Wallace, 603, both the majority and minority of the court concurred in accepting the doctrines of *M'Culloch* v. *Maryland* as sound expositions of the Constitution, though disagreeing in their application.

With these rules of constitutional construction before us, settled at an early period in the history of the government, hitherto universally accepted, and not even now doubted, we have a safe guide to a right decision of the questions before us. Before we can hold the Legal Tender Acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any plain degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited. This brings us to the inquiry whether they were, when enacted, appropriate instrumentalities for carrying into effect, or executing any of the known powers of Congress, or of any department of the government. Plainly to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. It is not to be denied that Acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times.

We do not propose to dilate at length upon the circumstances in which the country was placed, when Congress attempted to make treasury notes a legal tender. They are of too recent occurrence to justify enlarged description. Suffice it to say that a civil war was then raging which seriously threatened the overthrow of the government and the destruction of the Constitution itself. It demanded the equipment and support of large armies and navies, and the employment of money to an extent beyond the capacity of all ordinary sources of supply. Meanwhile the public treasury was nearly empty, and the credit of the government, if not stretched to its utmost tension, had become nearly exhausted. Moneyed institutions had advanced largely of their means, and more could not be expected of them. They had been compelled to suspend specie payments. Taxation was inadequate to pay even the interest on the debt already incurred, and it was impossible to await the income of additional taxes. The necessity was immediate and pressing. The army was unpaid. There was then due to the soldiers in the field nearly a score of millions of dollars. The requisitions from the War and Navy Departments for supplies exceeded fifty millions, and the current expenditure was over one million per day. The entire amount of coin in the country, including that in private hands, as well as that in banking institutions, was insufficient to supply the need of the government three months, had it all been poured into the treasury. Foreign credit we had none. We say nothing of the overhanging paralysis of trade, and of business generally, which threatened loss of confidence in the ability of the government to maintain its continued existence, and therewith the complete destruction of all remaining national credit.

It was at such a time and in such circumstances that Congress was called upon to devise means for maintaining the army and navy, for securing the large supplies of money needed, and, indeed, for the preservation of the government created by the Constitution. It was at such a time and in such an emergency that the Legal Tender Acts were passed. Now, if it were certain that nothing else would have supplied the absolute necessities of the treasury, that nothing else would have enabled the government to maintain its armies and navy, that nothing else would have saved the government and the Constitution from destruction, while the Legal Tender Acts would, could any one be bold enough to assert that Congress transgressed its powers? Or if these enactments did work these results, can it be maintained now that they were not for a legitimate end, or "appropriate and adapted to that end," in the language of Chief Justice Marshall? That they did work such results is not to be doubted. Something revived the drooping faith of the people; something brought immediately to the government's aid the resources of the nation, and something enabled the successful prosecution of the war, and the preservation of the national life. What was it, if not the legal tender enactments?

But if it be conceded that some other means might have been chosen for the accomplishment of these legitimate and necessary ends, the con-

cession does not weaken the argument. It is urged now, after the lapse of nine years, and when the emergency has passed, that treasury notes without the legal tender clause might have been issued, and that the necessities of the government might thus have been supplied. Hence it is inferred there was no necessity for giving to the notes issued the capability of paying private debts. At best this is mere conjecture. But admitting it to be true, what does it prove? Nothing more than that Congress had the choice of means for a legitimate end, each appropriate, and adapted to that end, though, perhaps, in different degrees. What then? Can this court say that it ought to have adopted one rather than the other? Is it our province to decide that the means selected were beyond the constitutional power of Congress, because we may think that other means to the same ends would have been more appropriate and equally efficient? That would be to assume legislative power, and to disregard the accepted rules for construing the Constitution. The degree of the necessity for any Congressional enactment, or the relative degree of its appropriateness, if it have any appropriateness, is for consideration in Congress, not here. Said Chief Justice Marshall, in *M'Culloch* v. *Maryland*, as already stated, "When 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."

It is plain to our view, however, that none of those measures which it is now conjectured might have been substituted for the Legal Tender Acts, could have met the exigencies of the case, at the time when those Acts were passed. We have said that the credit of the government had been tried to its utmost endurance. Every new issue of notes which had nothing more to rest upon than government credit, must have paralyzed it more and more, and rendered it increasingly difficult to keep the army in the field, or the navy afloat. It is an historical fact that many persons and institutions refused to receive and pay those notes that had been issued, and even the head of the treasury represented to Congress the necessity of making the new issues legal tenders, or rather, declared it impossible to avoid the necessity. The vast body of men in the military service was composed of citizens who had left their farms, their work-shops, and their business, with families and debts to be provided for. The government could not pay them with ordinary treasury notes, nor could they discharge their debts with such a currency. Something more was needed, something that had all the uses of money. And as no one could be compelled to take common treasury notes in payment of debts, and as the prospect of ultimate redemption was remote and contingent, it is not too much to say that they must have depreciated in the market long before the war closed, as did the currency of the Confederate States. Making the notes legal tenders gave them a new use, and it needs no argument to show that the value of things is in proportion to the uses to which they may be applied.

It may be conceded that Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or because they make the government stronger. There must be some relation between the means and the end; some adaptedness or appropriateness of the laws to carry into execution the powers created by the Constitution. But when a statute has proved effective in the execution of powers confessedly existing, it is not too much to say that it must have had some appropriateness to the execution of those powers. The rules of construction heretofore adopted, do not demand that the relationship between the means and the end shall be direct and immediate. Illustrations of this may be found in several of the cases above cited. The charter of a bank of the United States, the priority given to debts due the government over private debts, and the exemption of Federal loans from liability to State taxation, are only a few of the many which might be given. The case of *Veazie Bank* v. *Fenno*, 8 Wallace, 533, presents a suggestive illustration. There a tax of ten per cent on State bank notes in circulation was held constitutional, not merely because it was a means of raising revenue, but as an instrument to put out of existence such a circulation in competition with notes issued by the government. There, this court, speaking through the Chief Justice, avowed that it is the constitutional right of Congress to provide a currency for the whole country; that this might be done by coin, or United States notes, or notes of National banks; and that it cannot be questioned Congress may constitutionally secure the benefit of such a currency to the people by appropriate legislation. It was said there can be no question of the power of this government to emit bills of credit; 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 make them a currency uniform in value and description, and convenient and useful for circulation. Here the substantive power to tax was allowed to be employed for improving the currency. It is not easy to see why, if State bank notes can be taxed out of existence for the purposes of indirectly making United States notes more convenient and useful for commercial purposes, the same end may not be secured directly by making them a legal tender.

Concluding, then, that the provision which made treasury notes a legal tender for the payment of all debts other than those expressly excepted, was not an inappropriate means for carrying into execution the legitimate powers of the government, we proceed to inquire whether it was forbidden by the letter or spirit of the Constitution. It is not claimed that any express prohibition exists, but it is insisted that the spirit of the Constitution was violated by the enactment. Here those who assert the unconstitutionality of the Acts mainly rest their argument. They claim that the clause which conferred upon Congress power "to coin money, regulate the value thereof, and of foreign coin," contains an implication that nothing but that which is the subject of coinage, nothing but the precious metals can ever be declared by law to be money,

or to have the uses of money. If by this is meant that because certain powers over the currency are expressly given to Congress, all other powers relating to the same subject are impliedly forbidden, we need only remark that such is not the manner in which the Constitution has always been construed. On the contrary it has been ruled that power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject, less comprehensive. *United States* v. *Marigold*, 9 Howard, 560. There an express power to punish a certain class of crimes (the only direct reference to criminal legislation contained in the Constitution), was not regarded as an objection to deducing authority to punish other crimes from another substantive and defined grant of power. There are other decisions to the same effect. To assert, then, that the clause enabling Congress to coin money and regulate its value tacitly implies a denial of all other power over the currency of the nation, is an attempt to introduce a new rule of construction against the solemn decisions of this court. So far from its containing a lurking prohibition, many have thought it was intended to confer upon Congress that general power over the currency which has always been an acknowledged attribute of sovereignty in every other civilized nation than our own, especially when considered in connection with the other clause which denies to the States the power to coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. We do not assert this now, but there are some considerations touching these clauses which tend to show that if any implications are to be deduced from them, they are of an enlarging rather than a restraining character. The Constitution was intended to frame a government as distinguished from a league or compact, a government supreme in some particulars over States and people. It was designed to provide the same currency, having a uniform legal value in all the States. It was for this reason the power to coin money and regulate its value was conferred upon the Federal government, while the same power as well as the power to emit bills of credit was withdrawn from the States. The States can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated. This may indeed have been intended. Some powers that usually belong to sovereignties were extinguished, but their extinguishment was not left to inference. In most cases, if not in all, when it was intended that governmental powers, commonly acknowledged as such, should cease to exist, both in the States and in the Federal government, it was expressly denied to both, as well to the United States as to the individual States. And generally, when one of such powers was expressly denied to the States only, it was for the purpose of rendering the Federal power more complete and exclusive. Why, then, it may be asked, if the design was to prohibit to the new government, as well as to the States, that general power over the currency which the States had when the Constitution

was framed, was such denial not expressly extended to the new government, as it was to the States? In view of this it might be argued with much force that when it is considered in what brief and comprehensive terms the Constitution speaks, how sensible its framers must have been that emergencies might arise when the precious metals (then more scarce than now) might prove inadequate to the necessities of the government and the demands of the people — when it is remembered that paper money was almost exclusively in use in the States as the medium of exchange, and when the great evil sought to be remedied was the want of uniformity in the current value of money, it might be argued, we say, that the gift of power to coin money and regulate the value thereof, was understood as conveying general power over the currency, the power which had belonged to the States, and which they surrendered. Such a construction, it might be said, would be in close analogy to the mode of construing other substantive powers granted to Congress. They have never been construed literally, and the government could not exist if they were. Thus the power to carry on war is conferred by the power to "declare war." The whole system of the transportation of the mails is built upon the power to establish post-offices and post-roads. The power to regulate commerce has also been extended far beyond the letter of the grant. Even the advocates of a strict literal construction of the phrase, "to coin money and regulate the value thereof," while insisting that it defines the material to be coined as metal, are compelled to concede to Congress large discretion in all other particulars. The Constitution does not ordain what metals may be coined, or prescribe that the legal value of the metals, when coined, shall correspond at all with their intrinsic value in the market. Nor does it even affirm that Congress may declare anything to be a legal tender for the payment of debts. Confessedly the power to regulate the value of money coined, and of foreign coins, is not exhausted by the first regulation. More than once in our history has the regulation been changed without any denial of the power of Congress to change it, and it seems to have been left to Congress to determine alike what metal shall be coined, its purity, and how far its statutory value, as money, shall correspond, from time to time, with the market value of the same metal as bullion. How then can the grant of a power to coin money and regulate its value, made in terms so liberal and unrestrained, coupled also with a denial to the States of all power over the currency, be regarded as an implied prohibition to Congress against declaring treasury notes a legal tender, if such declaration is appropriate, and adapted to carrying into execution the admitted powers of the government?

We do not, however, rest our assertion of the power of Congress to enact legal tender laws upon this grant. We assert only that the grant can, in no just sense, be regarded as containing an implied prohibition against their enactment, and that, if it raises any implications, they are of complete power over the currency, rather than restraining.

We come next to the argument much used, and, indeed, the main reliance of those who assert the unconstitutionality of the Legal Tender Acts. It is that they are prohibited by the spirit of the Constitution because they indirectly impair the obligation of contracts. The argument, of course, relates only to those contracts which were made before February, 1862, when the first Act was passed, and it has no bearing upon the question whether the Acts are valid when applied to contracts made after their passage. The argument assumes two things, — *first*, that the Acts do, in effect, impair the obligation of contracts, and *second*, that Congress is prohibited from taking any action which may indirectly have that effect. Neither of these assumptions can be accepted. It is true that, under the Acts, a debtor, who became such before they were passed, may discharge his debt with the notes authorized by them, and the creditor is compellable to receive such notes in discharge of his claim. But whether the obligation of the contract is thereby weakened can be determined only after considering what was the contract obligation. It was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. (We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money.) The expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined metals, but neither the expectation of one party to the contract respecting its fruits, nor the anticipation of the other constitutes its obligation. There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it. *Apsden* v. *Austin*, 5 Adolphus & Ellis, N. S. 671; *Dunn* v. *Sayles*, Ib. 685; *Coffin* v. *Landis*, 10 Wright, 426. Were it not so the expectation of results would be always equivalent to a binding engagement that they should follow. But the obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. If there is anything settled by decision it is this, and we do not understand it to be controverted. *Davies*, 28; *Barrington* v. *Potter*, Dyer, 81, b., fol. 67; *Faw* v. *Marsteller*, 2 Cranch, 29. No one ever doubted that a debt of one thousand dollars, contracted before 1834, could be paid by one hundred eagles coined after that year, though they contained no more gold than ninety-four eagles such as were coined when the contract was made, and this, not because of the intrinsic value of the coin, but because of its legal value. The eagles coined after 1834 were not money until they were authorized by law, and had they been coined before, without a law fixing their legal value, they could no more have paid a debt than uncoined bullion, or cotton, or wheat. 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. Nor is this singular. A covenant for quiet enjoyment is not broken, nor is its obligation im-

paired by the government's taking the land granted in virtue of its right of eminent domain. The expectation of the covenantee may be disappointed. He may not enjoy all he anticipated, but the grant was made and the covenant undertaken in subordination to the paramount right of the government. *Dobbins* v. *Brown*, 2 Jones (Pennsylvania), 75; *Workman* v. *Mifflin*, 6 Casey, 362. We have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. Undoubtedly not. But this is a false analogy. There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values. Contracts for the delivery of specific articles belong exclusively to the domain of State legislation, while contracts for the payment of money are subject to the authority of Congress, at least so far as relates to the means of payment. They are engagements to pay with lawful money of the United States, and Congress is empowered to regulate that money. It cannot, therefore, be maintained that the Legal Tender Acts impaired the obligation of contracts.

Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless, or partially fruitless. Directly it may, confessedly, by passing a bankrupt Act, embracing past as well future transactions. This is obliterating contracts entirely. So it may relieve parties from their apparent obligations indirectly in a multitude of ways. It may declare war, or, even in peace, pass Non-intercourse Acts, or direct an embargo. All such measures may, and must operate seriously upon existing contracts, and may not merely hinder, but relieve the parties to such contracts entirely from performance. It is, then, clear that the powers of Congress may be exerted, though the effect of such exertion may be in one case to annul, and in other cases to impair the obligation of contracts. And it is no sufficient answer to this to say it is true only when the powers exerted were expressly granted. There is no ground for any such distinction. It has no warrant in the Constitution, or in any of the decisions of this court. We are accustomed to speak for mere convenience of the express and implied powers conferred upon Congress. But in fact the auxiliary powers, those necessary and appropriate to the execution of other powers singly described, are as expressly given as is the power to declare war, or to establish uniform laws on the subject of bankruptcy. They are not catalogued, no list of them is made, but they are grouped in the last clause of section eight of the first article, and granted in the same words in which all other powers are granted to Congress. And this court has recognized no such distinction as is now attempted. An embargo suspends many contracts and renders performance of others impossible, yet the power to enforce it has been declared constitutional. *Gibbons* v. *Ogden*, 9 Wheaton, 1. The power to enact a law directing an embargo is one of the auxiliary powers, existing only because appropriate in time of peace to regulate commerce, or appropriate to

carrying on war. Though not conferred as a substantive power, it has not been thought to be in conflict with the Constitution, because it impairs indirectly the obligation of contracts. That discovery calls for a new reading of the Constitution.

If, then, the Legal Tender Acts were justly chargeable with impairing contract obligations, they would not, for that reason, be forbidden, unless a different rule is to be applied to them from that which has hitherto prevailed in the construction of other powers granted by the fundamental law. But, as already intimated, the objection misapprehends the nature and extent of the contract obligation spoken of in the Constitution. As in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority.

Closely allied to the objection we have just been considering is the argument pressed upon us that the Legal Tender Acts were prohibited by the spirit of the Fifth Amendment, which forbids taking private property for public use without just compensation or due process of law. That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But who ever supposed that, because of this, a tariff could not be changed, or a Non-intercourse Act, or an embargo be enacted, or a war be declared? By the Act of June 28, 1834, a new regulation of the weight and value of gold coin was adopted, and about six per cent was taken from the weight of each dollar. The effect of this was that all creditors were subjected to a corresponding loss. The debts then due became solvable with six per cent less gold than was required to pay them before. The result was thus precisely what it is contended the Legal Tender Acts worked. But was it ever imagined this was taking private property without compensation or without due process of law? Was the idea ever advanced that the new regulation of gold coin was against the spirit of the Fifth Amendment? And has any one in good faith avowed his belief that even a law debasing the current coin, by increasing the alloy, would be taking private property? It might be impolitic and unjust, but could its constitutionality be doubted?[1] Other statutes have, from time to time, reduced the quantity of silver in silver coin without any question of

[1] Compare Sir Matthew Hale: "It is true that the imbasing of money in point of allay hath not been very usually practised in England, and it would be a dishonor to the nation if it should, . . . but surely if we respect the right of the thing, it is within the King's power to do it." — 1 *Hale, P. C.* 193. — Ed.

their constitutionality. It is said, however, now, that the Act of 1834 only brought the legal value of gold coin more nearly into correspondence with its actual value in the market, or its relative value to silver. But we do not perceive that this varies the case or diminishes its force as an illustration. The creditor who had a thousand dollars due him on the 31st day of July, 1834 (the day before the Act took effect), was entitled to a thousand dollars of coined gold of the rate and fineness of the then existing coinage. The day after, he was entitled only to a sum six per cent less in weight and in market value, or to a smaller number of silver dollars. Yet he would have been a bold man who had asserted that, because of this, the obligation of the contract was impaired, or that private property was taken without compensation or without due process of law. No such assertion, so far as we know, was ever made. Admit it was a hardship, but it is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an Act of Congress invalid merely because we might think its provisions harsh and unjust.

We are not aware of anything else which has been advanced in support of the proposition that the Legal Tender Acts were forbidden by either the letter or the spirit of the Constitution. If, therefore, they were, what we have endeavored to show, appropriate means for legitimate ends, they were not transgressive of the authority vested in Congress.

Here we might stop; but we will notice briefly an argument presented in support of the position that the unit of money value must possess intrinsic value. The argument is derived from assimilating the constitutional provision respecting a standard of weights and measures to that conferring the power to coin money and regulate its value. It is said there can be no uniform standard of weights without weight, or of measure without length or space, and we are asked how anything can be made a uniform standard of value which has itself no value? This is a question foreign to the subject before us. The Legal Tender Acts do not attempt to make paper a standard of value. We do not rest their validity upon the assertion that their emission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money. What we do assert is, that Congress has power to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the Coinage Acts, or to multiples thereof. It is hardly correct to speak of a standard of value. The Constitution does not speak of it. It contemplates a standard for that which has gravity or extension; but value is an ideal thing. The Coinage Acts fix its unit as a dollar; but the gold or silver thing we call a dollar is, in no sense, a standard of a dollar. It is a representative of it. There might never have been a piece of money of the denomination of a dollar. There never was a pound sterling coined until 1815, if we except a few coins struck in the reign of Henry VIII., almost immediately debased,

yet it has been the unit of British currency for many generations. It is, then, a mistake to regard the Legal Tender Acts as either fixing a standard of value or regulating money values, or making that money which has no intrinsic value.

But, without extending our remarks further, it will be seen that we hold the Acts of Congress constitutional as applied to contracts made either before or after their passage. In so holding, we overrule so much of what was decided in *Hepburn* v. *Griswold*, 8 Wallace, 603, as ruled the Acts unwarranted by the Constitution so far as they apply to contracts made before their enactment. That case was decided by a divided court, and by a court having a less number of judges than the law then in existence provided this court shall have. These cases have been heard before a full court, and they have received our most careful consideration. The questions involved are constitutional questions of the most vital importance to the government and to the public at large. We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right. *Briscoe* v. *Bank of Kentucky*, 8 Peters, 118. We are not accustomed to hear them in the absence of a full court, if it can be avoided. Even in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error. And it is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made. We agree this should not be done inconsiderately, but in a case of such far-reaching consequences as the present, thoroughly convinced as we are that Congress has not trangressed its powers, we regard it as our duty so to decide and to affirm both these judgments.

The other questions raised in the case of *Knox* v. *Lee* were substantially decided in *Texas* v. *White*, 7 Wallace, 700.

Judgment in each case affirmed.[1]

[The concurring opinion of BRADLEY, J., and the separate dissenting opinions of the CHIEF JUSTICE, CLIFFORD, J., and FIELD, J., are omitted. NELSON, J., also dissented.]

[1] In *Harris* v. *Jex*, 55 N. Y. 421 (1874) ANDREWS, J., for a unanimous court, said: "The mortgages, to foreclose which this action was brought, were executed prior to the enactment by Congress, in 1862, of the Act known as the Legal Tender Act, to secure the payment by the mortgagor to the mortgagee of the sum of $7,000, according to the condition of certain bonds, bearing even date with the mortgages. The time for the payment of the mortgage debt was subsequently extended, by an agreement between the parties, to the 1st day of March, 1870, and on that day the defendant Jex, who had become the grantee of the mortgaged premises by a conveyance which in terms was made subject to the mortgages, but which contained no covenant on his part to pay them, tendered to the plaintiff, to whom the bonds and mortgages had been assigned, the amount of the mortgage debt in United States legal tender notes in satisfaction of the mortgages. The plaintiff refused to accept them on the ground that she was entitled to payment in gold or in its equivalent in currency. This action was then brought, and the only question presented upon the record is whether the tender discharged the lien of the mortgages. . . .

"The Legal Tender Act by its terms made the notes authorized to be issued under it

LEGAL TENDER CASE.

JUILLIARD *v.* GREENMAN.

SUPREME COURT OF THE UNITED STATES. 1884.

[110 *U. S.* 421.]

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

lawful money and a legal tender in payment of all debts, public and private, within the United States, with certain exceptions not necessary to be noticed. The Supreme Court of the United States, in *Hepburn* v. *Griswold* (8 Wall. 605), determined that the Act, so far as it related to debts existing at the time of its passage, was in violation of the Constitution of the United States, and was void. The court declared that contracts for the payment of money made before that time were in legal effect contracts for payment in coin, and that Congress could not compel a creditor to accept legal-tender notes in payment of a debt antecedently created. The tender made by the defendants was made after the decision in *Hepburn* v. *Griswold* had been pronounced, and before its reversal by the case of *Knox* v. *Lee* (12 Wall. 457).

"It is insisted on the part of the defendant that notwithstanding the fact that at the time the tender was made the Supreme Court of the United States, the ultimate judicial authority on all questions arising under the Constitution and laws of the United States, had decided that the Legal Tender Act, so far as it applied to debts like that of the plaintiff, was void, and that he was entitled to demand payment of his debt in coin, yet he was bound to know the law to be as it was subsequently declared, and that a refusal to accept the tender involved the loss of his security. I think the law did not impose upon the plaintiff so unreasonable a burden. The claim is sought to be justified by the maxim, *ignorantia juris non excusat*, the reason of which is stated by Lord Ellenborough, in *Bilbie* v. *Lumley* (2 East, 469), to be, that otherwise there is no saying to what extent the ignorance might not be carried, and that it would be urged in almost every case. The reason of the rule has no application to a case like this. The plaintiff had a right to repose upon the decision of the highest judicial tribunal in the land. It was, as applied to the relations between these parties and to this case, the law, and not the mere evidence of the law. Respect for the decisions of courts is a duty incalculated by writers upon the law, and enforced by considerations of public policy. It is said by Kent (1 Com., 476): 'If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it.' The transactions of life would be involved in great and distressing perplexity and uncertainty, if the maxim quoted is to be applied and extended to cases like this. It is provided in this State by statute (2 R. S., 624, § 66) that every act done in good faith, in conformity with a construction by the Supreme Court of any penal or other statute, after such decision was made and before reversal by the Court for the Correction of Errors, shall be so far valid that the party doing said Act shall not be liable to any penalty or forfeiture therefor.

"In the absence of a statutory provision covering this case, I am of opinion that the same equitable principle should be applied as is contained in the statute cited, and that it should be held that the tender by the defendant did not discharge the lien of the mortgage, it being insufficient according to the law as then declared."

See *supra*, p. 1550, n. — ED.

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 interest 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 subtreasury 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. George F. Edmunds and *Mr. William Allen Butler* for plaintiff in error; *Mr. Benjamin F. Butler*, *Mr. Thomas H. Talbot*, and *Mr. James McKeen*, for defendant in 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 insufficient 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 overruled, 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 *M'Culloch* 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. 107. 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 *M'Culloch* 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 *M'Culloch* 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, 407.

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 *M'Culloch* 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 re-

strain, 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 lessons 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, c. 95, and with regard to silver by the Act of February 28th, 1878, c.

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 *M'Culloch* v. *Maryland:* "Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the gov-

ernment, 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, c. 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]

[FIELD, J., dissented. His opinion is omitted.]

[1] From *Legal Tender*, 1 Harv. Law Rev. 73. — The question whether Congress has the power to make paper a good tender in payment of debts, and the question whether under any given circumstances it is wise or right that Congress should use it, are very different things. He who asserts the power may well enough deny the wisdom, the justice, or the morality of any particular instance of its exercise; recalling what Sir Matthew Hale said of the king's prerogative regarding the coin: "It is true that the imbasing of money in point of allay hath not been very usually practised in England, and it would be a dishonor to the nation if it should . . . but surely if we respect the right of the thing, it is within the king's power to do it."[1] The topic which it is now proposed to consider is the purely legal one of constitutional power. . . . [After an account of what took place in the Convention, as to the power to emit bills (*supra*, p. 2198), the writer proceeds.]

This sagacious policy of silence, rather than positive grant or positive prohibition, as regards the powers and duty of the Union, was resorted to on several occasions; they wished, as Gouverneur Morris is reported to have said of the instrument which they were preparing,[2] to "make it as palatable as possible." For example, on an unsuccessful motion to strike out a clause making the compensation of members of Congress payable out of the National Treasury, Massachusetts voted to strike out; "not," says Madison, "because they thought the State treasury ought to be substituted, but because they thought nothing should be said on the subject, in which case it would silently devolve on the National Treasury to support the National Legislature." The members of the Convention were sensible that the Constitution, as Madison said, "had many obstacles to encounter," and they preferred sometimes to leave the instrument silent rather than to invite opposition by express provisions, either one way or the other.[3] . . .

Mr. Gorham's view is now the accepted one; the striking out was the removal of an express grant of power, but it was not a prohibition of the power. It had the effect to leave the question of power to be settled as it might arise, as in the instance of striking out the grant of power to grant charters of incorporation.[4] And so as regards the further question of the power to make the currency a legal tender, this act of striking out the words "and emit bills on the credit of the United States" was merely neutral. We have seen that most of those who took part in the debates of

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[1] 1 Hale, P. C. 193.

[2] 4 Ell. Deb. 611.

[3] Compare the striking out of a clause empowering Congress to grant charters of incorporation, a power which, nevertheless, it has, 5 Ell. Deb. 543, 544; and Jefferson's comments, 4 Ib. 610; and the note, Ib. 611; and see Legal Tender Cases, 12 Wall. 559, per Bradley, J. Compare also the fate of Mr. Gerry's motion ("he was not seconded") to extend to Congress the prohibition which was put upon the States, as to impairing the obligation of contracts, 5 Ell. Deb. 546; see the remarks of Morris, Ib. 485. Compare also the language of Madison, in his letter of Feb. 22, 1831, to C. J. Ingersoll; a certain evil which he is there discussing was not, he says, foreseen, "and, if it had been apprehended, it is questionable whether the Constitution of the United States (which had many obstacles to encounter) would have ventured to guard against it by an additional provision." 4 Ell. Deb. 608.

[4] See also the express proviso of Art. IV. Sect. 3, as to the Territories.

the Convention appear to have thought that if the power of emitting bills of credit should exist at all, the power to make them a legal tender would also exist if it were not expressly prohibited. Although Madison seems to have conceived that dropping the power to emit bills would not wholly deprive the Union of that power, while it would leave it destitute of the power to make its issues a tender, yet, as Mr. Justice Gray remarks,[1] "he has not explained why" he thought so. He also thought that there would be no power to issue them as a currency, or to establish any paper currency; which is not so. And he thought, too, that forbidding the issuing of bills of credit to the States was only forbidding such as are made a legal tender;[2] which was not so. "The Constitution itself," said Marshall, C. J., in *Craig* v. *The State of Missouri*,[3] "furnishes no countenance to this distinction. The prohibition [in the case of the States] is general. It extends to all bills of credit, not to bills of a particular description." . . .

This [that Congress may not make paper a legal tender] was strongly declared by Mr. Webster, in his speech on the "Specie Circular," delivered in the Senate of the United States on the 21st of December, 1836. The debate related to an order of the Secretary of the Treasury to certain officials to require the payment of gold and silver for public lands. Mr. Webster said:[4] "What is meant by the 'constitutional currency' about which so much is said? What species or forms of currency does the Constitution allow, and what does it forbid? It is plain enough that this depends on what we understand by *currency*. Currency, in a large, and, perhaps, in a just sense, includes not only gold, and silver, and bank notes, but bills of exchange also. It may include all that adjusts exchanges and settles balances in the operations of trade and business. But if we understand by currency the *legal money* of the country, and that which constitutes a lawful tender for debts, and is the statute measure of value, then, undoubtedly, nothing is included but gold and silver. Most unquestionably there is no legal tender, and there can be no legal tender, in this country, under the authority of this government or any other, but gold and silver, either the coinage of our own mints, or foreign coins, at rates regulated by Congress. This is a constitutional principle perfectly plain, and of the very highest importance. The States are expressly prohibited from making anything but gold and silver a tender, in payment of debts, and although no such express prohibition is applied to Congress, yet as Congress has no power granted to it, in this respect, but to coin money and to regulate the value of foreign coins, it clearly has no power to substitute paper, or anything else, for coin, as a tender in payment of debts and in discharge of contracts. Congress has exercised this power, fully, in both its branches. It has coined money, and still coins it. It has regulated the value of foreign coins, and still regulates their value. The legal tender, therefore, the constitutional standard of value, is established, and cannot be overthrown. To overthrow it, would shake the whole system. But, if the Constitution knows only gold and silver as a legal tender, does it follow that the Constitution cannot tolerate the voluntary circulation of bank notes, convertible into gold and silver at the will of the holder, as part of the actual money of the country? Is a man not only to be entitled to demand gold and silver for every debt, but is he, or should he be, obliged to demand it in all cases? Is it, or should government make it, unlawful to receive pay in anything else? Such a notion is too absurd to be seriously treated. The constitutional *tender* is the thing to be preserved, and it ought to be preserved sacredly, under all circumstances. The rest remains for judicious legislation by those who have competent authority."

That is a very emphatic expression of opinion, and it is often cited. Mr. Webster puts this doctrine as resulting from the fact that Congress, while not expressly prohibited, like the States, yet has no grant of power "in this respect, but to coin money and regulate the value of foreign coins."[5] If this ground be thought, as I venture to

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[1] 110 U. S. at p. 443.

[2] Letter to C. J. Ingersoll, Feb. 22, 1831, 4 Ell. Deb. 608.

[3] 4 Pet. 410, at p. 434. [4] Webster's Works, IV. 270, 271.

[5] Mr. Webster is, of course, a little inaccurate here. Congress may also "regulate

think it, not a very strong one, it must be remembered that Mr. Webster was not, just then, concerned with any careful or affirmative discussion of this topic; he was only making a passing concession to his opponents. His line of thought was this: "You talk of 'paper money' as unconstitutional; and of gold and silver as the only 'constitutional currency.' What is meant by 'constitutional currency?' If you mean that nothing but coin can be a legal tender, I agree; but if you mean that it is not constitutional to have a paper currency at all, I deny it." That is to say, he conceded a point, in passing, without at all undertaking to weigh carefully his language or his reasons as regards a matter upon which he assumes that all whom he is addressing think alike. Still he does give a reason; (*a*) there can be no legal tender but coin, as resulting from the action of a State, because the States are expressly prohibited from making anything but gold and silver a tender in payment of debts; (*b*) there can be no legal tender but coin resulting from the action of Congress, because, though not expressly prohibited, "as Congress has no power granted to it in this respect, but to coin money and regulate the value of foreign coins, it clearly has no power to substitute paper, or anything else, for coin, as a tender in payment of debts and in discharge of contracts."

Now, as regards these statements of Mr. Webster, there is, in the first place, no difficulty in assenting to what he says about the power of the States. But as regards Congress, his conclusion is by no means so obvious. When it is said that Congress has no other power granted to it, in respect to legal tender, than that which is mentioned, if it is meant that no such power is granted by implication elsewhere, there is a begging of the question which we are discussing, and of which more will be said later on. If it is meant that there is no other express grant of the power, the statement is objectionable in its assumption that there is here any express grant of power to establish a legal tender; although, it is to be admitted that there is not any express grant of it elsewhere.

The argument as regards this last point, which Mr. Webster's expressions suggest, has been forcibly put . . . thus: "It is hard to see how a limited power, which is expressly given, and which does not come up to a desired height, can be enlarged as an incident to some other express power; an express grant seems to exclude implications; the power to coin money means to strike off metallic medals (coins) and to make those medals legal tender (money). If the Constitution says expressly that Congress shall have power to make metallic legal tender, how can it be taken to say by implication that Congress shall have power to make paper legal tender?"[1] . . .

This reasoning seems to me obviously defective.

(1.) It does not take the language of the Constitution as it stands. It puts a construction on it, viz.: that money and legal tender are here synonymous; and reasons as if this part of the Constitution contained the expression "legal tender." The Constitution does not, in terms, say that Congress may make coin a legal tender, although, truly, the power is not wanting; but it says nothing about legal tender. The argument, then, that the express grant of power to make coin a tender excludes the implication of a power to make anything else a tender, is inapplicable to the actual text of the Constitution.

(2.) This construction appears to be wrong. The Constitution, in the coinage clause, simply confers on Congress one of the usual functions of a government, that of manufacturing metallic money and regulating the value of such money. As to what shall be done with it when it is manufactured and its value regulated, the Constitution says nothing. I cannot doubt that the word *money* in the coinage clause is limited to metallic money.[2] And Congress may do with it and about it, and may

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the value" of its own coin. And it is an error to say that Congress can make only gold and silver a tender.

[1] In 1 Kent's Com. (12 ed.) 254, n. 1 (1873); and also, before that, in 4 Am. Law Rev. 768 (July, 1870).

[2] But see Mr. McMurtrie's very able "Observations on Mr. George Bancroft's Plea for the Constitution."

abstain wholly or in part from doing, what is ordinarily done by governments when they coin money; and so may make it a legal tender. But money is not necessarily a tender in discharge of contracts or debts; with us, foreign money is not;[1] some domestic money is not; for example, trade dollars,[2] silver coins, under the denomination of one dollar, for amounts over ten dollars,[3] copper and other minor coins, for amounts over twenty-five cents.[4] Undoubtedly the legislature may make its coin a legal tender or not, as it pleases, and to such a partial extent, and with such qualifications as it pleases. In law, whatever is legal tender is money; but it is not true that whatever is money is legal tender. The clause of the Constitution, therefore, which provides for the coinage of money is not one which, by any necessary construction, says anything about legal tender. While, indeed, it is clear, having regard to the nature and ordinary use of coined money, to the ordinary powers of governments, to the control over this whole subject which is given to Congress by the Constitution, and to its silence as touching any restrictions regarding the power to make the money, when coined, a legal tender, — that Congress has full power to give or withhold this quality as regards its coined money, yet this power is inferential, and not express. The real argument, then, from the clauses relied upon by the learned persons above quoted, is not, as it is put; (*a*) Congress has an express power to make coin a legal tender; and so, (*b*) an implied power to make something else a legal tender is excluded. But it cannot be put higher than this: (*a*) Congress has an express power to coin money; (*b*) in that, is implied a power to make it a legal tender; and (*c*) this implied power excludes an implied power to make anything else a legal tender. That argument is not a strong one.

The power of Congress to make and put in circulation a paper currency, a paper medium of exchange, what Mr. Webster, in common with Adam Smith and Hamilton, and many another, calls "paper money," is now established. The express power to coin money does not exclude the implication of that. Why, then, should the implied power of making coined money a legal tender exclude an implied power of making "paper money" a legal tender? As the power to coin money, and so to furnish a medium of exchange does not exclude an implied power to furnish another medium of exchange, a paper currency, "paper money," — so neither in its expression nor its implication does it exclude the implied power to make this other medium of exchange a legal tender.

But it may be thought that I have gone too far in saying, as regards metallic money, that the terms *money* and *legal tender* are not convertible terms. It is not forgotten that distinguished persons have held the contrary opinion. Mill has said: "It seems to me to be an essential part of the idea of money that it be legal tender."[5] A distinguished French writer, Say, has remarked: "The copper coin and that of base metal are not, strictly speaking, money; for debts cannot be legally tendered in this coin, except such fractional sums as are too minute to be paid in gold or silver."[6] Many other persons have held this as a doctrine of political economy, although it is a view which is by no means universally accepted.[7] In law, also, it is to be admitted that, generally, in the payment of debts and obligations, and on the side of penal law, as in a statute relating to the embezzlement of money, only what is a legal tender is money.[8] But it must also be remembered that the Constitution, in giving to Congress the power to coin money, is not, just then, concerned with the technicalities of law or political economy; it is disposing of one of the "*jura majestatis*" in brief and general terms, in phrases which are the language of statesmen. The terms used in this place import the manufacture of metallic coin, and do not com-

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[1] U. S. Rev. St. Sect. 3584.
[2] 1 Suppl. Rev. St. p. 254.
[3] Ib. p. 488.
[4] U. S. Rev. St. Sect. 3587.
[5] Principles of Pol. Econ. Book III. c. XII. s. 6.
[6] Pol. Econ Book I. c. XXI., s. 10.
[7] See especially Francis A. Walker's acute and searching book on "Money."
[8] 2 Bish. Crim. Law, s. 357, Title Embezzlement, "Money means, as a general proposition, what is legal tender, and nothing else."

prehend the preparation of paper. But to say that they import no other metallic coin than that which is made a legal tender seems to be clearly an error. Even in strict law the term *money* sometimes covers things other than legal tender, as in the case of a gift of "money" in a will, which includes bank notes.[1] Of bank notes, also, Lord Mansfield said, in 1758, in *Miller* v. *Race*,[2] in an action of trover for a bank-note: "They . . . . are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind. . . . They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash." Of the guinea, first coined in 1664 and not made a legal tender till 1717, Holt, C. J., said, in 1694, in *St. Leiger* v. *Pope*:[3] "Do you think that it is not high treason to counterfeit guineas? A guinea is the current coin of the kingdom, and we are to take notice of it." And then, above all, consider the usage of the time when the Constitution was made. Adam Smith, of whose great work on "The Wealth of Nations," the first edition was published in 1776, and the last, of those during his lifetime, in 1786, remarks: "Originally, in all countries, I believe, a legal tender of payment could be made only in the coin of that metal which was peculiarly considered as the standard or measure of value. In England, gold was not considered as a legal tender for a long time after it was coined into money."[4] I am not concerned with the precise accuracy of this statement in certain points of fact,[5] but only with its use of terms. Dr. Johnson, whose dictionary received his last corrections in the edition of 1773, defined money, with no reference to the idea of tender simply and only as "metal, coined for the purposes of commerce." Hamilton, in 1790, in his opinion given to Washington, on the constitutionality of the bill to incorporate a United States Bank,[6] said: "The Bank will be conducive to the creation of a medium of exchange between the States. . . . Money is the very hinge on which commerce turns. And this does not merely mean gold and silver; many other things have served the purpose of money with different degrees of utility. Paper has been extensively employed."[7]

Observe, also, the sense of the term as used in our early statutes. In the first Coinage Act, of April 2, 1792,[8] in Sect. 9, ten coins, from eagles down to cents and half cents, are directed to be struck at the mint, and the value of them is regulated. Here appears to be the full exercise of the express power given in the Constitution, "to coin money and regulate the value thereof;" and it will be remarked that it is exercised in regard to the copper coins no less than the gold and silver ones. In a later section (Sect 16) the gold and silver coins, and these only, are made "a lawful tender in all payments whatsoever." But can there be any doubt that the two copper coins were regarded as "money"? If so, the doubt will vanish on looking at the Act of May 8, 1792, to "provide for a copper coinage,"[9] which, in furtherance of the previous Act, provided, among other things, that the cents and half cents were to be paid into the treasury, "thence to issue into circulation," and that after a fixed time "no copper coins or pieces whatsoever, except the said cents and half cents, shall pass current as money," and also enacted forfeiture and a penalty for paying or offering any other copper coins but these; but it said nothing of their being a tender. It was, I believe, more than seventy years before copper coin had the quality of legal tender.[10] As regards our later legislation, in the Revised Statutes of the United States (Sect. 3513), the trade dollar is classed among "the silver coins of the United States;" and in Sect. 3586 it is, with the rest, made a legal tender for amounts not over five dollars.

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[1] 2 Williams Ex., Pt. 3, Book 3, c. II. s. 4.

[2] 1 Burr, 457.

[3] 5 Mod. at p. 7.

[4] Book I. c. 5.

[5] See Coins of the Realm, by the Earl of Liverpool, 143.

[6] Lodge's Works of Alexander Hamilton, III. 213.

[7] It is needless to say that Hamilton was not here advocating making the paper a legal tender.

[8] 1 U. S. St. at Large, 246.

[9] Ib. 283.

[10] Upton's Money in Politics, 259. Can there (to adopt the suggestion of a learned friend) be any doubt, if a State should issue a copper coinage like this, that the proceedings would be unconstitutional, as coining money?

By a statute of 1876,[1] the quality of legal tender is taken away from this "silver coin of the United States." Does it thereby cease to be money? The case of the trade dollar is peculiar. But imagine the government to coin some very large gold piece for supposed reasons of convenience in trade, without making it a legal tender; this, as I am told, was formerly done in Germany; is such a coin, therefore, not money? Suppose the government, for like reasons, to manufacture coins, of exactly the same size and value as those of England, or Russia, or Holland, not a legal tender, but supposed to be serviceable in foreign trade, would they not be money? Suppose such coins to be made for use in China as being readily taken there, would the case be essentially different? And, finally, suppose that Congress, instead of repealing that part only of Title 39 of the Revised Statutes which related to the trade dollar had repealed all of it; it is the seven sections of this title, under the separate heading of "Legal Tender," which give that quality to the coins of the United States; would all our coins, manufactured as they are under the provisions of the separate Title 38, cease to be money? It seems clear that they would not; and we must conclude that the term money, as used in the coinage clause of the Constitution, has that large and universal sense in which it is used in the reasonings of Aristotle,[2] of Adam Smith, and of Hamilton, viz.: that of a common metallic medium of exchange, "the common measure of all commerce."[3]

And, finally, before leaving this argument from the supposed express power in the coinage clause, it may be added, as was said before, that this argument would equally apply if the Constitution had retained the express clause giving power "to emit bills on the credit of the United States." It might still have been said that the implication of a power to give these bills the quality of legal tender was excluded by the coinage clause. Yet the evident understanding of most of those who took part in the debates was, that if the power to emit bills was given it would carry with it the power to make them a tender, unless that power was expressly prohibited. There can be no doubt as to their understanding of that. The coinage clause was not even alluded to. We have, then, in a way, the authority of these framers of the Constitution against the argument that the coinage clause excluded the implication of a power to make paper a legal tender. . . .

It will be convenient here to make a few discriminations. In order to supply a paper currency the government need not emit bills; it may charter a private bank to provide a circulation, and may simply regulate its operations; and it may be itself a stockholder, as in the case of the United States Bank. Or it may avail itself of banks already established. In such cases there is no borrowing of money. On the continent of Europe, as I am informed, most of the cases where governments made the paper currency a legal tender, before the time of our Constitution, — and, some of the instances, since, but not all, — were those of giving this quality to the paper of private or *quasi* public institutions; not to government bills. Now, in such cases, the government does not necessarily borrow money. Again, even where it makes its own paper a currency, and a legal tender currency, it does not necessarily raise money on it, except, of course, in so far as it may go on to pay its debts with it, and thus borrow by a forced loan; for it may, as the States sometimes did,[4] cause its paper to be given out by lending it on the security of other property. Or it may issue it to banks on their giving security for its redemption, and merely allow them to use it and issue it as a circulating medium. In such a case there is no borrowing by the government.

The case of the present National banks is not quite this; for they take notes furnished by the government and issue them as their own, and are fully and primarily

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[1]] Suppl. R. S. U. S. 254.

[2] Nicom. Eth. Bk. V. 5. "For this purpose money was invented, and serves as a medium (*μέσον*, mean, or means) of exchange, for by it we can measure everything. . . . Money is, indeed, subject to the same conditions as other things; its value is not always the same, but still it tends to be more constant than anything else," etc. Translation by F. H. Peters. London, 1881.

[3] 1 Hale's P. C. 184.

[4] *Craig* v. *Mo.*, 4 Pet. 410.

responsible upon them; but the government is a sort of guarantor, and holds specific property of the banks, viz. government bonds, as security, to be applied to the redemption of the notes, being itself bound to redeem them on the failure of the banks to do so, and having the right to apply the bonds to reimburse itself. Now, there is here a remote element of borrowing; that is to say, the property of the banks which must be deposited consists of the securities of the United States; and, in order to get those securities, the banks, or somebody else, must have lent money to the United States. So that, under the existing system, the United States says: (1) there shall be a currency for the whole country; (2) it shall be furnished by the United States and guaranteed by it, but issued through private banks; (3) in receiving these printed notes the banks shall leave as security with the United States a certain quantity of bonds of the United States which are their own property; (4) they must return these notes to the United States before they can have their bonds again. This, of course, is uniting the operation of the two powers of borrowing and of issuing a currency. If the government, instead of this arrangement, were to issue its own currency directly, like the greenbacks, it need not necessarily borrow with it; for it might, as we have seen, lend it on security (which might or might not be its own bonds), to be used by others.

But, on the other hand, it may borrow money with it; and that is the natural and obvious way of giving out its currency. That was, in point of fact, done during our great rebellion. If this currency be one which is the full legal equivalent of money, a legal tender, the principle is still the same; the government may borrow with this currency as well as any other. When the government notes consist of promises to pay, the phrase of borrowing is, of course, strictly applicable. It is true we more commonly speak of this operation as that of the government selling its bonds or notes, as we speak of a man selling his own promissory notes. But it is, in fact, borrowing money on a promise to pay; and in the case of the government it is borrowing upon a kind of promise to pay, which is a part of the medium of exchange, and of that which is, in the full legal sense, money.

We perceive, then, a great difference between private borrowing and public borrowing.[1] When a nation borrows, it may, as we see, borrow with its currency; and if its currency be made a legal tender it may borrow with that. I do not say, if a government were denied the power of establishing a paper currency at all, that it could give to its paper the quality of legal tender in order to borrow with it. To do that, would, indeed, help the borrowing process; but, on the supposition I am now making, viz., of a government with no power to establish a paper currency, it would be an evasion of the restriction put upon it, to say that it could, merely for facility of borrowing, annex to its security a quality which would be forbidden if it were not borrowing. It is not, then, as part of the mere, bare, simple process of borrowing that Congress is to be said to have the power of giving to the government paper the quality of money. But it is as part of the borrowing power *of a nation;*[2] of a body which has other governmental powers, such as the power of establishing a paper currency, and so of annexing to it the legal-tender quality; the power and duty of raising armies and providing for their support, and so of raising money suddenly and in vast quantities; and the like. Such a body may borrow with its currency and with its legal-tender currency.

If there be any exigency, as, for example, that of war, in which the government may make its own notes, or any other, a legal tender, it seems to be purely a legislative question when such an exigency has in point of fact arisen. This was the unanimous opinion of the court in *Juilliard* v. *Greenman*.

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[1] And so *Juilliard* v. *Greenman*, 110 U.S. at p. 448, per Gray, J.

[2] *Juilliard* v. *Greenman*, 110 U.S. 421, 444–448. The pamphlet of Mr. Bancroft, called out by this case, proceeded upon singular misconceptions, and was unworthy of its author's fame.

See *Borie* v. *Trott*, 5 Phila. 366; 2 Hare, Am. Const. Law, 1232–1310.

CHAPTER XII.

WAR. — INSURRECTION. — THE ARMY AND NAVY.[1]

From Dicey's *Law of the Constitution*, 4th ed. 271–289. (Reprinted by permission.) "If, then, by martial law be meant the power of the government or of legal citizens to maintain public order, at whatever cost of blood or property may be necessary, martial law is assuredly part of the law of England. Even, however, as to this kind of martial law one should always bear in mind that the question whether the force employed was necessary or excessive will, especially where death has ensued, be ultimately determined by a judge and jury, and that the estimate of what constitutes necessary force formed by a judge and jury, sitting in quiet and safety after the suppression of a riot, may differ considerably from the judgment formed by a general or magistrate, who is surrounded by armed rioters, and knows that at any moment a riot may become a formidable rebellion, and the rebellion if unchecked become a successful revolution.

"Martial law is, however, more often used as the name for the government of a country or a district by military tribunals, which more or less supersede the jurisdiction of the courts. The proclamation of martial law in this sense of the term is, as has been already pointed out, nearly equivalent to the state of things which in France and many other foreign countries is known as the declaration of a 'state of siege,' and is in effect the temporary and recognized government of a country by military force. The legal aspect of this condition of affairs in States which recognize the existence of this kind of martial law can hardly be better given than by citing some of the provisions of the law which at the present day regulates the state of siege in France: —

"'7. Aussitôt l'état de siége déclaré, les pouvoirs dont l'autorité civile était revêtu pour le maintien de l'ordre et de la police passent tout entiers à l'autorité militaire. — L'autorité civile continue néanmoins à exercer ceux de ces pouvoirs dont l'autorité militaire ne l'a pas dessaisie.

"'8. Les tribunaux militaires peuvent être saisis de la connaissance des crimes et délits contre la sûreté de la République, contre la constitution, contre l'ordre et la paix publique, quelle que soit la qualité des auteurs principaux et des complices.

"'9. L'autorité militaire a le droit, — 1° De faire des perquisitions, de jour et de nuit, dans le domicile des citoyens; — 2° D'éloigner les repris de justice et les individus qui n'ont pas leur domicile dans les lieux, soumis à l'état de siége; — 3° D'ordonner la remise des armes et munitions, et de procéder à leur recherche et à leur enlèvement; — 4° D'interdire les publications et les réunions qu'elle juge de nature à exciter ou à entretenir le désordre.'

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[1] The standard text-book in the United States upon this general subject is Winthrop on Military Law, two volumes (Washington, 1886). A new edition is to be published in 1895. See also Whiting's "War Powers under the Constitution of the United States," forty-third edition (Poston, Lee & Shepard, 1871). This book was written during the war. The author was, for a long time, Solicitor to the War Department at Washington. While this work lacks literary form and is marked in some places by extreme opinions, it is an acute and valuable book. Historically it is of much importance, as indicating, in some degree, the constitutional doctrines on which the war of The Rebellion was conducted by the Federal Government. — Ed.

"We may reasonably, however, conjecture that the terms of the law give but a faint conception of the real condition of affairs when, in consequence of tumult or insurrection, Paris or some other part of France is declared in a state of siege, and, to use a significant expression known to some continental countries, 'the constitutional guarantees are suspended.' We shall hardly go far wrong if we assume that during this suspension of ordinary law any man whatever is liable to arrest, imprisonment, or execution at the will of a military tribunal consisting of a few officers who are excited by the passions natural to civil war. However this may be, it is clear that in France, even under the present Republican government, the suspension of law involved in the proclamation of a state of siege is a thing fully recognized by the Constitution, and (strange though the fact may appear) the authority of military courts during a state of siege is greater under the Republic than it was under the monarchy of Louis Philippe.

"Now, this kind of martial law is in England utterly unknown to the Constitution. Soldiers may suppress a riot as they may resist an invasion, they may fight rebels just as they may fight foreign enemies, but they have no right under the law to inflict punishment for riot or rebellion. During the effort to restore peace, rebels may be lawfully killed, just as enemies may be lawfully slaughtered in battle, or prisoners may be shot to prevent their escape, but any execution (independently of military law) inflicted by a court-martial is illegal and technically murder. Nothing better illustrates the noble energy with which judges have maintained the rule of regular law, even at periods of revolutionary violence, than *Wolfe Tone's Case*. In 1798, Wolfe Tone, an Irish rebel, took part in a French invasion of Ireland. The man-of-war in which he sailed was captured, and Wolfe Tone was brought to trial before a court-martial in Dublin. He was thereupon sentenced to be hanged. He held, however, no commission as an English officer, his only commission being one from the French Republic. On the morning when his execution was about to take place application was made to the Irish King's Bench for a writ of *habeas corpus*. The ground taken was that Wolfe Tone, not being a military person, was not subject to punishment by a court-martial, or, in effect, that the officers who tried him were attempting illegally to enforce martial law. The court of King's Bench at once granted the writ. When it is remembered that Wolfe Tone's substantial guilt was admitted, that the court was filled with judges who detested the rebels, and that in 1798 Ireland was in the midst of a revolutionary crisis, it will be admitted that no more splendid assertion of the supremacy of the law can be found than that then made by the Irish Bench.

"The English army consists of the standing (or regular) army, and of the militia. Each of these forces has been rendered subordinate to the law of the land. My object is not to give even an outline of the enactments affecting the army, but simply to explain the legal principles on which this supremacy of the law throughout the army has been secured.

"It will be convenient in considering this matter to reverse the order pursued in the common text-books; these contain a great deal about the militia, and comparatively little about the regular forces, or what we now call the 'army.' The reason of this is that historically the militia is an older institution than the permanent army, and the existence of a standing army is historically, and according to constitutional theories, an anomaly. Hence the standing army is often treated by writers of authority as a sort of exceptional or subordinate topic, a kind of excrescence, so to speak, on the national and constitutional force known as the militia. As a matter of fact, of course, the standing army is now the real national force, and the militia is a body of comparatively small importance.

"As to the Standing Army. — A permanent army of paid soldiers whose main duty is one of absolute obedience to commands, appears at first sight to be an institution inconsistent with that rule of law or submission to the civil authorities, and especially to the judges, which is essential to popular or parliamentary government; and in truth the existence of permanent paid forces has often in most countries and at times in England — notably under the Commonwealth — been found inconsistent with the existence of what, by a lax though intelligible mode of speech, is called a free govern-

ment. The belief indeed of our statesmen down to a time considerably later than the Revolution of 1689 was that a standing army must be fatal to English freedom, yet very soon after the Revolution it became apparent that the existence of a body of paid soldiers was necessary to the safety of the nation. Englishmen, therefore, at the end of the seventeenth and the beginning of the eighteenth century, found themselves placed in this dilemma. With a standing army the country could not, they thought, escape from despotism; without a standing army the country could not, they perceived, avert invasion; the maintenance of national liberty appeared to involve the sacrifice of national independence. Yet English statesmanship found almost by accident a practical escape from this theoretical dilemma, and the Mutiny Act, though an enactment passed in a hurry to meet an immediate peril, contains the solution of an apparently insolvable problem. . . . The object and principles of the first Mutiny Act (I. Will. and Mary, c. 5) of 1689 are exactly the same as the object and principles of the Army Act, 1881, under which the English Army is in substance now governed. A comparison of the two statutes shows at a glance what are the means by which the maintenance of military discipline has been reconciled with the maintenance of freedom, or to use a more accurate expression, with the supremacy of the law of the land.

"The preamble to the first Mutiny Act has reappeared with slight alterations in every subsequent Mutiny Act, and recites that 'Whereas no man be forejudged of life or limb, or subjected to any kind of punishment by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of this realm; yet, nevertheless, it' [is] 'requisite for retaining such forces as are, or shall be raised during this exigence of affairs, in their duty an exact discipline be observed; and that soldiers who shall mutiny or stir up sedition, or shall desert their majesties' service, be brought to a more exemplary and speedy punishment than the usual forms of law will allow.'

"This recital states the precise difficulty which perplexed the statesmen of 1689. Now let us observe the way in which it has been met.

"A person who enlists as a soldier in a standing army, or (to use the wider expression of modern Acts) 'a person subject to military law,' stands in a twofold relation: the one is his relation towards his fellow-citizens outside the army; the other is his relation towards the members of the army, and especially towards his military superiors; any man, in short, subject to military law has duties and rights as a citizen as well as duties and rights as a soldier. His position in each respect is under English law governed by definite principles.

"A soldier's position as a citizen. — The fixed doctrine of English law is that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen. 'Nothing in this Act contained' (so runs the first Mutiny Act) 'shall extend or be construed to exempt any officer or soldier whatsoever from the ordinary process of law.' These words contain the clew to all our legislation with regard to the standing army whilst employed in the United Kingdom. A soldier by his contract of enlistment undertakes many obligations in addition to the duties incumbent upon a civilian. But he does not escape from any of the duties of an ordinary British subject.

"The results of this principle are traceable throughout the Mutiny Acts.

"A soldier is subject to the same criminal liability as a civilian. He may when in the British dominions be put on trial before any competent 'civil' (*i. e.* non-military) court for any offence for which he would be triable if he were not subject to military law, and there are certain offences, such as murder, for which he must in general be tried by a civil tribunal. Thus if a soldier murders a companion or robs a traveller whilst quartered in England or in Van Dieman's Land, his military character will not save him from standing in the dock on the charge of murder or theft.

"A soldier cannot escape from civil liabilities, as for example, responsibility for debts; the only exemption which he can claim is that he cannot be forced to appear in court, and could not, when arrest for debt was allowable, be arrested for any debt not exceeding £30.

"No one who has entered into the spirit of continental legislation can believe that

(say in France or Prussia) the rights of a private individual would thus have been allowed to override the claims of the public service.

"In all conflicts of jurisdiction between a military and a civil court the authority of the civil court prevails. Thus, if a soldier is acquitted or convicted of an offence by a competent civil court, he cannot be tried for the same offence by a court-martial; but an acquittal or conviction by a court-martial, say for manslaughter or robbery, is no plea to an indictment for the same offence at the assizes.

"When a soldier is put on trial on a charge of crime, obedience to superior orders is not of itself a defence.

"This is a matter which requires explanation. A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in *bonâ fide* obedience to the orders (say) of the commander-in-chief. Hence the position of a soldier may be, both in theory and in practice, a difficult one. He may, as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it. His situation and the line of his duty may be seen by considering how soldiers ought to act in the following cases.

"During a riot an officer orders his soldiers to fire upon rioters. The command to fire is justified by the fact that no less energetic course of action would be sufficient to put down the disturbance. The soldiers are, under these circumstances, clearly bound from a legal as well as from a military point of view to obey the command of their officer. It is a lawful order, and the men who carry it out are performing their duty both as soldiers and as citizens.

"An officer orders his soldiers in a time of political excitement then and there to arrest and shoot without trial a popular leader against whom no crime has been proved, but who is suspected of treasonable designs. In such a case there is (it is conceived) no doubt that the soldiers who obey, no less than the officer who gives the command, are guilty of murder, and liable to be hanged for it when convicted in due course of law. In such an extreme instance as this the duty of soldiers is, even at the risk of disobeying their superior, to obey the law of the land.

"An officer orders his men to fire on a crowd who he thinks could not be dispersed without the use of firearms. As a matter of fact the amount of force which he wishes to employ is excessive, and order could be kept by the mere threat that force would be used. The order therefore to fire is not in itself a lawful order, that is, the colonel, or other officer who gives it, is not legally justified in giving it, and will himself be held criminally responsible for the death of any person killed by the discharge of firearms. What is, from a legal point of view, the duty of the soldiers? The matter is one which has never been absolutely decided; the following answer given by Mr. Justice Stephen, is, it may fairly be assumed, as nearly correct a reply as the state of the authorities makes it possible to provide: 'I do not think, however, that the question how far superior orders would justify soldiers or sailors in making an attack upon civilians has ever been brought before the courts of law in such a manner as to be fully considered and determined. Probably upon such an argument it would be found that the order of a military superior would justify his inferiors in executing any orders for giving which they might fairly suppose their superior officer to have good reasons. Soldiers might reasonably think that their officer had good grounds for ordering them to fire into a disorderly crowd which to them might not appear to be at that moment engaged in acts of dangerous violence, but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street when no disturbance of any kind was either in progress or apprehended. The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior. I think it is not less monstrous to suppose that superior orders would justify a soldier in the massacre of unoffending civilians in time of peace, or in the exercise of inhuman cruelties, such as the slaughter of women and children, during a rebellion. The only line that presents itself to my

mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds.[1] The inconvenience of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is an inevitable consequence of the double necessity of preserving on the one hand the supremacy of the law, and on the other the discipline of the army.'

"The hardship of a soldier's position resulting from this inconvenience is much diminished by the power of the Crown to nullify the effect of an unjust conviction by means of a pardon. While however a soldier runs no substantial risk of punishment for obedience to orders which a man of common-sense may honestly believe to involve no breach of law, he can under no circumstances escape the chance of his military conduct becoming the subject of inquiry before a civil tribunal, and cannot avoid liability on the ground of obedience to superior orders for any act which a man of ordinary sense must have known to be a crime.

"A soldier's position as a member of the army. — A citizen on entering the army becomes liable to special duties as being 'a person subject to military law.' Hence acts which if done by a civilian would be either no offence at all or only slight misdemeanors, *e. g.* an insult or a blow offered to an officer, may when done by a soldier become serious crimes and expose the person guilty of them to grave punishment. A soldier's offences moreover can be tried and punished by a court-martial. He therefore in his military character as a soldier occupies a position totally different from that of a civilian; he has not the same freedom, and in addition to his duties as a citizen is subject to all the liabilities imposed by military law: but though this is so, it is not to be supposed that, even as regards a soldier's own position as a military man, the rule of the ordinary law is, at any rate in time of peace, excluded from the army.

"The general principle on this subject is that the courts of law have jurisdiction to determine who are the persons subject to military law, and whether a given proceeding alleged to depend upon military law is really justified by the rules of law which govern the army.

"Hence flow the following (among other) consequences.

"The civil courts determine whether a given person is or is not 'a person subject to military law.'

"Enlistment, which constitutes the contract by which a person becomes subject to military law, is a civil proceeding, and a civil court may have to inquire whether a man has been duly enlisted, or whether he is or is not entitled to his discharge.

"If a court-martial exceeds its jurisdiction, or an officer, whether acting as a member of a court-martial or not, does any act not authorized by law, the action of the court, or of the officer, is subject to the supervision of the courts. 'The proceedings by which the courts of law supervise the acts of courts-martial and of officers may be criminal or civil. Criminal proceedings take the form of an indictment for assault, false imprisonment, manslaughter, or even murder. Civil proceedings may either be preventive, *i. e.* to restrain the commission or continuance of an injury; or remedial, *i. e.* to afford a remedy for injury actually suffered. Broadly speaking, the civil jurisdiction of the courts of law is exercised as against the tribunal of a court-martial by writs of prohibition or *certiorari*; and as against individual officers by actions for damages. A writ of *habeas corpus* also may be directed to any officer, governor of a prison, or other, who has in his custody any person alleged to be improperly detained under color of military law.'

"Lastly, the whole existence and discipline of the standing army, at any rate in time of peace, depends upon the passing of an annual Mutiny Act. If a Mutiny Act were not in force, a soldier would not be bound by military law. Desertion would be at most only a breach of contract, and striking an officer would be no more than an assault.

"As to the Militia. — The militia is the constitutional force existing under the law of the land for the defence of the country, and the older Militia Acts, especially 14 Car. II. c. 3, show that in the seventeenth century Parliament meant to rely for the defence of England upon this national army raised from the counties and placed under

[1] See *infra*, p. 2419. — Ed.

the guidance of country gentlemen. The militia may still be raised by ballot, and is in theory a local force levied by conscription. But the power of raising by ballot has been for a considerable time suspended, and the militia, like the regular army, is in fact recruited by voluntary enlistment.

"The militia is from its nature a body hardly capable of being used for the purpose of overthrowing Parliamentary government. But even with regard to the militia, care has been taken by the legislature to ensure that it shall be subject to the rule of law. The members of the local army are (speaking in general terms) subject to military law only when in training or when the force is embodied. Embodiment indeed converts the militia for the time being into a regular army, though an army which cannot be required to serve abroad. But the embodiment can lawfully take place only in 'case of imminent national danger or of great emergency.' If Parliament is sitting, the occasion for embodying the militia must be communicated to Parliament before the proclamation for embodying it is issued. If Parliament is not sitting, a proclamation must be issued for the meeting of Parliament within ten days after the Crown has ordered the militia to be embodied. Add to this, that the maintenance of discipline among the members of the militia when it is embodied depends on the continuance of the annual Mutiny Act."[1]

ELA *v.* SMITH ET AL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1855.

[5 *Gray*, 121.]

ACTION of tort against Jerome V. C. Smith, Mayor of Boston, Benjamin F. Edmands, Major General of the first division of the Massachusetts volunteer militia, Thomas H. Evans, commander of a company in said division, and Watson Freeman, marshal of the United States for the District of Massachusetts, for an assault, battery, and false imprisonment of the plaintiff at Boston on Friday, the 2d of June, 1854.

[1] "There exists an instructive analogy between the position of persons subject to military law, and the position of the clergy of the Established Church. A clergyman of the National Church, like a soldier of the National Army, is subject to duties and to courts to which other Englishmen are not subject. He is bound by restrictions, as he enjoys privileges peculiar to his class, but the clergy are no more than soldiers exempt from the law of the land. Any deed which would be a crime or a wrong when done by a layman is a crime or a wrong when done by a clergyman, and is in either case dealt with by the ordinary tribunals. Moreover, as the common-law courts determine the legal limits to the jurisdiction of courts-martial, so the same courts in reality determine (subject of course to Acts of Parliament) what are the limits to the jurisdiction of ecclesiastical courts. The original difficulty, again, of putting the clergy on the same footing as laymen, was at least as great as that of establishing the supremacy of the civil power in all matters regarding the army. Each of these difficulties was met at an earlier date and has been overcome with more completeness in England than in some other countries. We may plausibly conjecture that this triumph of law was due to the acknowledged supremacy of the king in Parliament, which itself was due to the mode in which the king, acting together with the two Houses, manifestly represented the nation, and therefore was able to wield the whole moral authority of the State."

The defendants answered severally, each denying any part in any assault on the plaintiff; Smith also alleging that, apprehending a riot, he issued a precept, and gave orders to Edmands to aid the police in keeping the peace of the city; Edmands that he acted under such precept and orders; Evans that he acted under orders of Edmands; and Freeman that he acted as marshal, in removing a fugitive from service to the State whence he fled, under the Act of Congress of 1850, c. 60, § 9. 9 U. S. Sts. at Large, 465.

At the trial in this court, at February term, 1855, before MERRICK, J., the evidence introduced by the plaintiff tended to prove the following facts. On the 24th of May, 1854, Anthony Burns was arrested in Boston by the United States marshal, at the claim of Thomas Suttle, as a person held to service or labor under the laws of Virginia, and brought before Edward G. Loring, a commissioner of the Circuit Court of the United States, and was afterwards confined by the marshal, with the assistance of a body of United States troops, in the court house in Boston, and brought before the commissioner from time to time, until the 2d of June, when the commissioner decided that he should be delivered to the claimant, and made a certificate under the Act of Congress of 1850, c. 60, § 10, reciting that Suttle had exhibited to him a record of a court of the State of Virginia, of the slavery and escape of Burns, and had proved the identity of Burns, and declaring that the claimant was authorized to remove him to Virginia. . . .

On the 2d of June, the mayor (as he stated in answer to the plaintiff's written interrogatories) gave such directions, verbal and written, as he thought would best tend to preserve the peace of the city. . . .

General Edmands, after receiving the mayor's note and proclamation, read the latter to his troops, and then, about ten o'clock, marched them from the Common to Court Square, and afterwards so disposed them, in conjunction with the city police, as to exclude the public from Court and State Streets, and allow a free passage for the marshal and his posse from the court house through those streets to Long Wharf, and placed lines of sentries at the ends of the streets leading into Court and State Streets. The police were posted beyond these sentries, some distance down the cross streets, with orders to every captain of police to use every possible means to keep the line, but if he found he could not, to give notice to the police to take care of their own lives, for the military had orders to fire on the people without notice. . . .

The troops remained at their posts until about three o'clock, when the marshal and his posse, carrying Burns with them, passed through Court and State and Commercial Streets, and then down Commerce Street along the north side of Long Wharf, and placed Burns on a steamboat lying at T Wharf, which took him out to the United States revenue cutter, to be taken back to Virginia; and the troops were soon afterwards dismissed.

Captain Evans and his company, with muskets loaded with ball, were posted in Commercial Street, where it joins Commerce Street,

and were charged with the duty of keeping Commercial Street clear, and of guarding the passages down Commerce Street and the rear of the procession. The plaintiff, after Burns had been taken down Long Wharf, attempted to pass along Commercial Street, but was pushed back and knocked down by the soldiers, and cut over the head by a commissioned officer, and then taken away by the police, the officer, whom some of the witnesses thought was Evans, following behind with sword drawn. He was detained by the police some hours, and then released. . . .

At the close of the plaintiff's case, the counsel for the mayor and the two officers moved for a nonsuit, and the counsel for the marshal moved the judge to instruct the jury that the plaintiff was not entitled to recover. But the judge, without hearing the plaintiff's counsel on the motions, and against his protest, reported the evidence in order that the questions of law arising thereon might be considered by the whole court.

C. M. Ellis, for the plaintiff; *R. Choate & G. S. Hillard*, for Smith, Edmands, and Evans; *J. P. Hale* (of New Hampshire) replied.

The decision was made at February term, 1857.

Bigelow, J. This case presents for the first time to the consideration of the court questions of great interest and importance, arising on the true construction and practical operation of those provisions of the statutes, by which authority is given to certain civil officers to call out the organized militia of the Commonwealth to aid in preserving the public peace and enforcing the laws. It is obvious that the nature of the case necessarily leads to an inquiry into the powers and duties of magistrates in the exercise of some of their highest functions, and to a determination of the rights and obligations of citizens, when put to the severest test to which they can be subjected in a well ordered and law-abiding community. It was therefore a wise act of judicial discretion in the judge who presided at the trial to withdraw the case from the consideration of the jury, in order that the legal principles applicable to the facts proved might be first deliberately settled and adjudicated. By such a course, the rights of all parties were preserved, and, in the event of another trial, an intelligent, safe, and impartial verdict rendered more certain.

The provisions of law, on which the defendants Smith, Edmands, and Evans rely for a justification of the acts of trespass alleged in the plaintiff's writ, are found in St. 1840, c. 92, establishing the volunteer militia, §§ 27–29. These are re-enactments of the Rev. Sts. c. 12, §§ 134–136, with the addition of mayors of cities to the list of civil officers by whom an armed force may be called out; and are intended to prescribe the same mode of calling out the "volunteer militia" in aid of the civil authority, as was provided in the Rev. Sts. for calling out, in like case, a portion of the entire organized militia of the State. The aspect in which this case is presented renders it unnecessary to consider in detail the provisions of the Rev. Sts. c. 129, § 5, which are

applicable only where a tumult or riot actually exists, and a military force, having been duly called out, is employed in suppressing or dispersing it. Such was not the case here. The defendants justify on the ground, and the evidence tends to prove, that an unlawful assembly or mob was threatened, and that it was in view of the imminent danger to the public peace, and an anticipated violence and resistance to the laws, that the acts charged in the declaration were committed. It is to the rights, powers, and duties of the defendants, acting in their official capacities in such an exigency, that the whole inquiry in the present case is to be limited.

By the sections of St. 1840, c. 92, above cited, it is provided, among other things, that the mayor of a city, or any other of the civil officers therein designated, may, in case a "tumult, riot, or mob shall be threatened, and the fact be made to appear to" him, issue his precept, the form of which is prescribed by § 27, to call out a division or any smaller body of the volunteer militia "to aid the civil authority in suppressing such violence and supporting the laws." In exercising the authority thus conferred, the statute makes it the first duty of the mayor or other magistrate to determine whether the occasion for calling out a military force exists. This depends on a question of fact, which it is his exclusive duty to determine. If it be made to appear to him that a tumult or riot is threatened, he may then issue his precept. He is, in his official capacity, and under the sanction of his oath of office, to examine and decide this question. This provision of the statute clearly confers a judicial power. Whenever the law vests in an officer or magistrate a right of judgment, and gives him a discretion to determine the facts on which such judgment is to be based, he necessarily exercises, within the limits of his jurisdiction, a judicial authority. So long as he acts within the fair scope of this authority, he is clothed with all the rights and immunities which appertain to judicial tribunals in the discharge of their appropriate functions. Of these none is better settled than the wise and salutary rule of law by which all magistrates and officers, even when exercising a special and limited jurisdiction, are exempted from liability for their judgments, or acts done in pursuance of them, if they do not exceed their authority; although the conclusions to which they arrive are false and erroneous. The grounds of their judgment cannot be inquired into, nor can they be held responsible therefor in a civil action. *Piper* v. *Pearson*, 2 Gray, 120. *Clarke* v. *May*, 2 Gray, 410. This protection and immunity are essential in order that the administration of justice and the discharge of important public duties may be impartial, independent, and uninfluenced by fear of consequences. And they are the necessary result of the nature of judicial power. It would be most unreasonable and unjust to hold a magistrate liable for the lawful and honest exercise of that judgment and discretion with which the law invested him, and which he was bound to use in the discharge of his official duties. Nor would there be any security or safeguard to the magistrate or other officer

against liability, however careful and discreet he might be in exercising his authority, if his judgments were to be examined into and revised in ulterior proceedings against him, in the light of subsequent events, upon new evidence, and with different means of forming conclusions from those upon which he was called upon to act in the performance of his duty. Such an *ex post facto* judgment might be more sound and wise, but it would not be a just or proper standard by which to try the opinions and conduct of an officer, acting at a different time and under other circumstances. Especially is this true in a case like the one at bar, where a public officer is compelled to decide and act promptly in a pressing emergency, and without time or opportunity for careful and deliberate consideration.

If any argument were needed to strengthen this view of the nature of the power conferred by the statute in question, or to show that it is in accordance with the intent of the legislature in creating that authority and jurisdiction, it may be found in the fact that the same power is granted by the statute to a court of record sitting within the county, as is given to the commander in chief and mayors of cities. It is entirely clear that no liability could attach to the judge of a court for exercising his authority and judgment in a matter within his jurisdiction; and it is equally clear that the same rule must apply to other officers performing the same duty under the same grant of power.

It follows from these considerations, that the question, whether a riot was actually threatened, cannot be inquired into in this action. The judgment of the mayor upon it was conclusive, and having been rightly exercised within the limits of the authority conferred by law, no liability was incurred by him in issuing the precept by which the armed force was called out. Another result also follows as a necessary corollary. The precept of the mayor was in exact conformity to the terms of the statute. It was, therefore, a warrant regular on its face, issued by a magistrate of competent authority, within the scope of his jurisdiction. On familiar principles, it affords a complete justification to all those bound to obey its command, for acts lawfully done by them in pursuance thereof. *Fisher* v. *McGirr*, 1 Gray, 45, 46; *Whipple* v. *Kent*, 2 Gray, 413.

The armed force having been legally called out and assembled at the place designated in the precept of the mayor, for the reason that "a tumult, riot, or mob was threatened," the important question arises as to the nature and extent of the authority of the mayor to employ the force for the prevention or suppression of the apprehended violence. A satisfactory answer to this inquiry is furnished by the statute itself, which expressly provides, not only that a military force may be called out when a riot or tumult exists or is threatened, but declares the purpose for which it may be thus ordered to appear, to be "to aid the civil authority in suppressing such violence, and supporting the laws." This clearly includes threatened, as well as existing, violence and resistance to the laws. When, therefore, it is provided in § 29 that the

troops assembled in pursuance of a precept issued under § 27 "shall obey and execute such orders as they may then and there receive according to law," it is manifestly intended to comprehend all necessary and proper orders issued by the officers designated in the statute to effect the purpose for which the military force is called out. If this purpose be to prevent a riot or other unlawful violence, threatened and not actually existing, then the civil officers have the right to employ the troops in all reasonable and proper means to effect this purpose, and the officers and men composing the armed force are bound to obey their commands. Indeed it would be little else than absurd to say that a body of troops might be summoned to aid in carrying out an object distinctly specified in the statute; but that, when they appeared in pursuance of such summons, no one could legally give them an order to accomplish the purpose for which they were assembled. The right and power to call them out for a particular purpose carries with it, by necessary and reasonable implication, the authority to employ them to effect that object, and to issue all proper orders and use all reasonable means therefor.

Any other construction of the statute would render its provisions, in case of a threatened riot or tumult, of no practical utility or advantage. If no orders could be legally issued to the troops, after their assembly under the precept of a mayor or other civil officer, until a tumult, or riot, or other violent resistance to the laws actually existed, it is clear that they could not be effectually employed in efforts to prevent or suppress any anticipated outbreak or disturbance of the public peace.

Nor do we think any sound argument against the existence of a right in the civil officers to issue orders and employ an armed force to prevent a threatened tumult or riot can be drawn from the Rev. Sts. c. 129, § 5, which provide that, when a riot or tumult actually exists, the military force called out to aid the civil authority shall, upon their arrival at the place of such riot or tumult, obey such orders as they may have received from such officers; on the contrary, the language of that statute clearly implies an authority previously vested in such officers to give all needful and proper orders to the troops to suppress the riot. The manifest purpose of that provision was not to confer a power on the officers named in c. 12, to issue orders to the military force called out by their authority; but only to give the same power to any two of the other officers enumerated in § 1 of c. 129, and by an express enactment to secure ample protection to the troops against any personal liability, while engaged in a difficult and perilous duty.

We have no doubt, therefore, that it was clearly within the authority conferred on the mayor by the statute, to order the troops assembled by his precept on the 2d of June, 1854, on Boston Common, to repair thence to any designated portion of the city, there to perform a specific duty or service by him directed, such as clearing the streets from crowds, and preventing the ingress and egress of persons, if, in his judgment, it was expedient and necessary for the purpose of suppress-

ing a tumult or other unlawful violence and resistance to the laws then and there threatened. And this is by no means an extraordinary power. A similar authority, in cases of actual riot or tumult, is vested in all magistrates and civil officers by the well settled rules of the common law. 1 Hawk. c. 28, 4, § 11; *Rex* v. *Pinney*, 5 Car. & P. 254, 258, note; *Case of Arms*, Pop. 121.

It cannot be urged, as a valid argument against the recognition of this authority in civil officers, that it is liable to abuse, and may be made the instrument of oppression. The great security against its misuse and perversion is to be found in the discretion, good judgment, and honesty of purpose of those to whom important public duties are necessarily intrusted. But the existence of such authority is essential in a community where the first and most important use of law consists in preserving and protecting persons and property from unlawful violence. The same argument would apply with equal, if not greater force, to the authority clearly given to any two or more of the same officers, when a riot actually exists, to take life, if in their judgment necessary, in which case they are by express enactment to "be held guiltless and fully justified in law." Rev. Sts. c. 129, §§ 5, 6.

But while thus recognizing the authority of civil officers to call out and use an armed force to aid in suppressing a riot or tumult actually existing, or preventing one which is threatened, it must be borne in mind that no power is conferred on the troops, when so assembled, to act independently of the civil authority. On the contrary, they are called out, in the words of the statute, "to aid the civil authority," not to usurp its functions, or take its place. They are to act as an armed police only, subject to the absolute and exclusive control and direction of the magistrates and other civil officers designated in the statute, as to the specific duty or service which they are to perform. The statute does not even enlarge the power of the civil officers by giving them any military authority; but only places at their disposal, in the exercise of their appropriate and legal functions, an organized, disciplined, and equipped body of men, capable of more efficient action in an emergency, and among a multitude, than an ordinary police force. Nor can the magistrate delegate his authority to the military force which he summons to his aid, or vest in the military authorities any discretionary power to take any steps or do any act to prevent or suppress a mob or riot. They must perform only such service, and render such aid, as is required by the civil officers. This is not only essential to guard against the use of excessive force and the exercise of irresponsible power; but it is required by the fundamental principles of our Constitution, which provides that "the military power shall always be held in an exact subordination to the civil authority, and be governed by it." Declaration of Rights, art. 17. It does not follow from this, however, that the military force is to be taken wholly out of the control of its proper officers. They are to direct its movements in the execution of the orders given by the civil officers, and to manage the details

in which a specific service or duty is to be performed. But the service or duty must be first prescribed and designated by the civil authority.

In the present case, therefore, if the division marched from the Common, where it was duly assembled, and acting solely under the proclamation of the mayor, bearing date of June 2d, 1854, addressed to the citizens of Boston, a copy of which was sent to the major general, in which it is stated that he and the chief of police are "clothed with full discretionary powers to sustain the laws of the land;" and, by virtue of the discretion thus given, proceeded to clear and guard the streets; it acted without any lawful authority, and the defendants Smith, Edmands, and Evans are legally responsible to the plaintiff for any act of force or violence committed upon him, in pursuance of their orders, or in which they or either of them participated.

If, however, it shall be made to appear that the act of clearing and guarding the streets was done in pursuance of a specific order from the mayor, either verbal or written, to effect that purpose, it would be a sufficient justification for all the acts of the defendants, which were reasonable and necessary for the performance of this specific duty; and the plaintiff cannot recover, unless he can show that the force used towards him was excessive and unreasonable. Such specific order may be shown by proof that it was arranged between the mayor and the major general, that the service of clearing and guarding the streets was to be performed by the military force on the happening of a certain specified contingency or event, and that intelligence of the occurrence of such contingency or event was communicated to the major general by the mayor, with an order to carry out and perform the specified duty previously designated and prescribed by him. . . .

Upon the evidence offered by the plaintiff at the trial, there are no sufficient grounds to authorize a jury to find a verdict against Freeman. The acts done by him had no other connection with those of the other defendants, by which the plaintiff alleges he was injured, than necessarily arose from the fact, that the performance of his official act as marshal of the United States was the cause or occasion which rendered it necessary, in the judgment of the mayor, to call out a military force to prevent a threatened disturbance of the peace. He did not ask for the aid of any portion of the militia in the service of the process in his hands; but, on the contrary, informed the mayor that no such aid was required. In advising that they should be called out to prevent a riot, he only asked for a legal exercise of the authority vested in the mayor. His statement that the expenses incurred by calling out the militia would probably be paid by the President, as they afterwards were, was only a voluntary offer to compensate the city for the lawful service of the military force. He is not shown to have advised or aided in the commission of any unauthorized or unlawful act by which the plaintiff was injured.

It follows, that the question whether the military force was legally and properly called out cannot be drawn into controversy in this case.

That was conclusively settled by the action of the mayor in issuing his precept according to the provisions of the statute, and therefore the only questions as to the remaining defendants, Smith, Edmands, and Evans, are, whether specific orders were given by the mayor for clearing and guarding the streets on the 2d of June, 1854, and if so, whether any of the defendants acted unreasonably, or exceeded the just limits of the authority vested in them by law.

Of course, the question whether the acts charged in the declaration were the result of the orders given for the suppression of a riot, or were the consequence of a sudden outbreak, in which either of the defendants acted upon his own responsibility, will be open, to be determined upon the familiar principles applicable to actions of trespass upon the person. The defendants cannot be held for the unlawful acts of others, done without their authority, and not coming within the fair scope of the orders given by them. The defendants Smith and Edmands will not be liable to the plaintiff for any force and violence used upon him, beyond that which was necessary to carry into effect the order for clearing and guarding the streets, even if such order was not legally given, according to the rules and principles above stated. Not having been present at the alleged assault, they cannot be held liable for any unauthorized violence of their soldiers. The same rule would apply to Evans, if he did not authorize or participate in the alleged violence offered to the plaintiff. *Case to stand for trial.*

A trial was had at February term, 1858, before MERRICK, J., and resulted in a verdict for the defendants.

OPINION OF THE JUSTICES

OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1812.

[8 *Mass.* 547.]

[THE Governor and Council of Massachusetts having submitted certain questions to the Justices of the Supreme Judicial Court of that State, received in reply the opinion which follows. The questions were]: "1. Whether the commanders-in-chief of the militia of the several States have a right to determine whether any of the exigencies contemplated by the Constitution of the United States exist, so as to require them to place the militia, or any part of it, in the service of the United States, at the request of the President, to be commanded by him, pursuant to Acts of Congress.

"2. Whether, when either of the exigencies exist authorizing the employing of the militia in the service of the United States, the militia thus employed can be lawfully commanded by any officers but of the militia, except by the President of the United States."

To his Excellency the Governor, and the Honorable Council of the Commonwealth of Massachusetts:

The undersigned, justices of the Supreme Judicial Court, have considered the several questions proposed by your Excellency and Honors for their opinion.

By the Constitution of this State, the authority of commanding the militia of the Commonwealth is vested exclusively in the Governor, who has all the powers incident to the office of commander-in-chief, and is to exercise them personally, or by subordinate officers under his command, agreeably to the rules and regulations of the Constitution and the laws of the land.

While the Governor of the Commonwealth remained in the exercise of these powers, the Federal Constitution was ratified, by which was vested in the Congress a power to provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasions; and to provide 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. The Federal Constitution further provides that the President shall be commander-in-chief of the Army of the United States, and of the militia of the several States when called into the actual service of the United States.

On the construction of the Federal and State Constitutions must depend the answers to the several questions proposed. As the militia of the several States may be employed in the service of the United States for the three specific purposes of executing the laws of the Union, of suppressing insurrections, and repelling invasions, the opinion of the judges is requested, whether the commanders-in-chief of the militia of the several States have a right to determine whether any of the exigencies aforesaid exist, so as to require them to place the militia, or any part of it, in the service of the United States, at the request of the President, to be commanded by him pursuant to Acts of Congress.

It is the opinion of the undersigned, that this right is vested in the commanders-in-chief of the militia of the several States.

The Federal Constitution provides, that when either of these exigencies exist, the militia may be employed, pursuant to some Act of Congress, in the service of the United States; but no power is given, either to the President, or to the Congress, to determine that either of the said exigencies does in fact exist. As this power is not delegated to the United States by the Federal Constitution, nor prohibited by it to the States, it is reserved to the States respectively; and from the nature of the power, it must be exercised by those, with whom the States have respectively entrusted the chief command of the militia.

It is the duty of these commanders to execute this important trust agreeably to the laws of their several States respectively, without reference to the laws or officers of the United States, in all cases, except those specially provided for in the Federal Constitution. They must, therefore, determine when either of the special cases exist, obli-

ging them to relinquish the execution of this trust, and to render themselves and the militia subject to the command of the President.

A different construction, giving to Congress the right to determine when those special cases exist, authorizing them to call forth the whole of the militia, and taking them from the commanders-in-chief of the several States, and subjecting them to the command of the President, would place all the militia in effect at the will of Congress, and produce a military consolidation of the States, without any constitutional remedy, against the intentions of the people, when ratifying the Federal Constitution. Indeed, since the passing of the Act of Congress of February 28, 1795, vesting in the President the power of calling forth the militia, when the exigencies mentioned in the Constitution shall exist, if the President has the power of determining when those exigencies exist, the militia of the several States is in fact at his command, and subject to his control.

No inconveniences can reasonably be presumed to result from the construction, which vests in the commanders-in-chief of the militia in the several States the right of determining when the exigencies exist, obliging them to place the militia in the service of the United States. These exigencies are of such a nature, that the existence of them can be easily ascertained by, or made known to the commanders-in-chief of the militia; and when ascertained, the public interest will induce a prompt obedience to the Acts of Congress.

Another question proposed to the consideration of the justices, is, whether, when either of the exigencies exist, authorizing the employing of the militia in the service of the United States, the militia thus employed can be lawfully commanded by any officer but of the militia, except by the President of the United States.

The Federal Constitution declares, that the President shall be the commander-in-chief of the Army of the United States. He may undoubtedly exercise this command by officers of the Army of the United States, by him commissioned according to law. The President is also declared to be the commander-in-chief of the militia of the several States, when called into the actual service of the United States. The officers of the militia are to be appointed by the States; and the President may exercise his command of the militia by the officers of the militia duly appointed. But we know of no constitutional provision, authorizing any officer of the Army of the United States to command the militia, or authorizing any officer of the militia to command the Army of the United States. The Congress may provide laws for the government of the militia, when in actual service; but to extend this power to the placing of them under the command of an officer, not of the militia, except the President, would render nugatory the provision, that the militia are to have officers appointed by the States.

The union of the militia in the actual service of the United States, with the troops of the United States, so as to form one army, seems to be a case not provided for or contemplated in the Constitution. It is

therefore not within our department to determine on whom the command would devolve on such an emergency, in the absence of the President. Whether one officer, either of the militia, or of the Army of the United States, to be settled according to military rank, should command the whole; whether the corps must be commanded by their respective officers, acting in concert as allied forces; or what other expedient should be adopted, are questions to be answered by others.

The undersigned regret, that the distance of the other justices [Justices Sedgwick and Thatcher] of the Supreme Judicial Court renders it impracticable to obtain their opinions seasonably upon the questions submitted.

(Signed) Theop. Parsons.
Samuel Sewall.
Isaac Parker.

MARTIN *v.* MOTT.

Supreme Court of the United States. 1827.

[12 *Wheat.* 19.][1]

The Attorney-General and *Coxe*, for the plaintiff in error; *D. T. Ogden*, for the defendant in error.

Story, J. 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, ch. 20. 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 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, ch. 101. 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

[1] The statement of facts is omitted. — Ed.

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 the 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.

But it is now contended, as it was contended in that case, that notwithstanding the judgment of the President is conclusive as to the existence of the exigency, and may be given in evidence as conclusive proof thereof, yet that the avowry is fatally defective, because it omits to aver that the fact did exist. The argument is that the power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute, and therefore it is necessary to aver the facts which bring the exercise within the purview of the statute. In short, the same principles are sought to be applied to the delegation and exercise of this power intrusted to the Executive of the nation for great political purposes, as might be applied to the humblest officer in the government, acting upon the most narrow and special authority. It is the opinion of the court that this objection cannot be maintained. When the President exercises an authority confided to him by law, the presumption is that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and, *a fortiori*, this presumption ought to be favorably applied to the chief magistrate of the Union. It is not necessary to aver that the act which he may rightfully do was so done. If the fact of the existence of the exigency were averred, it would be traversable, and of course might be passed upon by a jury; and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury. This view of the objection is precisely the same which was acted upon by the Supreme Court of New York, in the case already referred to, and, in the opinion of this court, with entire legal correctness. . . .

Upon the whole, it is the opinion of the court that the judgment of the Court for the Trial of Impeachments and the Correction of Errors ought to be reversed, and that the cause be remanded to the same court, with directions to cause a judgment to be entered upon the pleadings in favor of the avowant.

OPINION OF THE JUSTICES

Of the Supreme Judicial Court of Massachusetts. 1859.

[14 *Gray*, 614.][1]

On the 13th of December, 1859, it was ordered by the Governor and Council that the opinion of the justices of the Supreme Judicial Court be required upon the following questions: —

"Whether the Legislature of this Commonwealth can constitutionally provide for the enrolment in the militia of any person, other than those enumerated in the Act of Congress approved May 8th, 1792, entitled 'an Act more effectually to provide for the national defence by establishing an uniform militia throughout the United States'?

"Whether the aforesaid Act of Congress, as to all matters therein provided for, and except as amended by subsequent Acts, has such force in this Commonwealth, independently of, or notwithstanding any State legislation, that all officers under the State government, civil and military, are bound by its provisions?"

The undersigned, justices of the Supreme Judicial Court, having considered the above stated interrogatories, propounded to them by the Governor and Council, do hereby, in answer thereto, respectfully submit the following opinion: —

We are first, as preliminary to any direct answer to the inquiries, to consider what the militia was, as understood in the Constitution and laws, both of this Commonwealth and of the United States. It was an institution, not only theoretically known, but practically adopted and carried into effect, in all the colonies and provinces before the Revolution, and even before the formation of a Congress for any purpose. The utility and capabilities of this institution for military purposes had been put to a severe test by the events of the Revolution, and were well understood before either of these Constitutions was adopted.

Prior to the Revolution, the establishment and control of this institution was within the jurisdiction of the respective Colonial and Provincial governments, because these were the only local governments acting directly upon the rights and interests of the inhabitants within their respective territorial limits. It was constituted by designating,

[1] Compare *Houston* v. *Moore*, 5 Wheat. 1 (1820). — Ed.

setting apart, and putting in military array, under suitable military officers, all the able-bodied male inhabitants of the province, with certain specified exceptions, and was held in readiness upon certain exigencies, and in the manner provided by law, to act under military orders as a military armed force. It was the constituting of a citizen soldiery, in contradistinction to a regular or standing army. Such having been the jurisdiction of the several Provincial governments, it naturally devolved upon the respective State governments after the Declaration of Independence, and during the earlier years of the revolutionary war. During that period, all were acting under the articles of confederation, which was rather a league between the States for mutual defence, than a government acting directly upon the people of those States.

The Constitution of Massachusetts was adopted and went into operation in 1780. It recognized the militia as an essential department of the constitution of its government, and provided for the enrolment of the men, the appointment of the officers, their duties and powers, with all the details to give efficiency to this cherished arm of defence, and declaring its proper subordination to the civil power. It also, in the Declaration of Rights, distinctly declared the right of the people to bear arms. But this Constitution, recognizing the existence of the articles of confederation between the States, and the powers thereby vested in the Congress of the United States, and possibly anticipating important changes therein, reserved from the State government all powers then vested, or which might afterwards be constitutionally vested, in Congress.

Several years afterwards, in 1789, the Constitution of the United States, having been adopted by the required number of States, including Massachusetts, went into operation, and became the law of the land. This system was founded upon an entirely different principle from that of the confederation. Instead of a league among sovereign States, it was a government formed by the people, and to the extent of the enumerated subjects, the jurisdiction of which was confided to and vested in the general government, acting directly upon the people. "We the people," are the authors and constituents; and "in order to form a more perfect union" was the declared purpose of the constitution of a general government.

It was a bold, wise, and successful attempt to place the people under two distinct governments, each sovereign and independent within its own sphere of action, and dividing the jurisdiction between them, not by territorial limits, and not by the relation of superior and subordinate, but classifying the subjects of government and designating those over which each has entire and independent jurisdiction. This object the Constitution of the United States proposed to accomplish by a specific enumeration of those subjects of general concern in which all have a general interest, and to the defence and protection of which the undivided force of all the States could be brought promptly and directly to bear.

Some of these were our relations with foreign powers, — war and peace, treaties, foreign commerce and commerce amongst the several States, with others specifically enumerated; leaving to the several States their full jurisdiction over rights of person and property, and, in fact, over all other subjects of legislation, not thus vested in the general government. All powers of government, therefore, legislative, executive, and judicial, necessary to the full and entire administration of government over these enumerated subjects, and all powers necessarily incident thereto, are vested in the general government; and all other powers, expressly as well as by implication, are reserved to the States.

This brief and comprehensive view of the nature and character of the government of the United States, we think, is not inappropriate to this discussion, because it follows as a necessary consequence that, so far as the government of the United States has jurisdiction over any subject, and acts thereon within the scope of its authority, it must necessarily be paramount, and must render nugatory all legislation by any State, which is repugnant to and inconsistent with it. There may, perhaps, in some few cases, be a concurrent jurisdiction, as in case of direct taxation of the same person and property; but until it shall practically extend to a case where there may be an actual interference, by seizing the same property at the same time, the exercise of the powers by the one is not, in its necessary effect, exclusive of the exercise of a like power by the other; but in such case they are not repugnant. That one must be so paramount, to prevent constant collision, is obvious; and, accordingly, the Constitution expressly provides that the Constitution and all laws and treaties, made in pursuance of its authority, shall be the supreme law of the land.

Assuming that such was the manifest object of the people of the United States, and of the several States respectively, in establishing the two distinct governments in each State, we proceed to the more direct consideration of the questions propounded.

The establishment of a militia was manifestly intended to be effected by arranging the able-bodied men in each and all the States in military array, arming and placing them under suitable officers, but without forming them into a regular standing army, to be ready as the exigency should require, to defend and protect the rights of all, whether placed under the administration of the local or general government, to be called out by either in the manner and for the purposes determined by the Constitution and laws of either. It was one and the same militia, for both purposes, under one uniform organization and discipline, and to be commanded by the same officers. Were it otherwise, were the general and the State governments to have their own militia, the results would have been that there would be, within the bosom of each State, a large embodied military force, not by its organization amenable to the laws or subject to the orders of the State government; and also a similar force, on which the general government would have

no right to call for aid, to repel invasion, suppress insurrection, or execute the laws; a state of things, not only rendering each to a great extent inefficient and powerless, but also entirely destructive of that harmony and union which were intended to characterize the combined action of both governments. We find, therefore, that the functions of both are called into activity in constituting this military force and carrying it into practical operation.

The Constitution of the United States having charged the general government with the administration of the foreign relations of the whole Union, and the military defence of the whole, provides (art. 1, § 8), "The Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasion; 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."

"Organizing" obviously includes the power of determining who shall compose the body known as the militia. The general principle is, that a militia shall consist of the able-bodied male citizens. But this description is too vague and indefinite to be laid down as a practical rule; it requires a provision of positive law to ascertain the exact age, which shall be deemed neither too young nor too old to come within the description. One body of legislators might think the suitable ages would be from 18 to 45, others from 16 to 30 or 40, others from 20 to 50. Here the power is given to the general government to fix the age precisely, and thereby to put an end to doubt and uncertainty; and the power to determine who shall compose the militia, when executed, equally determines who shall not be embraced in it, because all not selected are necessarily excluded.

The question upon the construction of this provision of the Constitution is, whether this power to determine who shall compose the militia is exclusive. And we are of opinion that it is. A power, when vested in the general government, is not only exclusive when it is so declared in terms, or when the State is prohibited from the exercise of the like power, but also when the exercise of the same power by the State is superseded and necessarily impracticable and impossible after its exercise by the general government. For instance, when the general government have exercised their power to establish a uniform system of bankruptcy, that is, laws for sequestering and administering the estate of a living insolvent debtor; when one set of commissioners and assignees of such estate have taken possession of property with power to sell and dispose of it, and distribute the proceeds; another set of officers, under another law, cannot take and dispose of the same property. The one power is necessarily repugnant to the other; if one is paramount, the other is void. We think the present case is similar. The general government having authority to determine who shall and

who may not compose the militia, and having so determined, the State government has no legal authority to prescribe a different enrolment.

This power was early carried into execution by the Act of Congress of May, 1792, being an "Act more effectually to provide for the national defence by establishing an uniform militia throughout the United States." This Act specially directs who shall be, and by necessary implication, who may not be enrolled in the militia. This is strengthened by a provision that each State may by law exempt persons embraced in the class for enrolment, according as the peculiar form and particular organization of its separate government may require; but there is no such provision for adding to the class to be enrolled.

We are therefore of opinion that the legislature of this Commonwealth cannot constitutionally provide for the enrolment in the militia of any persons other than those enumerated in the Act of Congress of May, 1792, hereinbefore cited.

We do not intend, by the foregoing opinion, to exclude the existence of a power in the State to provide by law for arming and equipping other bodies of men, for special service of keeping guard, and making defence, under special exigencies, or otherwise, in any case not coming within the prohibition of that clause in the Constitution, art. 1, § 10, which withholds from the State the power to "keep troops;" but such bodies, however armed or organized, could not be deemed any part of "the militia," as contemplated and understood in the Constitution and laws of Massachusetts and of the United States, and, as we understand, in the question propounded for our consideration.

Nor is this question, in our opinion, affected by the second article of the amendments of the Constitution, of the following tenor: "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."

This, like similar provisions in our own Declaration of Rights, declares a great general right, leaving it for other more specific constitutional provision or to legislation to provide for the preservation and practical security of such right, and for influencing and governing the judgment and conscience of all legislators and magistrates, who are thus required to recognize and respect such rights.

In answer to the second question proposed, we are of opinion that the Act of Congress above cited, as to all matters therein provided for, except so far as it may have been changed by subsequent Acts, has such force in this Commonwealth, independently of, and notwithstanding any State legislation, that all officers under the State government, civil and military, are bound by its provisions.

LEMUEL SHAW,
THERON METCALF,
GEORGE T. BIGELOW,
PLINY MERRICK,
EBENEZER R. HOAR.

BOSTON, December 23, 1859.

TARBLE'S CASE.

SUPREME COURT OF THE UNITED STATES. 1871.

[13 *Wall.* 397.]

ERROR to the Supreme Court of Wisconsin.

This was a proceeding on *habeas corpus* for the discharge of one Edward Tarble, held in the custody of a recruiting officer of the United States as an enlisted soldier, on the alleged ground that he was a minor, under the age of eighteen years at the time of his enlistment, and that he enlisted without the consent of his father.

The writ was issued on the 10th of August, 1869, by a court commissioner of Dane County, Wisconsin, an officer authorized by the laws of that State to issue the writ of *habeas corpus* upon the petition of parties imprisoned or restrained of their liberty, or of persons on their behalf. It was issued in this case upon the petition of the father of Tarble, in which he alleged that his son, who had enlisted under the name of Frank Brown, was confined and restrained of his liberty by Lieutenant Stone, of the United States army, in the city of Madison, in that State and county; that the cause of his confinement and restraint was that he had, on the 20th of the preceding July, enlisted, and been mustered into the military service of the United States; that he was under the age of eighteen years at the time of such enlistment; that the same was made without the knowledge, consent, or approval of the petitioner; and was, therefore, as the petitioner was advised and believed, illegal; and that the petitioner was lawfully entitled to the custody, care, and services of his son. . . .

The commissioner, after argument, held that the prisoner was illegally imprisoned and detained by Lieutenant Stone, and commanded that officer forthwith to discharge him from custody.

Afterwards, in September of the same year, that officer applied to the Supreme Court of the State for a *certiorari*, setting forth in his application the proceedings before the commissioner and his ruling thereon. The *certiorari* was allowed, and in obedience to it the proceedings had before the commissioner were returned to the Supreme Court. These proceedings consisted of the petition for the writ, the return of the officer, the reply of the petitioner, and the testimony, documentary and parol, produced before the commissioner.

Upon these proceedings the case was duly argued before the Supreme Court, and in April, 1870, that tribunal pronounced its judgment, affirming the order of the commissioner discharging the prisoner. This judgment was now before this court for examination on writ of error prosecuted by the United States. . . .

Mr. B. H. Bristow, Solicitor-General, for the United States.

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

The important question is presented by this case, 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. . . .

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 govern-

ments. 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 gov-

ernment 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 mean time, 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.*

The Chief Justice, dissenting. I cannot concur in the opinion just read. I have no doubt of the right of a State court to inquire into the jurisdiction of a Federal court upon *habeas corpus*, and to discharge when satisfied that the petitioner for the writ is restrained of liberty by the sentence of a court without jurisdiction. If it errs in deciding the question of jurisdiction, the error must be corrected in the mode prescribed by the 25th section of the Judiciary Act; not by denial of the right to make inquiry.

I have still less doubt, if possible, that a writ of *habeas corpus* may issue from a State court to inquire into the validity of imprisonment or

detention, without the sentence of any court whatever, by an officer of the United States. The State court may err; and if it does, the error may be corrected here. The mode has been prescribed and should be followed.

To deny the right of State courts to issue the writ, or, what amounts to the same thing, to concede the right to issue and to deny the right to adjudicate, is to deny the right to protect the citizen by *habeas corpus* against arbitrary imprisonment in a large class of cases; and, I am thoroughly persuaded, was never within the contemplation of the Convention which framed, or the people who adopted, the Constitution. That instrument expressly declares that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it."

TYLER *v.* POMEROY ET AL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1864.

[8 *Allen*, 480.]

TORT against the selectmen of Washington and two other persons, to recover damages for an assault and battery upon, and an unlawful arrest and imprisonment of, the plaintiff. The defence was that the plaintiff enlisted as a volunteer in the military service of the United States, as one of the quota of the town of Washington; that the selectmen duly received him as such; that they used no coercion upon the plaintiff; and that if an arrest of the plaintiff by either of the defendants should be proved, it was made under the authority of the selectmen, as special recruiting officers. . . .

The judge instructed the jury that, upon the evidence, the defendants had no lawful authority to use force upon the plaintiff, in order to take him to camp. . . .

The jury returned a verdict for the plaintiff, with $150.87 damages; and the defendants alleged exceptions.

J. M. Barker (*J. D. Colt & C. N. Emerson* with him), for the defendants.

H. L. Dawes (*M. Wilcox* with him), for the plaintiff.

GRAY, J. Questions of the lawfulness of acts done under color of military authority, in time of war, are among the most delicate and important that can come before a court of justice, whose duty it is equally to maintain the rightful powers of the government and to guard the subject against unlawful violence. But when the decision becomes necessary to the determination of the rights of the parties in a judicial proceeding, they must be treated in the same manner as any other question of law. . . .

Was the plaintiff, then, at the time of the acts of which he complains, a soldier? The words "enlist" and "enlistment," in the law, as in common usage, may signify either the complete fact of entering into the military service, or the first step taken by the recruit towards that end. If this ambiguity is not borne in mind, the consideration of this matter may degenerate into a dispute about words. The question before us is no ordinary one of the force, construction, or validity of a contract — whether the plaintiff has made an agreement and broken it, and is liable in damages for the breach; but of a change of *status* — whether by signing a particular paper, or by any other act, the plaintiff has changed his condition, given up some of the rights of a private citizen, and become amenable to military discipline. It becomes necessary, therefore, to ascertain the boundary between the civil and military states, and to inquire what acts, by the principles of the common law or the American constitutions, or by express provision of statute, are required to change a citizen into a soldier. By tracing the history of the mode of enlisting soldiers under the law of England, out of which our law grew, we shall be enabled more satisfactorily to answer this question.

In the reigns of Edward I. and Edward II., soldiers for foreign wars were obtained for the most part, either by calling out the king's feudal tenants by knight service, or by compulsory levies under a claim of prerogative. But the feudal service could not be required for more than forty days out of the realm, and was thus useless for prolonged wars upon the Continent; and compulsory levies without consent of Parliament were forbidden, as contrary to the common law, by the Sts. of 1 Edw. III., St. 2, c. 5, and 25 Edw. III., St. 5, c. 8. Edward III., therefore, during his wars with France, raised most of his armies under a system which had been introduced in some degree in the reign of Edward I., and continued in use until that of Henry VIII., by which nobles, knights, or military leaders covenanted with the king to serve him in war for such a time with so many men, whose wages they received from the king, and who covenanted in turn with their leaders and received their wages from them, and were mustered before the king's commissioners, and their names recorded. 1 Rot. Parl. 163 *b*, 164 *a*. 2 Ib. 62 *b*, 63 *a*, 108 *b*, 329 *a*. Cotton Ab. Rec. 10, 11, 24, 35, 439, 440. St. 5 Rich. II., St. 1, c. 10. 3 Selden's Works, 1957. Co. Litt. 68 *b*–71 *a*, and Hargrave's notes. 2 Inst. 528, 529. 3 Inst. 86. 1 Hale, P. C. 672, 673, 677. 1 Hallam's Middle Ages, c. 2, part 2 (10th ed.), 260–265. 2 Hallam's Const. Hist. Eng. c. 9 (7th ed.) 129–133.

By the law of England during the same period, upon certificate of a captain that any of his soldiers, after receiving wages of the king through him for foreign military service, would not go, writs issued out of chancery to the sheriffs or to sergeants at arms to arrest such soldiers and bring them into the chancery or before the king in council. See in the Register the writ *De arrestando ipsum qui pecuniam recepit ad pro-*

ficiscendum in obsequium regis et non est profectus, and the writ *Ad capiendum conductos ad proficiscendum in obsequium, qui captis vadiis ad dictum obsequium venire non curaverint.* Reg. Brev. 24, 191. "And this," says Lord Coke, in his commentary on Magna Charta, "is *lex terræ*, by process of law, *pro defensione regis et regni.*" 2 Inst. 53. Both of these writs were founded upon the soldier's having once actually submitted himself to his military leader, and alleged that he had received from his leader the king's money. The statement, therefore, of Lord Coke, in his Fourth Institute, that the writ *Ad capiendum conductos ad proficiscendum* lies by the common law "if any soldier have covenanted to serve the king in his war, and appear not at the time and place appointed," which at first sight might seem to imply that receipt of wages was unnecessary to fix the military character, must on the contrary be deemed to assume the payment of money as essential to bind the contract. 4 Inst. 128, 129.

The practice of enlisting soldiers in this manner was recognized, and the departure from their captains, without license from them, of soldiers who had thus received part of their wages, "and so have mustered and been entered of record the king's soldiers before his commissioners, for such terms for which their masters have indented," declared felony, by St. 18 Hen. VI. c. 19. The St. of 7 Hen. VII. c. 1, extended this to "any soldier, being no captain immediately retained with the king, which hereafter shall be in wages and retained, or take any prest, to serve the king upon the sea, or upon the land beyond the sea," to which the St. of 3 Hen. VIII. c. 5, § 2, by inserting "or" between "land" and "beyond," added within the realm; and also substituted "license of the king's lieutenant there" for that of the captain of the soldiers. *Resolves concerning Soldiers*, Hutton, 135. The St. of 18 Hen. VI. was declared by St. 5 Eliz. c. 5, § 18 (or § 27), to extend to all mariners and gunners "having taken prest or wages" to serve the Crown upon the sea. All these statutes required actual receipt of money by the soldiers, as well as departure from their captains, to constitute desertion. But the St. of 2 & 3 Edw. VI. c. 2 (repealed by St. 1 Mary, c. 1, and revived by St. 4 & 5 P. & M. c. 3), punished desertion by any soldier "serving the king in his wars."

In the reign of Elizabeth, after the mode of raising soldiers through indenture with their captains had fallen into disuse, all the judges of England held that the St. of Edw. VI. applied only to soldiers who had served in actual war; but that soldiers who had been pressed (*prest*, in the original Law French) and taken wages to serve against the Irish rebels, and were on the way towards Ireland, and before they actually served in the war, departed from their captains without license, were guilty of felony under the Sts. of Hen. VII. and Hen. VIII.; and according to this opinion many soldiers were condemned and executed. *Case of Soldiers*, 2 Anderson, 151; s. c. 6 Co. 27 *a*.

It appears from these reports that the soldiers in question had been impressed to serve. Lord Hale was of opinion that *prest*, as applied in

these statutes to the money received, did not necessarily imply that the service was compulsory; but that "in truth it was imprest money, *præstitium*, or the earnest of the contract between the king by the captain and soldiers." 1 Hale P. C. 675, 677. And he was clear that, in order to make a felony under the Sts. of Hen. VII., Hen. VIII., and Eliz., it must be alleged and proved, "1. That either they received wages, or took *prest* to serve the king upon sea or land; 2. That he that thus *imprested* them was commissioned by the king so to imprest them." Ib. 679. In those times, much weight was given to the payment of part of the consideration money of any agreement by way of earnest to bind the bargain, a vestige of which is still found in the provision of the statute of frauds concerning the sale of goods of considerable value without a written memorandum, which has come down to us from the English statute passed in the reign of Charles II., in the framing of which Lord Hale is said to have taken part.

The decision of the judges in the reign of Elizabeth upon the statutes of soldiers is further explained by an opinion given by their successors to Charles I. upon the question whether soldiers were guilty of felony under the Sts. of Hen. VII. and Hen. VIII., who had taken pay, and (as stated in the report by one of the judges) been enrolled, or (as another has it) made an agreement with the deputy-lieutenant that a certain conductor should lead them to the place of rendezvous, and were accordingly delivered to the conductor to be brought to the sea side, and then withdrew themselves and ran away without license. A majority of the judges (Hutton, Croke, and Yelverton, dissenting) were of opinion that such a conductor, although holding no military rank, was a captain within these statutes. It may well be doubted whether this was not too harsh a construction; and the opinion of the judges of that reign in favor of the Crown against the subject is not of the highest authority, especially with such a weighty dissent. But the deputy-lieutenant here mentioned was "the king's lieutenant" mentioned in the St. of Hen. VIII. above cited, perhaps the lord lieutenant of the county, in either aspect a purely military officer. 2 Hallam's Const. Hist. Eng. c. 9 (7th ed.), 134. And even those twelve judges "unanimously agreed, that if one takes press money, and when he should be delivered over he withdraw himself, this is not felony, although he is hired and retained to serve." *Resolves concerning Soldiers*, Hutton, 134; s. c. Cro. Car. 71. This opinion puts it beyond doubt that soldiers must have both received money and come under actual command of a leader, to warrant their punishment as deserters under those statutes. And Judge Jenkins says, "It seems that these statutes are only a declaration of the common law." Jenk. 271.

As lately as the reign of Charles II., the greatest lawyers in England overlooked the distinction between martial and military law — between the military rule, not limited to the army, which prevails in time of war, when the civil laws have lost their force, and the military discipline, necessary to the government of an army at all times; and punishment

by military authority in time of peace, even of the king's soldiers, was hardly allowed. 1 Hale's Hist. Com. Law (5th ed.), 54, 56. *Ekins* v. *Newman*, T. Jones, 147. James II. indeed established articles of war for the government of his troops. 14 Law Mag. 4. But he was obliged to resort to the courts of law and the statutes already cited for the punishment of deserters; and this at a time when he could and did arbitrarily remove half of the judges of the King's Bench for refusing to order a deserter thus convicted in one county to be illegally executed in another. *The King* v. *Beal*, 3 Mod. 124; s. c. *nom. The King* v. *Dale*, 2 Show. 511; s. c. 12 Howell's State Trials, 262, *note*.

After the accession of William and Mary, a standing army being found necessary, Parliament retained the control of it by establishing it for only a year at a time; and these annual acts first made mutiny and desertion punishable at the sentence of a court-martial in time of peace, and are therefore known as the Mutiny Acts. The earliest of these was limited to persons "being in their majesties' service in the army, and being mustered and in pay as an officer or soldier." St. 1 W. & M. c. 5, § 2. This clause was re-enacted in the same form, thus requiring both mustering and pay to constitute the military character, until early in the following reign, when either was made sufficient, and the Act extended to "every person being in her Majesty's service in the army, or mustered or in pay as an officer, or listed or in pay as a soldier." Sts. 6 Anne, c. 18 (often cited as 5 & 6 Anne, c. 16), § 2; 7 Anne, c. 4. But within five years after the passage of the first Mutiny Act, a section was inserted providing that no person should be "esteemed a listed soldier, or be subject to any of the pains or penalties of this Act, or any other penalty for his behavior as a soldier," unless he should before a civil magistrate "declare his free consent to be listed or mustered as a soldier, before he should be listed or mustered or inserted on any muster roll of a regiment, troop, or company." St. 5 & 6 W. & M. c. 15, § 2. And the law of England has since by similar provisions required either enlistment by a military officer, with full opportunity to reconsider and retract, in the case of a soldier, or actually being mustered or commissioned in the case of an officer, to subject either to military discipline; allowing, however, the alternative of being in pay to avoid the necessity of discussing the nature of the engagement or mode of contracting it. See *Methuen* v. *Martin*, Sayer, 107; *Grant* v. *Gould*, 2 H. Bl. 103, 104; 1 McArthur on Courts Martial, 195, 196; *Bradley* v. *Arthur*, 4 B. & C. 308; *Wolton* v. *Gavin*, 16 Q. B. 48; Thomson's Military Forces of Great Britain, 92, & *seq.* That the original enlistment of a recruit, or payment of money to him, must be made by some person having the necessary military authority, in order to justify forcibly restraining him, is shown by the case in which a drummer, who had no lawful power to enlist recruits, upon being urged by a man to enlist him, gave him a shilling for that purpose; the man afterwards attempted to escape, and was opposed by the drummer and a private soldier with him, and the latter stabbed one who was assisting the

escape; and the twelve judges held that he was liable to indictment for wilful stabbing. *Rex* v. *Longden*, Russ. & Ry. 228.

The articles of war, reported by a committee of which Adams and Jefferson were members, and established by the Congress of the Confederation in 1776, within three months after the Declaration of American Independence, substantially adopted the provisions of the English Mutiny Acts; and required every recruit to be enlisted by a military officer and taken before a civil magistrate and there have the articles of war read to him and take the oath of allegiance and service; yet allowed the receipt of pay from the government to be conclusive evidence of enlistment; and declared that "all officers and soldiers who, having received pay, or having been duly enlisted in the service of the United States, shall be convicted of having deserted the same, shall suffer death or such other punishment as by sentence of a court-martial shall be inflicted;" and that these articles "are to be read every two months at the head of every regiment, troop, or company, mustered or to be mustered in the service of the United States; and are to be duly observed and exactly obeyed by all officers and soldiers who are or shall be in the said service." Articles of War of September 20, 1776, § 3, art. 1; § 6, art. 1; § 18, art. 1; 2 Journals of Congress, 367, 369, 380. 3 John Adams's Works, 83, 84.

After all powers of war and peace had been granted by the Constitution to the national government, the Congress of the United States established similar articles. U. S. St. 1806, c. 20, arts. 10, 20, 101, 2 U. S. Sts. at Large, 361, 362, 371. The oath was permitted, by the St. of 1806, to be taken before the judge advocate, and by the St. of 1861, c. 42, § 11, before any commissioned officer of the army. 12 U. S. Sts. at Large, 289. Taking the recruit before the civil magistrate is thus dispensed with, but his engagement with a military officer is essential.

It was argued that the tenth article of war, which provides that "every non-commissioned officer or soldier who shall enlist himself in the service of the United States," shall have the articles of war read and the oath administered to him, shows that the oath can be administered to none but soldiers, and therefore the recruit must be a soldier before the oath could be administered to him. But it might equally well be contended that the use of the words "every soldier who shall enlist himself," instead of "shall have enlisted himself," shows that he must be a soldier before he enlists. The description of the recruit as a "non-commissioned officer or soldier" in this article is not intended to denote what he is already, but what he will be when his enlistment is complete.

A statute was passed near the close of the last war with England, authorizing recruiting officers of the army to enlist any one between the ages of eighteen and fifty years, "which enlistment shall be absolute and binding upon all persons under the age of twenty-one years as well as upon persons of full age, such recruiting officers having complied

with all the regulations of the law regulating the recruiting service." U. S. St. 1814, sess. 3, c. 10, 3 U. S. Sts. at Large, 146. That statute did not undertake to fix what should constitute an enlistment, but referred for that to the previous laws. The object of the provision just quoted was simply to enable minors to be held like persons of full age; and the statute has always been considered as having been repealed by the Act passed at the same session, fixing the military peace establishment of the United States. U. S. St. 1815, c. 79, Ib. 225. *Ex parte Kimball*, 9 Law Reporter, 502, 503.

In addition to the power to raise, support, and regulate armies, Congress is vested by the Constitution with authority to provide for organizing, arming, and disciplining the militia, for calling them into the service of the United States to execute the laws of the Union, to suppress insurrections and repel invasions, and for governing them when employed in the national service. Under this power to organize, Congress has the exclusive power of determining who shall constitute the militia; and all persons coming within the class defined by Congress are members of the militia, without any act of their own. *Opinion of Justices*, 14 Gray, 614. *Commonwealth* v. *Cushing*, 11 Mass. 71. *Whitmore* v. *Sanborn*, 8 Greenl. 310, U. S. St. 1862, c. 201, 12 U. S. Sts. at Large, 597. Signing an enlistment list is not required to make them militia, and does no more than ascertain the particular company in which they shall serve, and perhaps estop the signers to claim exemption afterwards. Decisions or statutes, like those cited by the defendants, that such a signing is evidence of enlistment in a volunteer militia company, have therefore no bearing upon the question of what constitutes a soldier of the United States. *Bullen* v. *Baker*, 8 Greenl. 391. Gen. Sts. c. 13, § 18.

A nearer analogy may be found in the entry of the militia into the service of the Union, when called out by Congress. This is well settled by the decisions of the Supreme Court of the United States to be upon their arrival at the place of rendezvous, and not before. *Houston* v. *Moore*, 5 Wheat. 20, 36, 53, 61. *Martin* v. *Mott*, 12 Wheat. 15. Some of the reasons given by the justices apply with great force to the case before us. "The arrival of the militia at the place of rendezvous," said Mr. Justice Washington, "is the *terminus a quo* the service, the pay, and subjection to the articles of war are to commence and continue. If the service, in particular, is to continue for a certain length of time from a certain day, it would seem to follow, almost conclusively, that the service commenced on that, and not on some prior day." 5 Wheat. 20. Mr. Justice Story added, "It would seem almost absurd to say that those men, who have performed no actual service, are yet to receive pay; that they are 'employed,' when they refuse to be employed in the public service; that they are 'acting' in conjunction with the regular forces or otherwise, when they are not embodied to act at all; or that they are subject to the articles of war as troops organized and employed in the public service, when they have utterly disclaimed all military organiza-

tion and obedience. There are the strongest reasons to believe that by employment 'in the service,' or, as it is sometimes expressed, 'in the actual service' of the United States, something more must be done than a mere calling forth of the militia; that it includes some act of organization, mustering, or marching, done or recognized." Ib. 63.

Attorney-General Legaré, in an opinion to the Secretary of War in 1841, on the payment of the Florida militia, expressed like views, saying, "It is only when called out into actual service that the militia are subjected to the exclusive control of the Federal authorities. Until detachments from it have been actually mustered, to be subjected in a solemn and authentic form to the articles of war, as in the parallel case of voluntary enlistment, the body of the people, armed and disciplined in self-defence (for that is the definition of the militia), stand in all respects upon the same footing as in any other of their great political relations. Nor will anything short of this formal dedication, so to express it, of portions of it to military responsibilities, and actual embodying of them into masses, under the rules and regulations of war, constitute them a part of the Federal army." 3 Opinions of Attorneys-General, 691.

The standing army of the United States has always been inconsiderable in number, and the policy of the government has not favored sudden increase and decrease of the regular forces. The power of calling out the militia has been exercised for short periods, both in order to avoid unnecessarily disturbing the usual occupations of the citizens, and because the militia were unfitted for long service. Congress, therefore, whenever there has been need of an unusually large military force, has resorted to an intermediate method of obtaining soldiers, by authorizing the President to accept the services of volunteers, either for a particular war, or for a period estimated by the probable duration of hostilities. The government thus appeals directly to the patriotism of the people, relying upon the fundamental principle of society, the mutual obligation of protection and support, which is expressed in the simplest words and the closest connection in our own Declaration of Rights. "Each individual of the society has a right to be protected by it in the enjoyment of life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary." Declaration of Rights, art. 10.

In providing for calling out volunteers, Congress has usually lodged the appointment of officers of the regiments and companies, where the Constitution left the appointment of militia officers, with the States. One exception to this course is to be found during the last war with England, when Congress at first authorized the President to accept of "companies of volunteers, either of artillery, cavalry, or infantry, who may associate themselves for the service," who should be armed and equipped at the expense of the United States "after they shall be called into the service," and their officers appointed according to State

laws; and who should be bound to continue in the service for the term of twelve months after they should "arrive at the place of rendezvous, unless sooner discharged; and, when called into the service and while remaining there," should be under the same rules and regulations and be entitled to the same pay as the regular troops of the United States. U. S. St. 1812, c. 21, 2 U. S. Sts. at Large, 676. Six months afterwards Congress by a supplemental Act provided that the President might appoint and commission the officers, "provided that prior to the issuing of such commissions the volunteers aforesaid shall have signed an enrolment binding themselves to service, conformably to the provisions of the Act to which this is a supplement." U. S. St. 1812, c. 138, Ib. 785. But there is nothing in that Act to show that those volunteers, before they had assembled at the place of rendezvous, or the officers appointed by the President had assumed command of them, were to be treated as soldiers subject to military discipline.

During the war with Mexico the President was authorized to accept the services of volunteers, "to serve twelve months after they shall have arrived at the place of rendezvous, or to the end of the war, unless sooner discharged, according to the time for which they shall have been mustered into the service," who, "when mustered into the service, shall be armed at the expense of the United States," and, "when called into actual service, and while remaining therein, be subject to the rules and articles of war," and be accepted by the President in companies, battalions, squadrons, or regiments, with officers appointed according to the laws of the States. The same Act provided that "whenever the militia or volunteers are called and received into the service of the United States, under the provisions of this Act, they shall have the same pay and allowances." U. S. St. 1846, c. 16, 9 U. S. Sts. at Large, 9, 10. And Congress afterwards made provision for refunding to "States, counties, corporations, or individuals, either acting with or without the authority of any State," the amount of any necessary or proper expenses incurred in organizing, subsisting, and transporting volunteers, "previous to their being mustered and received into the service of the United States during the present war." U. S. St. 1848, c. 60, Ib. 236.

Upon the breaking out of the existing rebellion the President summoned Congress together, and called out the militia first, and then volunteers to serve for a period of three years, unless sooner discharged, and "to be mustered into the service as infantry and cavalry." Proclamations of April 15th and May 3d, 1861, 12 U. S. Sts. at Large, Appendix. Congress, upon assembling, ratified the acts of the President; authorized him to accept the services of volunteers, for any time not exceeding three years nor less than six months, in such numbers from each State as he might determine, and to form them into regiments, the officers of which should be appointed by the governors of the States; and enacted that these volunteers should be "mustered into the service for three years" or "during the war," be subject to the rules and regu-

lations governing the army of the United States, and be upon the same footing in all respects with similar corps of the regular army. U. S. Sts. 1861, cc. 9, 17, 34, Ib. 268, 274, 279. Provision was also made for the payment of "all volunteers mustered into the service of the United States," from the time of their organization and acceptance as companies by the governors of the States. U. S. Sts. 1861, cc. 16, 63. Ib. 274, 326.

By an Act of February 13th, 1862, "no person under the age of eighteen shall be mustered into the United States service;" and "no volunteers or militia from any State or Territory shall be mustered into the service of the United States on any terms or conditions confining their service to the limits of said State or territory," with certain exceptions in Maryland and Missouri. U. S. St. 1862, c. 25, §§ 2, 3. Ib. 339.

On the 21st of June, 1862, Congress resolved that "every soldier who hereafter enlists, either in the regular army or the volunteers, for three years or during the war, may receive his first month's pay in advance, upon the mustering of his company into the service of the United States, or after he shall have been mustered into and joined a regiment already in the service." U. S. Res. 37. Ib. 620. The order of the War Department under this resolution, together with a like order offering payment of a portion of the bounty allowed by law "upon the mustering of the regiment to which such recruits belong into the service of the United States," were set forth in the governor's proclamation of July 2d, 1862, which is annexed to the bill of exceptions.

By the army regulations, "when volunteers are to be mustered into the service of the United States, they will at the same time be minutely examined by the surgeon and assistant surgeon of the regiment;" and "no volunteer will be mustered into the service who is unable to speak the English language." Revised Army Regulations of 1861, §§ 1666, 1670.

All these Acts of the national legislature and executive look to the mustering of the volunteers into the service of the United States as the beginning of their military condition. Some of them use, as synonymous with "mustered," the words "received into the service," or "called into service," which last, as applied to the similar case of militia, had received the highest judicial exposition in the case of *Houston* v. *Moore*, above cited. There are many later public Acts to the same effect. But we have confined our citations to those preceding the call of July, 1862, under which the defendants acted.

It was argued, upon the etymological derivation of the word "muster" from the Latin *monstrare*, "to show," that "mustering" was only showing that the persons mustered were at the time of the muster in the service, and that "mustering into the service" was only the first time they were mustered after being in the service. But although the word "muster" by itself may doubtless be applied to a parade of sol-

diers already enrolled, armed, and trained, the addition of the preposition of motion removes all ambiguity, and "mustering into the service," or "mustering in," clearly implies that the persons mustered are not already in the service.

The action of the selectmen of Washington toward the plaintiff was founded on an entire misapprehension of the nature of their powers and duties. The appeal of the President was made through the governor of Massachusetts, as the chief executive authority of the Commonwealth, for its quota or proportion of men, the mode of raising which was left to him. He proceeded to organize a system by which the patriotism of the people might promptly and effectively meet the President's call. But that call was for volunteers, and to be responded to voluntarily. The President commissioned no military officers to obtain recruits; the militia organization of the State was unsuitable, as had in fact been assumed in the very call for volunteers; and new regiments were needed, of which no officers had yet been appointed, as well as men to fill up the ranks of old regiments. The whole Commonwealth had long been divided into cities and towns, the officers of which, chosen annually by the people, were well known and trusted by them. To these officers the governor appealed. They held no military commission, they were subject to no military discipline, and clothed with no military authority. They were called upon simply as representatives of their fellow-citizens, to excite and assist them in the performance of the patriotic duty of uniting in the active support of the government of the country. They were to explain to them the nature of the service to be undertaken, obtain their promises to engage therein, show them the way to the rendezvous, and pay their expenses thither. . . .

An examination of the position in which the plaintiff stood leads to the same conclusion. Congress had authorized the enlistment of volunteers for no longer term than three years. U. S. St. 1861, c. 9. The only act done by the plaintiff toward entering the service was to sign an agreement "to serve for a period of three years from the date of being mustered into the service, in accordance with the Act" just referred to. He never agreed to enter the service or become a soldier immediately. He never submitted himself to, nor contracted any engagement with, any military officer. He never received any money from any officer, military or civil, of the State or nation, nor any rations, uniform, arms, or equipments. He never was examined by a surgeon, nor took any oath, nor was mustered into the service. And he never actually served as a soldier. But when called upon by the selectmen to go to the rendezvous, he absolutely refused to do so, and was by them forcibly taken to the camp of rendezvous and delivered to the commandant, who imprisoned him in the guard tent for some days; and immediately upon being released he brought this action against the selectmen and their assistants to recover damages for his arrest and imprisonment.

After the fullest consideration, we are unanimous in the opinion that the plaintiff was not a soldier, nor subject to any military authority or

discipline as such. The statutes and orders already cited seem to assume the mustering of a recruit into the service as the point at which the right to exercise military restraint over him is intended to begin. We are not, however, prepared to say that actual submission as a soldier to a commissioned officer would not be of itself sufficient. Still less would we be understood as intimating that a recruit of full age, who had actually served, or received money from the government, could be allowed to dispute the regularity or completeness of his enlistment. But we can have no doubt that the mere signing of a paper in the hands of a municipal officer, containing a promise to serve from a future day, to be fixed only by the performance of a distinct act, is not sufficient to change the state of a citizen into that of a soldier. . . .

The plaintiff not being a soldier nor subject to military discipline, the justification of the defendants fails, and they are liable in this action.

KNEEDLER *v.* LANE ET AL. SMITH *v.* LANE ET AL. NICKELS *v.* LEHMAN ET AL.

SUPREME COURT OF PENNSYLVANIA. 1863.

[45 *Pa.* 238.] [1]

George M. Wharton and *Charles Ingersoll*, for complainants.

There being a disagreement in the court, the judges delivered separate opinions at Pittsburgh, on Monday, the 9th of November, 1863, as follows: —

LOWRIE, C. J. These are three bills in equity, wherein the plaintiffs claim relief against the defendants, who, acting under the Act of Congress of the 3d March last, well known as the Conscription Act, claim to coerce the plaintiffs to enter the army of the United States as drafted soldiers. The claim of the plaintiffs is founded on the objection that that Act is unconstitutional. The question is raised by a motion for a preliminary injunction, and might have been heard by a single judge. But at the request of our brother Woodward, who allowed the motion, and on account of the great importance of the question, we all agreed to sit together at the argument. But we are very sorry that we are left to consider the subject without the aid of an argument on behalf of the government, by the proper legal officers of the government having deemed it their duty not to appear. . . . Our appeal is to the Constitution, a written standard, adopted by us all, sworn to by many of us, and obligatory on all who exercise the rights of citizenship under it, until they can secure its alteration in a regular and peaceable way. By that standard alone can we try this Act. Is it authorized by the Federal Constitution?

[1] The statement of facts is omitted. — ED.

That Constitution, adopting our historical experience, recognizes two sorts of military land forces, — the militia and the army, sometimes called the regular, and sometimes the standing army, — and delegates to Congress power "to raise and support armies," and "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." But though this Act of Congress is intended to provide means for suppressing the rebellion, yet it is apparent that it is not founded on the power of "calling forth the militia," for those who are drafted under it have not been armed, organized, and disciplined under the militia law, and are not called forth as militia under State officers, as the Constitution requires. Art. 1, 8, 16.

It is therefore only upon the power to raise armies that this Act can be founded, and as this power is undisputed, the question is made to turn on the ancillary power to pass "all laws which shall be necessary and proper" for that purpose. Art. 1, 8, 18. It is therefore a question of the mode of exercising the power of raising armies. Is it admissible to call forced recruiting a "necessary and proper" mode of exercising this power?

The fact of rebellion would not seem to make it so, because the inadequacy or insufficiency of the permanent and active forces of the government for such a case is expressly provided for by the power to call forth the usually dormant force, the militia; and that therefore is the only remedy allowed, at least until it has been fully tried and failed, according to the maxims *expressio unius est exclusio alterius*, and *expressum facit cessare tacitum*. No other mode can be necessary and proper so long as a provided mode remains untried; and the force of these maxims is increased by the express provision of the Constitution, that powers not granted are reserved, and none shall be implied from the enumeration of those which are reserved. Amendments 9, 10. A granted remedy for a given case would therefore seem to exclude all ungranted ones. Or, to say the least, the militia not having been called forth, it does not and cannot appear that another mode is necessary for suppressing the rebellion.

And it seems very obvious that a departure from the constitutional mode cannot be considered necessary because of any defect in the organization of the militia, for Congress has always had authority to correct this, and it cannot possibly found new powers in its own neglect of duty. Most of the presidents have repeatedly called the attention of Congress to this subject, and yet it has never been adequately attended to. I do not know why it might not have been performed since this rebellion commenced, and yet I do not know that it could.

Though, therefore, this Act was passed to provide means for suppressing the rebellion, yet the authority to pass it does not depend on the fact of rebellion. That fact authorizes forced levies of the militia under their own State officers, but not for the regular army.

But it is not important that Congress may have assigned an insufficient reason for the law. If it may pass such a law for any reason, we

must sustain it for that reason. The question, then, is, may Congress, independent of the fact of rebellion or invasion, make forced levies in order to recruit the regular army?

If it may, it may do so even when no war exists or threatens, and make this the regular mode of recruiting; it may disregard all considerations of age, occupation, profession, and official station; it may take our governors, legislators, heads of State departments, judges, sheriffs, and all inferior officers, and all our clergy and public teachers, and leave the State entirely disorganized; it may admit no binding rule of equality or proportion for the protection of individuals, States, and sections. In all other matters of allowed forced contribution to the Union, duties, imposts, excises, and direct taxes, and organizing and training the militia, the rule of uniformity, equality, or proportion is fixed in the Constitution. It could not be so in calling out the militia, because the emergency of rebellion or invasion does not always allow of this.

But for the recruiting of the army no such reason exists, and yet, contrary to the rule of other cases, if it may be recruited by force, we find no regulation or limitation of the exercise of the power, so as to prevent it from being arbitrary and partial, and hence we infer that such a mode of raising armies was not thought of, and was not granted. If any such mode had been in the intention of the fathers of the Constitution, they would certainly have subjected it to some rule of equality or proportion, and to some restriction in favor of State rights, as they have done in other cases of compulsory contributions to Federal necessities. We are forbidden by the Constitution from inferring the grant of this power from its not being enumerated as reserved; and the rule that what is not granted is reserved, operates in the same way, and is equivalent to the largest bill of rights.

No doubt it would be unreasonable to suppose that Congress would so disregard natural rights as to take such an advantage of this want of regulation of their power as that above indicated; but the fathers of the Constitution did presume that some such things are possible, and therefore they would have regulated the mode, if such a mode had been intended. It needed no regulation, if all recruits were to be obtained in the ordinary way, by voluntary enlistments.

Our jealousy of the usurpation of dominant parties is quite natural, and has been inherited through many generations of experience of Cavalier and Roundhead, Court and Country, Whig and Tory parties, each using unconstitutional means of enforcing the measures which they deemed essential or important for the public welfare, or of securing their own power; and the fathers of the Constitution had experienced such usurpations from the very beginning of the reign of George III., and were not at all inclined to grant powers which, for want of regulation, might possibly become merely arbitrary. They had had no experience of forced levies for the regular army, except by the States themselves, and it seems to me they did not intend to grant such a power to the Federal government.

Besides this, the Constitution does authorize forced levies of the militia force of the States in its organized form, in cases of rebellion and invasion, and, on the principle that a remedy expressly provided for a given case, excludes all implied ones, it is fair to infer that it does not authorize forced levies in any other case or mode. The mode of increasing the military force for the suppression of rebellion being given in the Constitution, every other mode would seem to be excluded.

But even if it be admitted that the regular army may be recruited by forced levies, it does not seem to me that the constitutionality of this Act is decided. The question would then take the narrower form, — Is this mode of coercion constitutional?

It seems to me that it is so essentially incompatible with the provisions of the Constitution relative to the militia that it cannot be. On this subject, as on all others, all powers not delegated are reserved. This power is not expressly delegated, and cannot be impliedly so if incompatible with any reserved or granted power. This is not only the express rule of the Constitution, but it is necessarily so; for we can know the extent to which State functions were abated by the Federal Constitution only by the express or necessarily implied terms of the law or compact in which the abatement is provided for. And this is the rule in regard to the common law; it is changed by statute only so far as the expression of the statute requires it to be.

Now, the militia was a State institution before the adoption of the Federal Constitution, and it must continue so, except so far as that Constitution changes it, that is, by subjecting it, under State officers, to organization and training according to one uniform Federal law, and to be called forth to suppress insurrection and repel invasion, when the aid of the Federal government is needed, and it needs this force. For this purpose it is a Federal force; for all others it is a State force, and it is called in the Constitution "the militia of the several States." Art. 2, 2, 1. It is, therefore, the standing force of the States, as well as in certain specified respects the standing force of the Union. And the right of the States to have it is not only not granted away, but is expressly reserved, and its whole history shows its purpose to be to secure domestic tranquillity, suppress insurrections, and repel invasions. Neither the States nor the Union have any other militia than this.

Now, it seems to me plain that the Federal government has no express, and can have no implied power to institute any national force that is inconsistent with this. This force shall continue, says the Constitution, and the Federal goverment shall make laws to organize and train it as it thinks best, and shall have the use of it when needed; this seems reasonable and sufficient. Is the force provided for by this Act inconsistent with it?

It seems to me it is. By it all men, between the ages of twenty and forty-five, are "declared to constitute the national forces," and made liable to military duty, and this is so nearly the class which is usually understood to constitute the militia force of the States that we may say

that this Act covers the whole ground of the militia, and exhausts it entirely. It is, in fact, in all its features a militia for national instead of State purposes, though claiming justification only under the power to raise armies, and accidentally under the fact of the rebellion. In England this can be done, because the State, being a unit there, there can be no place for the distinction between State and Federal powers, and the army and militia forces become naturally confounded.

It seems to me this is an unauthorized substitute for the militia of the States. If valid, it completely annuls, for the time being, the remedy for insurrection provided by the Constitution, and substitutes a new and unprovided one. Or rather, it takes that very State force, strips it of its officers, despoils it of its organization, and reconstructs its elements under a different authority, though under somewhat similar forms. If this Act is law, it is supreme law, and the States can have no militia out of the class usually called to militia duty; for the whole class is appropriated as a national force under this law; and no State can make any law that is inconsistent with it. The State militia is wiped out if this Act is valid, except so far as it may be permitted by the Federal government. If Congress may thus, under its power to raise armies, constitute all the State militiamen into "national forces" as part of the regular army, and make them "liable to perform duty in the service of the United States when called out by the President," I cannot see that it may not require from them all a constant military training under Federal officers as a preparation for the greatest efficiency when they shall be so called out, and then all the State militia and civil officers may be put into the ranks, and subjected to the command of such officers as the President may appoint, and every one would then see that the constitutional State militia becomes a mere name. The Constitution makes it and the men in it a national force in a given contingency, and in a prescribed form, but this Act makes them so irrespective of the constitutional form and contingency. This is the substantial fact, and I am not able to refine it away.

And it seems to me that this Act is unconstitutional, because it plainly violates the State systems in this: that it incorporates into this new national force every State civil officer, except the governor, and this exception might have been omitted, and every officer of all our social institutions, — clergymen, professors, teachers, superintendents of hospitals, etc., — and degrades all our State generals, colonels, majors, etc., into common soldiers, and thus subjects all the social, civil, and military organization of the States to the Federal power to raise armies, potentially wipes them out altogether, and leaves the States as defenceless as an ancient city with its walls broken down. Nothing is left that has any constitutional right to stand before the will of the Federal government.

If this be so, the party in power at any time holds all State rights in its hands. It is subject to no restraints, except that of the common morality of the time and of the party, and every one knows how weak

and changeable this is in times of popular excitement, when the party in power, convinced of the rightness and greatness of its own ends, thinks lightly of the modes and forms that in any way obstruct or retard their attainment. There are no constitutional restraints of this power, if it exists, and therefore if the unsteady morality of party excitements will bear it, the party in power may require all the troops to be drafted from the opposite party, or from States and sections where it prevails.

Our fathers saw these dangers, and intended the Constitution to stand as a restraint upon party power. They knew that a party in power naturally encroaches upon every institution that obstructs its will, and is inclined, when its power totters, to adopt extreme, unusual, and unconstitutional measures to maintain it; and they intended to guard against this. They knew how Episcopalians, Independents, and Presbyterians, Cavalier and Roundhead, Court and Country, Whig and Tory parties, had each in turn, when in power, tyrannized over their opponents, and sacrificed or endangered public liberty; they had felt how great was this evil in all the partisan struggles that preceded our Revolution, and they desired posterity to profit by their experience. The very restriction upon appropriations for the support of the army exceeding two years, is copied from our English ancestors, and was deemed by them a constitutional limitation of the party in power. None of our constitutions, State or Federal, have any purpose or function more important than that of restraining and regulating the party that may chance to be in power, and that is one of the most important purposes of the separation of governmental functions into different departments. . . .

In England the popular jealousy of power was usually directed against the party which was ordinarily represented by the King, because he was a permanent authority; but in this country, in the act of framing the Federal Constitution, it could be directed against no other power but that which the people were then creating, or the parties that were sure to contend for it; and history tells us that this jealousy was intense and watchful, and it was perfectly natural and inevitable that it should be so. States, as well as individuals, are careful in putting themselves under the power of others. That was the power to be feared in its relations with the States, and I know not how it is possible to suppose that under the power to raise armies they were really giving up their whole militia system, at the time when it is most needed, to be the instrument of a suspected power, a Federal party in power, always prone, whatever be its name, to place its respect for the time-honored doctrines of constitutional liberty in subordination to the intemperate, and therefore often disingenuous zeal for party success. In great political commotions, liberty is in its greatest peril, because, neither party knowing how to give or to receive those reasonable concessions, or that generous respect that is necessary to restore peace, the occasion demands force, and alarm or excitement gives it an undue

measure, which increases the resistance, and consequently the excitement or alarm and the force, until all the bulwarks of constitutional liberty are passed or swept away.

If Congress may institute the plan now under consideration, as a necessary and proper mode of exercising its power "to raise and support armies," then it seems to me to follow with more force that it may take a similar mode in the exercise of other powers, and may compel people to lend it their money; take their houses for offices and courts; their ships and steamboats for the navy; their land for its fortresses; their mechanics and workshops for the different branches of business that are needed for army supplies; their physicians, ministers, and women for army surgeons, chaplains, nurses, and cooks; their horses and wagons for their cavalry and for army trains; and their provisions and crops for the support of the army. If we give the latitudinarian interpretation, as to mode, which this Act requires, I know not how to stop short of this. I am sure there is no present danger of such an extreme interpretation, and that even partisan morality would forbid it; but if the power be admitted we have no security against the relaxation of the morality that guides it, I am quite unable now to suppose that so great a power could have been intended to be granted, and yet to be left so loosely guarded.

It may be thought that even voluntary enlistments in the regular army have the same sort of inconsistency with the militia system as forced recruiting has; but more careful reflection will show that it is not so. Enlistment in the army takes away a part of the militia; but every militia system allows for this, and the general purpose of both is the same, — the constitution of a military force. And besides this, it is of the very nature of the system that it leaves every man free in the pursuit of his ordinary calling, and binds no man to any part of the militia, except by reason of his residence, which he may abandon or change as he pleases.

This Act seems to me to be further unconstitutional in that it provides for a thorough confusion between the army and the militia, by allowing that the regular soldiers obtained by draft may be assigned, by the President, to any corps, regiment, or branch of service he pleases; whereas the Constitution keeps the two forces distinct. Under this law, the President may even send them to the navy. Under the militia system, every man goes out with his neighbors and friends, and under officers with whom he is acquainted. It is very properly suggested that, in 1790, General Knox, the Secretary of War under President Washington, and with his approval, and in 1814, Mr. Monroe, President Madison's Secretary of War, recommended plans of recruiting the army, which were very similar to this one, and no doubt this is some argument in favor of its constitutionality. But, notwithstanding our great reverence for those illustrious names, it is impossible to admit them as very influential on this question, when we consider that neither of those plans was adopted by Congress, and the subject

never received such a discussion as to settle the question. Instead of Mr. Monroe's plan, a pure militia bill was reported by Mr. Giles from the Senate's committee on military affairs. . . .

It is with very real distress that I find my mind forced into this conflict with an Act of Congress of such very great importance in the present juncture of Federal affairs; but I cannot help it, and the question is so presented that I cannot evade it. Possibly an argument from the counsel of the government might have saved me from this, if it is an error; and it may yet produce a different result on the final hearing, which I trust will take place so soon that no public or private injury may arise from any misjudgment now and here.

Certainly, in this great struggle we owe nothing to the rebels but war until they submit, unless it be that we do not let the war so depart from its proper purpose as to force them to submit to a Constitution and system different from that against which they have rebelled. But we do owe it to each other, to minorities and individuals, that no part of that sacred compact of union shall become the sport of partisan struggles, or be subjected to the anarchy of conflicting moralities, urged on by ambitious hopes veiled in the background. Our solemn oaths and plighted faith have made that compact the shield of State constitutions, institutions, and peculiarities, and of their right to their own free development, against all arbitrary and intermeddling action of the central government (which in all free countries represents a party), and I venture to hope that that shield will continue to afford its intended protection.

What I have written I have written under a very deep sense of the responsibility imposed upon me by my position, and with an earnest desire to be guided only by the Constitution. Very many will be dissatisfied with my conclusions; but I submit to the judgment of God, and also to that of my fellow-citizens when the present troubles shall have passed away and are felt no more.

I am in favor of granting the injunction in favor of each of the defendants for his own protection, but not for the staying of all proceedings under the Act.

[The concurring opinions of JUSTICES WOODWARD and THOMPSON, and the dissenting opinion of READ, J., are omitted.

The dissenting opinion of STRONG, J., is as follows:]

The complainants having been enrolled and drafted, under the provisions of the Act of Congress of March 3, 1863, entitled, "An Act for enrolling and calling out the national forces, and for other purposes," have presented their bills in this court against the persons who constitute the board of enrolment, and against the enrolling officers, praying that they may be enjoined against proceeding, under the Act of Congress, with the requisition, enrolment, and draft of citizens of the Commonwealth, and of persons of foreign birth who have declared their intention to become citizens under and in pursuance of the laws, to perform compulsory military duty in the service of the United States,

and particularly that the defendants may be enjoined from all proceedings against the persons of the complainants, under pretence of executing the said law of the United States. The bills having been filed, motions are now made for preliminary injunctions until final hearing. These motions have been argued only on the part of the complainants. We have therefore before us nothing but the bills and the special affidavits of the complainants. It is to be noticed that neither the bills nor the accompanying affidavits aver that the complainants are not subject to enrolment and draft into the military service of the United States, under the Act of Congress, if the Act be valid, nor is it asserted that they have been improperly or fraudulently drawn. It is not alleged that the defendants have done anything, or that they propose to do anything, not warranted and required by the words and spirit of the enactment. The complainants rest wholly upon the assertion that the Act of Congress is unconstitutional and therefore void. It is denied that there is any power in the Federal government to compel the military service of a citizen by direct action upon him, and it is insisted that Congress can constitutionally raise armies in no other way than by voluntary enlistment.

The necessity of vesting in the Federal government power to raise, support, and employ a military force, was plain to the framers of the Constitution, as well as to the people of the States by whom it was ratified. This is manifested by many provisions of that instrument, as well as by its general purpose, declared to be for "common defence." Indeed, such a power is necessary to preserve the existence of any independent government, and none has ever existed without it. It was, therefore, expressly ordained in the eighth Article, that the Congress of the United States should have power to "provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." It was also ordained that they should have power 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. Nor is this all. It is obvious that if the grant of power to have a military force had stopped here it would not have answered all the purposes for which the government was formed. It was intended to frame a government that should make a new member in the family of nations. To this end, within a limited sphere, every attribute of sovereignty was given. To it was delegated the absolute and unlimited power of making treaties with other nations, a power explicitly denied to the States. This unrestricted power of making treaties involved the possibility of offensive and defensive alliances. Under such treaties the new government might be required to send armies beyond the limits of its territorial jurisdiction; and in fact, at the time when the Constitution was formed, a treaty of alliance, offensive and defensive, was in existence between the old Confederacy and the gov-

ernment of France. Yet more. Apart from the obligations assumed by treaty, it was well known that there are many cases where the rights of a nation and of its citizens cannot be protected or vindicated within its own boundaries. But the power conferred upon Congress over the militia is insufficient to enable the fulfilment of the demands of such treaties, or to protect the rights of the government, or its citizens, in those cases in which protection must be sought beyond the territorial limits of the country. The power to call the militia into the service of the Federal government is limited by express terms. It reaches only three cases. The call may be made "to execute the laws of the Union, to suppress insurrections, and to repel invasions," and for no other uses. The militia cannot be summoned for the invasion of a country without the limits of the United States. They cannot be employed, therefore, to execute treaties of offensive alliance, nor in any case where military power is needed abroad to enforce rights necessarily sought in foreign lands. This must have been understood by the framers of the Constitution, and it was for such reasons doubtless that other powers to raise and maintain a military force were conferred upon Congress, in addition to those which were given over the militia. By the same section of the eighth Article of the Constitution it was ordained, in words of the largest meaning, that Congress should have power to "raise and support armies," — a power not to be confounded with that given over the militia of the country. Unlike that, it was unrestricted, unless it be considered a restriction that appropriations of money to the use of raising and supporting armies were forbidden for a longer term than two years. In one sense this was a practical restriction. Without appropriations no army can be maintained, and the limited period for which appropriations can be made, enables the people to pass judgment upon the maintenance and even existence of the army every two years, and in every new Congress. But in the clause conferring authority to raise armies, no limitation is imposed other than this indirect one, either upon the magnitude of the force which Congress is empowered to raise, or upon the uses for which it may be employed, or upon the mode in which the army may be raised. If there be any restriction upon the mode of exercising the power, it must be found elsewhere than in the clause of the Constitution that conferred it. And if a restricted mode of exercise was intended, it is remarkable that it was not expressed, when limitations were so carefully imposed upon the power given to call for the militia, and more especially when, as it appears from the prohibition of appropriations for the army for a longer time than two years, the subject of limiting the power was directly before the minds of the authors of the Constitution. This part of the Constitution, like every other, must be held to mean what its framers, and the people who adopted it, intended it should mean. We are not at liberty to read it in any other sense. We cannot insert restrictions upon powers given in unlimited terms, any more than we can strike out restrictions imposed.

There is sometimes great confusion of ideas in the consideration of

questions arising under the Constitution of the United States, caused by misapprehension of a well-recognized and oft-repeated principle. It is said, and truly said, that the Federal government is one of limited powers. It has no other than such as are expressly given to it, and such as (in the language of the Constitution itself) "are necessary and proper for carrying into execution" the powers expressly given. By the tenth Article of the Amendments, it is ordained 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. Of course there can be no presumption in favor of the existence of a power sought to be exercised by Congress. It must be found in the Constitution. But this principle is misapplied when it is used, as is sometimes the case, to restrict the right to exercise a power expressly given. It is of value when the inquiry is whether a power has been conferred, but of no avail to strip a power, given in general terms, of any of its attributes. The powers of the Federal government are limited in number, not in their nature. A power vested in Congress is as ample as it would be if possessed by any other legislature, — none the less because held by the Federal government. It is not enlarged or diminished by the character of its possessor. Congress has power to borrow money. Is it any less than the power of a State to borrow money? Because the Federal government has not all the powers which a State government has, will it be contended that it cannot borrow money, or regulate commerce, or fix a standard of weights and measures, in the same way, by the same means, and to the same extent as any State might have done had no Federal Constitution ever been formed? If not, and surely this will not be contended, why is not the Federal power to raise armies, as large and as unfettered in the mode in which it may be exercised, as was the power to raise armies possessed by the States before 1787, and possessed by them now in time of war? If they were not restricted to voluntary enlistments in procuring a military force, upon what principle can Congress be? In *Gibbons* v. *Ogden*, 9 Wheat. 196, the Supreme Court of the United States laid down the principle that all the powers vested by the Constitution in Congress are complete in themselves, and may be exercised to their utmost extent, and that there are no limitations upon them, other than such as are prescribed in the Constitution.

It is not difficult to ascertain what must have been intended by the founders of the government when they conferred upon Congress the power to "raise armies." At the time when the Constitution was formed, and when it was submitted to the people for adoption, the mode of raising armies by coercion, by enrolment, classification, and draft, as well as by voluntary enlistment, was well known, practised in other countries, and familiar to the people of the different States. In 1756, but a short time before the Revolutionary War, a British statute had enacted that all persons without employment might be seized and coerced into the military service of the kingdom. The Act may be found

at length in Ruffhead's British Statutes at Large, vol. vii. p. 625. Another Act of a similar character was passed in 1757 (British Statutes at Large, vol. viii. p. 11). Both were enacted under the administration of William Pitt, afterwards Lord Chatham, reputed to have been one of the stanchest defenders of English liberties. They were founded upon a principle always recognized in the Roman empire, and asserted by all modern civilized governments, that every able-bodied man capable of bearing arms, owes personal military service to the government which protects him. Lord Chatham's Acts were harsh and unequal in their operation, much more so than the Act of Congress now assailed. They reached only a select portion of the able-bodied men in the community, and they opened wide a door for favoritism and other abuses. For these reasons, they must have been the more prominently before the eyes of the framers of the Federal Constitution, when they were providing safeguards for liberty and checks to arbitrary power. Yet, in full view of such enactments, they conferred upon Congress an unqualified power to raise armies. And, still more than this, coercion into military service by classification and draft from the able-bodied men of the country was to them a well-known mode of raising armies in the different States which confederated to carry on the Revolutionary War. It was equally well known to the people who ordained and established the Constitution, expressly "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, and secure the blessings of liberty for themselves and their posterity." It is an historical fact that, during the later stages of the war, the armies of the country were raised not alone by voluntary enlistment, but also by coercion, and that the liberties and independence sought to be secured by the Constitution, were gained by soldiers made such, not by their own voluntary choice, but by compulsory draft. Chief Justice Marshall, himself a soldier of the Revolution, than whom no one was better acquainted with revolutionary history, in his Life of Washington (vol. iv. p. 241), when describing the mode in which the armies of the government were raised, makes the following statement: "In general, the Assemblies (of the States) followed the example of Congress, and apportioned on the several counties within the States the quota to be furnished by each. This division of the State was again to be subdivided into classes, and each class was to furnish a man by contributions or taxes imposed on itself. In some instances, a draft was to be used in the last resort." This mode of recruiting the army by draft, in revolutionary times, is also mentioned in Ramsey's Life of Washington (vol. ii. p. 246), where it is said: "When voluntary enlistments fell short of the proposed numbers, the deficiencies were, by the laws of several States, to be made up by drafts or lots from the militia." Thus it is manifest that when the members of the Convention proposed to confer upon Congress the power to raise armies, in unqualified terms, and when the people of the United States adopted the Constitution, they had in full view compulsory draft from the popula-

tion of the country, as a known and authorized mode of raising them. The memory of the Revolution was then recent. It was universally known that it had been found impossible to raise sufficient armies by voluntary enlistment, and that compulsory draft had been resorted to. If, then, in construing the Constitution we are to seek for and be guided by the intention of its authors, there is no room for doubt. Had any limitation upon the mode of raising armies been intended, it must have been expressed. It could not have been left to be gathered from doubtful conjecture. It is incredible that when the power was given in words of the largest signification, it was meant to restrict its exercise to a solitary mode, that of voluntary enlistment, when it was known that enlistments had been tried and found ineffective, and that coercion had been found necessary. The members of the Convention were citizens of the several States, each a sovereign, and each having power to raise a military force by draft, — a power which more than one of them had exercised. By the Constitution, the authority to raise such a force was to be taken from the States partially, and delegated to the new government about to be formed. No State was to be allowed to keep troops in time of peace. The whole power of raising and supporting armies, except in time of war, was to be conferred upon Congress. Necessarily, with it was given the means of carrying it into full effect.

I agree that Congress is not at liberty to employ means for the execution of any power delegated to it that are prohibited by the spirit of the Constitution, or that are inconsistent with the reserved rights of the States, or the inalienable rights of a citizen. The means used must be lawful means. But I have not been shown, and I am unable to perceive, that compelling military service in the armies of the United States, not by arbitrary conscription, but, as this Act of Congress directs, by enrolment of all the able-bodied citizens of the United States, and persons of foreign birth, who have declared their intention to become citizens, between the ages of twenty and forty-five (with some few exceptions), and by draft by lot from those enrolled, infringes upon any reserved right of the States, or interferes with any constitutional right of a private citizen. If personal service may be compelled, — if it is a common duty, — this is certainly the fairest and most equal mode of distributing the public burden.

It was urged, in the argument, that coercion of personal service in the armies is an invasion of the right of civil liberty. The argument was urged in strange forgetfulness of what civil liberty is. In every free government the citizen or subject surrenders a portion of his absolute rights in order that the remainder may be protected and preserved. There can be no government at all where the subject retains unrestrained liberty to act as he pleases, and is under no obligation to the State. That is undoubtedly the best government which imposes the fewest restraints, while it secures ample protection to all under it. But no government has ever existed, none can exist, without a right to the

personal military service of all its able-bodied men. The right to civil liberty in this country never included a right to exemption from such service. Before the Federal Constitution was formed, the citizens of the different States owed it to the governments under which they lived, and it was exacted. The militia systems of the States then asserted it, and they have continued to assert it ever since. They assert it now. No one doubts the power of a State to compel its militia into personal service, and no one has ever contended that such compulsion invades any right of civil liberty. On the contrary, it is conceded that the right to civil liberty is subject to such power in the State governments, and the history of the period immediately antecedent to the adoption of the Federal Constitution shows that it was then admitted. Is civil liberty now a different thing from what it was when the Constitution was formed? It is better protected by the provisions of the Constitution, but are the obligations of a citizen to the government any less now than they were then? This cannot be maintained. If, then, coercion into military service was no invasion of the rights of civil liberty enjoyed by the people of the States before the Federal Constitution had any existence, it cannot be now.

Again, it is insisted that if the power given to Congress to raise and support armies be construed to warrant the compulsion of a citizen into military service, it must, with equal reason, be held to authorize arbitrary seizures of property for the support of the army. The force of the objection is not apparent. Confessedly the army must be raised by legal means. By such means it must also be supported. It has already been shown that enrolment and draft are not illegal; that to make them illegal, a prohibition must be found in the letter or in the spirit of the Constitution. Arbitrary seizures of private property for the support of the army are illegal and prohibited. Not only does the Constitution point out the mode in which provision shall be made for the support of the army, but in numerous provisions it protects the people against deprivation of property without compensation and due course of law. Exemption from such seizures was always an asserted and generally an admitted right, while exemption from liability to being compelled to the performance of military service was, as has been seen, never claimed. There are therefore limitations upon the means which may be used for the support of the army, while none are imposed upon the means of raising it.

Again, it is said this Act of Congress is a violation of the Constitution, because it makes a drafted man punishable as a deserter before he is mustered into service. The contrary was declared by Justice Washington, when delivering the judgment of the Supreme Court of the United States, in *Houston* v. *Moore*, 5 Wheaton. Under the Act of 1795, the drafted men were not declared to be subject to military law until mustered into service. This is the Act of which Judge Story speaks in his Commentaries. But in the opinion of Judge Washington, Congress might have declared them in service from the time of the

draft, precisely what this Act of Congress does. Judge Washington's opinion, of course, explodes this objection.

The argument most pressed in support of the alleged unconstitutionality of the Act of Congress is, that it interferes with the reserved rights of the States over their own militia. It is said the draft takes a portion of those who owe militia service to the States, and thus diminishes the power of the States to protect themselves. The States, it is claimed, retain the principal power over the militia, and therefore the power given to Congress to raise armies must be so construed as not to destroy or impair that power of the States. If, say the complainants, Congress may draft into their armies, and compel the service of a portion of the State militia, they may take the whole, and thus the entire power of the States over them may be annulled, for want of any subject upon which it can act. I have stated the argument quite as strongly as it was presented. It is more plausible than sound. It assumes the very matter which is the question in debate. It ignores the fact that Congress has also power over those who constitute the militia. The militia of the States is also that of the general government. It is the whole able-bodied population capable of bearing arms, whether organized or not. Over it certain powers are given to Congress, and others are reserved to the States. Besides the power of calling it forth, for certain defined uses, Congress may provide for its organization, arming, and discipline, as well as for governing such portion as may be employed in its service. It is the material, and the only material, contemplated by the Constitution, out of which the armies of the Federal government are to be raised. Whether gathered by coercion or enlistment, they are equally taken out of those who form a part of the militia of the States. Taking a given number by draft no more conflicts with the reserved power of the States than does taking the same number of men in pursuance of their own contract. No citizen can deprive a State of her rights without her consent. None could therefore voluntarily enlist, if taking a militiaman into military service in the army of the United States is in conflict with any State rights over the militia. Those rights, whatever they may be, it is obvious cannot be affected by the mode of taking. It is clear that the States hold their power over the militia, subordinate to the power of Congress to raise armies out of the population that constitutes it. Were it not so, the delegation of the power to Congress would have been an empty gift. Armies can be raised from no other source. Enlistments in other lands are generally prohibited by foreign enlistment acts, and even where they are not, they may, under the law of nations, involve a breach of neutrality. Justly, therefore, may it be said the objection now under consideration begs the question in debate. It assumes a right in the State which has no existence, to wit, a right to hold all the population that constitutes its militiamen exempt from being taken in any way into the armies of the United States. When it is said, if any portion of the militia may be coerced into such military service the whole may, it is but a repeti-

tion of the common, but very weak, argument against the existence of a power, because it may possibly be abused. It might with equal force be urged against the existence of any power in either the State or general government. It applies as well to a denial of power to raise armies by voluntary enlistment. It is as conceivable that high motives of patriotism, or inducements held out by the Federal government, might draw into its military service the entire able-bodied population of a State, as that the whole might be drafted. We are not to deny the existence of a power because it may possibly be unwisely exercised, nor are we to presume that abuses will take place. Especially are we not at liberty to do so in this case, in view of the fact that the general government is under constitutional obligations to provide for the common defence of the country, and to guarantee to each State a republican form of government. That would be to impose a duty, and deny the power to perform it.

These are all the objections, deserving of notice, that have been urged against the power of Congress to compel the complainants into military service in the army. I know of no others of any importance. They utterly fail to show that there is anything in either the letter or the spirit of the Constitution to restrict the power to "raise armies," given generally, to any particular mode of exercise. For the reasons given, then, I think the provisions of the Act of Congress under which these complainants have been enrolled and drafted, must be held to be such as it is within the constitutional power of Congress to enact. It follows that nothing has been done, or is proposed to be done, by the defendant that is contrary to law, or prejudicial to the rights of the complainants.

An attempt was made on the argument to maintain that those provisions of the Act of Congress which allow a drafted man to commute by the payment of $300, are in violation of the Constitution. But this is outside of the cases before us. By these provisions the complainants are not injuriously affected, and the bills do not complain of anything done, or proposed to be done, under them. It is the compulsory service which the plaintiffs resist; they do not complain that there is a mode provided of ridding themselves of it. If it be conceded, Congress cannot provide for commutation of military service by the payment of a stipulated sum of money, or cannot do it in the way adopted in this enactment, the concession in no manner affects the directions given for compulsion into service. Let it be that the provision for commutation is unauthorized, those for enrolment and draft are such as Congress had power to enact. It is well settled that part of a statute may be unconstitutional, and the remainder in force. I by no means, however, mean to be understood as conceding that any part of this Act is unconstitutional. I think it might easily be shown that every part of it is a legitimate exercise of the power vested in Congress, but I decline to discuss the question, because it is not raised by the cases before us.

Nor while holding the opinions expressed, that no rights of the com-

plainants are unlawfully invaded or threatened, is it necessary to consider the power or propriety of interference by this court, on motion, to enjoin Federal officers against the performance of a duty imposed upon them in plain terms by an Act of Congress. Upon that subject I express no opinion. I have said enough to show that the complainants are not entitled to the injunctions for which they ask, and I think they should be denied.

The injunctions thus granted were only preliminary, were limited to the cases of the three plaintiffs in these bills, and were in the following terms: "Order, November 9, 1863. Preliminary injunction (in each case) granted for the protection of the plaintiff, on his giving bond with surety, to be approved by the prothonotary, in the sum of $500, according to law, and refused for any other purpose." No security was entered, and no writs of injunction issued in either of the three cases. On the 12th of December, 1863, after the term of LOWRIE, C. J., had expired, and AGNEW, J., had taken his seat as one of the judges of the Supreme Court, *Mr. Knox* appeared for the defendants in each case, and applied to JUDGE STRONG, then holding the court at Nisi Prius, to dissolve the injunctions which had been granted as above stated. JUDGE STRONG received the motions, and appointed the 30th December for their hearing, and, as in the former proceeding, requested his brethren to sit with him. The motions to dissolve were argued before all the judges on that and the succeeding day, by *Mr. Knox*, for the defendants, and *Messrs. George W. Biddle*, *Peter McCall*, and *Charles Ingersoll*, for the complainants. On the 16th January, 1864, JUDGE STRONG, representing the majority of the court, made the following order: "And now, to wit, January 16, 1864, it is ordered by the court that the orders heretofore made in all these cases be vacated; and the motions for injunctions are overruled."

Separate opinions in favor of dissolving the injunctions were read by JUDGES STRONG, READ, and AGNEW, and the joint dissenting opinion of CHIEF JUSTICE WOODWARD and JUDGE THOMPSON, was read by the Chief Justice.

The opinion of the court was delivered by

STRONG, J. . . . The orders were made at Nisi Prius, and they are in fact but the orders of a single judge, though he undoubtedly took the opinions of all his brethren. Still the orders were his, and his alone. They could be nothing more. Our Act of Assembly, of July 26, 1842, P. L. 433, § 9, turns all cases in equity, brought in the Supreme Court, over to the judge at Nisi Prius, and they come into the Supreme Court in banc only after final decree. And it was at Nisi Prius that these motions were made. The judge before whom they were made has called in the other judges, not to decide but to advise what disposition shall be made of them. This he has done from respect to them, and because they advised when the injunctions were ordered. It is not easy to see that any other course would have been

decorous. The motions are therefore pending. Nothing can be gained or secured by a continuance of the injunctions. The bills on their face show that the complainants must have gone into the military service of the United States, and beyond any possible interference of the defendants, or that they had commuted, or had been exempted before the injunctions were ordered, and even before the motions for injunctions had been argued.

The orders of the judge at Nisi Prius can, therefore, have no possible beneficial effect upon the condition of the complainants, while if they remain, made as they were, in accordance with the advice of a majority of the judges of the Supreme Court, and upon the ground that the Act of Congress is unconstitutional, they hold out to every drafted man a temptation to resist all attempts to coerce him into military service. Unnecessarily to continue such a temptation is cruelty, if a majority of the Supreme Court now believe the Act of Congress to be constitutional, and that consequently forcible resistance to it would be a crime. . . .

Such being the opinion of a majority of the judges of the Supreme Court, the orders are directed to be vacated, and the motions for injunctions are overruled.

DYNES *v.* HOOVER.

SUPREME COURT OF THE UNITED STATES. 1857.

[20 *How.* 65.]

[ERROR to the Circuit Court for the District of Columbia. The case is sufficiently stated in the opinion. *Jones*, for the plaintiff in error; *Gillett* and *Cushing*, for the defendant.]

MR. JUSTICE WAYNE delivered the opinion of the court.

The plaintiff brought an action for assault and battery and false imprisonment, charging that the defendant imprisoned him in the penitentiary of the District of Columbia. The defendant pleaded the general issue, and several special pleas, in which he denied the force and injury, and set up, that he, as marshal of the District of Columbia, imprisoned the plaintiff by virtue of the authority of the President of the United States, in the execution of a sentence of a naval court martial, convened under an Act of Congress of the 23d of April, 1800; which sentence was approved by the Secretary of the Navy, which was final and absolute, and denying the jurisdiction of the court. The plaintiff filed a retraxit, admitting that there was no battery, other than the imprisonment in pursuance of the sentence of the court martial.

The charge by the Secretary of the Navy was desertion, with this specification: "that on or about the twelfth day of September, in the

year of our Lord one thousand eight hundred and fifty-four, Frank Dynes deserted from the United States ship 'Independence' at New York." He pleaded not guilty. After hearing the evidence, the court declared, "We do find the accused, Frank Dynes, seaman of the United States Navy, as follows: Of the specification of the charge, guilty of attempting to desert; of the charge, not guilty of deserting, but guilty of attempting to desert; and the court do thereupon sentence the said Frank Dynes, a seaman of the United States Navy, to be confined in the penitentiary of the District of Columbia, at hard labor, without pay, for the term of six months from the date of the approval of this sentence, and not to be again enlisted in the naval service." This conviction and sentence was approved by the Secretary of the Navy, on the 26th of September, 1854. The prisoner was then brought from New York to Washington, in custody; and the President, reciting the trial and sentence, made the following order upon the defendant, the marshal, in relation to carrying the judgment of the court into execution. "The prisoners above named (the plaintiff, Dynes, being one among others) having been brought to the city, by direction of the Secretary of the Navy, in the United States steamer 'Engineer,' you are hereby directed to receive them from the commanding officer of said vessel, and commit them to the penitentiary in the District of Columbia, in accordance with their respective sentences." These facts formed a portion of the defendant's pleas, to which the plaintiff demurred, pointing out the following causes of demurrer: —

1. Because the said court martial had no jurisdiction or authority whatever to pass such sentence as that pleaded and set forth in said plea.

2. Because the sentence is illegal and void.

3. Because the President of the United States had no jurisdiction or authority whatever to write such a letter to the defendant as that pleaded and set forth in said plea, nor in any manner whatever to direct the defendant to commit the plaintiff to the penitentiary in the District of Columbia, in accordance with said sentence.

4. Because the said letter, and the said directions therein contained, are unconstitutionl, illegal, and void.

5. Because the said plea is altogether vicious and insufficient in law, and wants form.

There was a joinder in demurrer and judgment for the defendant.

This presents the question, whether the defendant, as marshal, was authorized to execute the direction to receive the plaintiff, then in custody of the captain of the United States steamer "Engineer," to deliver him to the keeper of the penitentiary of the District of Columbia.

The demurrer admits that the court martial was lawfully organized; that the crime charged was one forbidden by law; that the court had jurisdiction of the charge as it was made; that a trial took place before the court upon the charge, and the defendant's plea of not guilty; and that upon the evidence in the case the court found Dynes

guilty of an attempt to desert, and sentenced him to be punished, as has been already stated; that the sentence of the court was approved by the Secretary, and that by his direction Dynes was brought to Washington; and that the defendant was marshal for the District of Columbia, and that in receiving Dynes, and committing him to the keeper of the penitentiary, he obeyed the orders of the President of the United States, in execution of the sentence. Among the powers conferred upon Congress by the 8th section of the first article of the Constitution, are the following: "to provide and maintain a navy;" "to make rules for the government of the land and naval forces." And the 8th amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operation "cases arising in the land or naval forces." And by the 2d section of the 2d article of the Constitution it is declared that "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."

These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practised by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.

In pursuance of the power just recited from the 8th section of the first article of the Constitution, Congress passed the Act of the 23d April, 1800 (2 Stat. at Large, 45), providing rules for the government of the navy. The 17th article of that Act is: "And if any person in the navy shall desert or entice others to desert, he shall suffer death, or such other punishment as a court martial shall adjudge." The 32d article is: "All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea." The 35th article provides for the appointment of courts martial to try all offences which may arise in the naval service. The 38th article provides that charges shall be made in writing, which was done in this case. The court was lawfully constituted, the charge made in writing, and Dynes appeared and pleaded to the charge. Now, the demurrer admits, if Dynes had been found guilty of desertion, that no complaint would have been made against the conviction for want of jurisdiction in the court. But as it appears that the court, instead of finding Dynes guilty of the high offence of desertion, which authorizes the punishment of death, convicted him of attempting to desert, and sentenced him to imprisonment for six months at hard labor in the penitentiary of the District of Columbia, it is argued that the court had no jurisdiction or authority to pass such a sentence; in other words, in the language of the counsel of the plaintiff in error, that "the finding was *coram non judice*, it being for an offence of which the plaintiff was

never charged, and of which the court had no cognizance. That the subject-matter of the sentence, the punishment inflicted, was not within their jurisdiction, and is a punishment which they had no sort of permission or authority of law to inflict."

But the finding of the court against the prisoner was what is known in the administration of criminal law as a partial verdict, in which the accused is acquitted of a part of the accusation against him, and found guilty of the residue. As when there is an acquittal on one count, and a verdict of guilty on another. Or when the charge is of a higher degree, including one of a lesser, there may be a finding by a partial verdict of the latter. As upon a charge of burglary, there may be a conviction for a larceny, and an acquittal of the nocturnal entry. So, upon an indictment for murder, there may be a verdict of manslaughter, and robbery may be reduced to simple larceny, and a battery into an assault. . . .

But the case in hand is not one of a court without jurisdiction over the subject-matter, or that of one which has neglected the forms and rules of procedure enjoined for the exercise of jurisdiction. It was regularly convened; its forms of procedure were strictly observed as they are directed to be by the statute; and if its sentence be a deviation from it, which we do not admit, it is not absolutely void. Whatever the sentence is, or may have been, as it was not a trial by court martial taking place out of the United States, it could not have been carried into execution but by the confirmation of the President, had it extended to loss of life, or in cases not extending to loss of life, as this did not, but by the confirmation of the Secretary of the Navy, who ordered the court. And if a sentence be so confirmed, it becomes final, and must be executed, unless the President pardons the offender. It is in the nature of an appeal to the officer ordering the court, who is made by the law the arbiter of the legality and propriety of the court's sentence. When confirmed, it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject-matter or charge, or one in which, having jurisdiction over the subject-matter, it has failed to observe the rules prescribed by the statute for its exercise. In such cases, as has just been said, all of the parties to such illegal trial are trespassers upon a party aggrieved by it, and he may recover damages from them on a proper suit in a civil court, by the verdict of a jury.

Persons, then, belonging to the army and the navy are not subject to illegal or irresponsible courts martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases, everything which may be done is void — not voidable, but void; and civil courts have never failed, upon a proper suit, to give a party redress, who has been injured by a void process or void judgment. In England, it has been done by the civil courts, ever since the passage of the 1 Mutiny Act of William

and Mary, ch. 5, 3d April, 1689. And it must have been with a direct reference to what the law was in England, that this court said, in *Wise* v. *Withers*, 3 Cr. 337, that in such a case "the court and the officers are all trespassers." When we speak of proceedings in a cause, or for the organization of the court and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence or law, but of a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law.

Courts martial derive their jurisdiction and are regulated with us by an Act of Congress, in which the crimes which may be committed, the manner of charging the accused, and of trial, and the punishments which may be inflicted, are expressed in terms; or they may get jurisdiction by a fair deduction from the definition of the crime that it comprehends, and that the legislature meant to subject to punishments one of a minor degree of a kindred character, which has already been recognized to be such by the practice of courts martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts martial. And when offences and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article of the rules for the government of the navy, which means that courts martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offences by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts martial, and the offences of which the different courts martial have cognizance. With the sentences of courts martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. But we repeat, if a court martial has no jurisdiction over the subject-matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction and give him redress. *Harman* v. *Tappenden*, 1 East. 555: as to ministerial officers, Marshall's Case, 10 Cr. 76; *Morrison* v. *Sloper*,

Wells, 30; *Parton* v. *Williams*, B. and A. 330; and as to justices of the peace, by Ld. Tenterden, in *Basten* v. *Carew*, 3 B. and C. 653; *Mules* v. *Calcott*, 6 Bins, 85.

Such is the law of England. By the Mutiny Acts, courts martial have been created, with authority to try those who are a part of the army or navy for breaches of military or naval duty. It has been repeatedly determined that the sentences of those courts are conclusive in any action brought in the courts of common law. But the courts of common law will examine whether courts martial have exceeded the jurisdiction given them, though it is said, "not, however, after the sentence has been ratified and carried into execution." *Grant* v. *Gould*, 2 H. Black, 69; Ship Bounty, 1 East. 313; Shalford's Case, 1 East. 313; *Mann* v. *Owen*, 9 B. and C. 595; in the matter of Poe, 5 B. and A. 681, on a motion for a prohibition. A judge, or any person acting by authority as such, where he has over the subject-matter, and over the person, a general jurisdiction which he has not exceeded, will not be liable to have his judgment examined in an action brought against himself; but if jurisdiction be wanting over the subject-matter, and over the person, such judgment would be examinable. *Hammond* v. *Howel*, 1 Mod. 184; *Garnett* v. *Ferrand*, 6 B. and C. 611; *Moslyn* v. *Fabugas*, Cow. 172; Bonham's Case, 8 Co. 114; *Greenwell* v. *Burwell*, 1 Le Roy, 454; by Holt, C. J., 1 Le Roy, 470; *Lumley* v. *Lance*, 2 Le Roy, 767; *Basten* v. *Carew*, 3 B. and C. 649. The preceding cited cases relate to judges of record. As to judges not of record, ecclesiastical judges, *Acherly* v. *Parkerson*, 3 M. and S. 411. Commissioners of court of bequests, *Aldridge* v. *Haines*, 2 B. and Ad. 395. As to returning officer of election, *Ashby* v. *White*, 2 Ld. Raym. 941; *Cullen* v. *Morris*, 2 Start, 577.

In this case, all of us think that the court which tried Dynes had jurisdiction over the subject-matter of the charge against him; that the sentence of the court against him was not forbidden by law; and that, having been approved by the Secretary of the Navy as a fair deduction from the 17th article of the Act of April 23d, 1800, and that, Dynes having been brought to Washington as a prisoner by the direction of the Secretary, that the President of the United States, as constitutional commander-in-chief of the army and navy, and in virtue of his constitutional obligation, that "He shall take care that the laws be faithfully executed," violated no law in directing the marshal to receive the prisoner Dynes from the officer commanding the United States steamer "Engineer," for the purpose of transferring him to the penitentiary of the District of Columbia; and, consequently, that the marshal is not answerable in this action of trespass and false imprisonment.

We affirm the judgment of the Circuit Court.[1]

Mr. Justice McLean dissented.

[1] "Courts martial of the United States, although their legal sanction is no less than that of the Federal courts, being equally with these authorized by the Constitution, are, unlike these, not a portion of the Judiciary of the United States, and are

THE PRIZE CASES.

THE BRIG "AMY WARWICK."—THE BARK "HIAWATHA." THE SCHOONER "BRILLIANTE."—THE SCHOONER "CRENSHAW."

SUPREME COURT OF THE UNITED STATES. 1863.

[2 *Black*, 635.][1]

THE case of the "Amy Warwick" was argued by *Mr. Dana*, of Massachusetts, for libellants, and by *Mr. Bangs*, of Massachusetts, for claimants. The "Crenshaw," by *Mr. Eames*, of Washington City, for libellants, and by *Messrs. Lord, Edwards*, and *Donohue*, of New York, for claimants. The "Hiawatha," by *Mr. Evarts* and *Mr. Sedgwick*, of New York, for libellants, and by *Mr. Edwards*, of New York, for claimants. The "Brilliante," by *Mr. Eames*, of Washington City, for libellants, and by *Mr. Carlisle*, of Washington City, for claimants.

MR. JUSTICE GRIER. There are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each. They are, 1st. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the government, on the principles of international law, as known and acknowledged among civilized States? 2d. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as "enemies' property"?

I. Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

That a blockade *de facto* actually existed, and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the President, as the Executive Chief of the Government and Commander-in-Chief of the Army and Navy, was the proper person to make such notification, has not been, and cannot be disputed.

thus not included among the 'inferior' courts which Congress 'may from time to time ordain and establish.' [Here follows a quotation from *Dynes* v. *Hoover*, 'the leading case on this subject.'] Not belonging to the judicial branch of the government, it follows that courts martial must pertain to the executive department; and they are in fact simply instrumentalities of the executive power, provided by Congress for the President as commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives." — 1 *Winthrop's Military Law*, pp 52–53. — ED.

[1] The statement of facts is omitted. — ED.

The right of prize and capture has its origin in the *jus belli*, and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us inquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents, — the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"A civil war," says Vattel, "breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

"This being the case, it is very evident that the common laws of war — those maxims of humanity, moderation, and honor — ought to be observed by both parties in every civil war. Should the sovereign

conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, etc.; the war will become cruel, horrible, and every day more destructive to the nation."

As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and know.

The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land."

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. 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 28, 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 13, 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 Wheaton, 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, etc., 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.

On this first question therefore we are of the opinion that the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard.

II. We come now to the consideration of the second question. What is included in the term "enemies' property"?

Is the property of all persons residing within the territory of the States now in rebellion, captured on the high seas, to be treated as "enemies' property" whether the owner be in arms against the government or not?

The right of one belligerent not only to coerce the other by direct

force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war. Money and wealth, the products of agriculture and commerce, are said to be the sinews of war, and as necessary in its conduct as numbers and physical force. Hence it is, that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy, by capturing his property on the high seas.

The appellants contend that the term "enemy" is properly applicable to those only who are subjects or citizens of a foreign State at war with our own. They quote from the pages of the common law, which say, "that persons who wage war against the King may be of two kinds, subjects or citizens. The former are not proper enemies, but rebels and traitors; the latter are those that come properly under the name of enemies."

They insist, moreover, that the President himself, in his proclamation, admits that great numbers of the persons residing within the territories in possession of the insurgent government are loyal in their feelings, and forced by compulsion and the violence of the rebellious and revolutionary party and its "*de facto* government" to submit to their laws and assist in their scheme of revolution; that the acts of the usurping government cannot legally sever the bond of their allegiance; they have, therefore, a co-relative right to claim the protection of the government for their persons and property, and to be treated as loyal citizens, till legally convicted of having renounced their allegiance and made war against the government by treasonably resisting its laws.

They contend, also, that insurrection is the act of individuals and not of a government or sovereignty; that the individuals engaged are subjects of law. That confiscation of their property can be effected only under a municipal law. That by the law of the land such confiscation cannot take place without the conviction of the owner of some offence, and finally that the secession ordinances are nullities and ineffectual to release any citizen from his allegiance to the national Government, and consequently that the Constitution and laws of the United States are still operative over persons in all the States for punishment as well as protection.

This argument rests on the assumption of two propositions, each of which is without foundation on the established law of nations. It assumes that where a civil war exists, the party belligerent claiming to be sovereign cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battle-field or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is "unconstitutional"! Now, it is a proposition never doubted, that the belligerent party who claims to be sovereign may

exercise both belligerent and sovereign rights (see 4 Cr. 272). Treating the other party as a belligerent and using only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war, cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity. We have shown that a civil war such as that now waged between the Northern and Southern States is properly conducted according to the humane regulations of public law as regards capture on the ocean.

Under the very peculiar Constitution of this government, although the citizens owe supreme allegiance to the Federal government, they owe also a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws.

Hence, in organizing this rebellion, they have acted as States claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal Government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by wager of battle. The ports and territory of each of these States are held in hostility to the General Government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force — south of this line is enemies' territory, because it is claimed and held in possession by an organized hostile and belligerent power.

All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their government, and are none the less enemies because they are traitors.

But in defining the meaning of the term "enemies' property," we will be led into error if we refer to Fleta and Lord Coke for their definition of the word "enemy." It is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law.

Whether property be liable to capture as "enemies' property" does not in any manner depend on the personal allegiance of the owner. "It is the illegal traffic that stamps it as 'enemies' property.' It is of no consequence whether it belongs to an ally or a citizen. 8 Cr. 384. The owner, *pro hac vice*, is an enemy." 3 Wash. C. C. R. 183.

The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicil of the owner, and much more so if he reside and trade within their territory.

III. We now proceed to notice the facts peculiar to the several cases submitted for our consideration. The principles which have just been

stated apply alike to all of them. [Here follows a separate, brief consideration of each of the cases, affirming the decrees below except as to a part of the goods in the "Crenshaw," which were restored to their owner.[1] The dissenting opinion of NELSON, J. (given in the case of the "Hiawatha"), in which TANEY, C. J., and JUSTICES CATRON and CLIFFORD, concurred, is given in a note.[2]]

[1] See 1 Winthrop's "Military Law," 957–958.

From ADAMS's *Life of R. H. Dana*, ii. 266. — "Few of those even most familiar with the history of the Civil War knew anything of the important legal episodes connected with it. Much has been said and written of the gathering of armies, of the fitting out of fleets, of the blockade of the rebel ports, and of the political and diplomatic discussions which absorbed the time and energies of the statesmen and diplomats of that day; but out of these grew a class of questions, the decision of which by the courts of law had a most important bearing on military operations. The issue of President Lincoln's proclamations of April 19 and 27, 1861, and, in pursuance thereof, the blockade of the Southern ports and the capture on the high seas of ships carrying contraband goods, or of ships owned by parties residing in the States in rebellion, implying, of course, proceedings in the prize courts for the condemnation of such captured vessels, raised in those courts a class of questions that involved the authority of the government to suppress the rebellion. This was the momentous issue presented in the cause known as 'The Prize Cases,' which was decided by the Supreme Court of the United States at its December term, 1862. Mr. Dana thus described it in a letter to Mr. Adams written immediately upon his return home after making his argument before the full bench at Washington: —

"'[1863. March 9, Boston.] These causes present our Constitution in a new and peculiar light. In all States but ours, now existing or that have ever existed, the function of the judiciary is to interpret the acts of the government. In ours, it is to decide upon their legality. The government is carrying on a war. It is exerting all the powers of war. Yet the claimants of the captured vessels not only seek to save their vessels by denying that they are liable to capture, but deny the right of the government to exercise war powers, — deny that this can be, in point of law, a war. So the judiciary is actually, after a war of twenty-three months' duration, to decide whether the government has the legal capacity to exert these war powers. This is the result of a written Constitution, as a supreme law, under which there is no sovereign power, but only coördinate departments.

"'Contemplate, my dear sir, the possibility of a Supreme Court deciding that this blockade is illegal! What a position it would put us in before the world whose commerce we have been illegally prohibiting, whom we have unlawfully subjected to a cotton famine and domestic dangers and distress for two years! It would end the war, and where it would leave us with neutral powers it is fearful to contemplate! Yet such an event is legally possible, — I do not think it probable, hardly possible, in fact. But last year I think there was danger of such a result, when the blockade was new, and before the three new judges were appointed. The bare contemplation of such a possibility makes us pause in our boastful assertion that our written Constitution is clearly the best adapted to all exigencies, the last, best gift to man.'

"The three new judges here referred to were Davis, Swayne, and Miller, all appointed by President Lincoln in October, 1862. Before they took their seats, the Supreme Court was composed of the Chief Justice, Taney, and of the five associates, justices Wayne, Catron, Nelson, Grier, and Clifford, all democrats, and three of them appointed from slaveholding States. What made the situation more grave was the fact that the Chief Justice had already, from his circuit bench, challenged the legality of some of President Lincoln's most important and essential acts." — ED.

[2] MR. JUSTICE NELSON, dissenting. The property in this case, vessel and cargo, was seized by a government vessel on the 20th of May, 1861, in Hampton Roads, for an alleged violation of the blockade of the ports of the State of Virginia. . . .

Another objection taken to the seizure of this vessel and cargo is, that there was

no existing war between the United States and the States in insurrection within the meaning of the law of nations, which drew after it the consequences of a public or civil war. A contest by force between independent sovereign States is called a public war; and, when duly commenced by proclamation or otherwise, it entitles both of the belligerent parties to all the rights of war against each other, and as respects neutral nations. Chancellor Kent observes, "Though a solemn declaration, or previous notice to the enemy, be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things." "Such an official act operates from its date to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them." He further observes, "as war cannot lawfully be commenced on the part of the United States without an Act of Congress, such Act is, of course, a formal notice to all the world, and equivalent to the most solemn declaration."

The legal consequences resulting from a state of war between two countries at this day are well understood, and will be found described in every approved work on the subject of international law. The people of the two countries become immediately the enemies of each other — all intercourse commercial or otherwise between them unlawful — all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemies' property, the drawing of bills of exchange or purchase on the enemies' country, the remission of bills or money to it, are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved, and, in fine, interdiction of trade and intercourse direct or indirect is absolute and complete by the mere force and effect of war itself. All the property of the people of the two countries on land or sea is subject to capture and confiscation by the adverse party as enemies' property, with certain qualifications as it respects property on land (*Brown* v. *United States*, 8 Cranch, 110), all treaties between the belligerent parties are annulled. The ports of the respective countries may be blockaded, and letters of marque and reprisal granted as rights of war, and the law of prizes as defined by the law of nations comes into full and complete operation, resulting from maritime captures, *jure belli*. War also effects a change in the mutual relations of all States or countries, not directly, as in the case of the belligerents, but immediately and indirectly, though they take no part in the contest, but remain neutral.

This great and pervading change in the existing condition of a country, and in the relations of all her citizens or subjects, external and internal, from a state of peace, is the immediate effect and result of a state of war: and hence the same code which has annexed to the existence of a war all these disturbing consequences has declared that the right of making war belongs exclusively to the supreme or sovereign power of the State.

This power in all civilized nations is regulated by the fundamental laws or municipal constitution of the country. By our Constitution this power is lodged in Congress. Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

We have thus far been considering the status of the citizens or subjects of a country at the breaking out of a public war when recognized or declared by the competent power.

In the case of a rebellion or resistance of a portion of the people of a country against the established government, there is no doubt, if in its progress and enlargement the government thus sought to be overthrown sees fit, it may by the competent power recognize or declare the existence of a state of civil war, which will draw after it all the consequences and rights of war between the contending parties as in the case of a public war. Mr. Wheaton observes, speaking of civil war, "But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations." It is not to be denied, therefore, that if a civil war existed between that portion of the people in

organized insurrection to overthrow this government at the time this vessel and cargo were seized, and if she was guilty of a violation of the blockade, she would be lawful prize of war. But before this insurrection against the established Government can be dealt with on the footing of a civil war, within the meaning of the law of nations and the Constitution of the United States, and which will draw after it belligerent rights, it must be recognized or declared by the war-making power of the Government. No power short of this can change the legal status of the Government or the relations of its citizens from that of peace to a state of war, or bring into existence all those duties and obligations of neutral third parties growing out of a state of war. The war power of the Government must be exercised before this changed condition of the Government and people and of neutral third parties can be admitted. There is no difference in this respect between a civil and a public war.

We have been more particular upon this branch of the case than would seem to be required on account of any doubt or difficulties attending the subject in view of the approved works upon the law of nations, or from the adjudication of the courts, but because some confusion existed on the argument as to the definition of a war that drew after it all the rights of prize of war. Indeed, a great portion of the argument proceeded upon the ground that these rights could be called into operation — enemies' property captured — blockades set on foot and all the rights of war enforced in prize courts — by a species of war unknown to the law of nations and to the Constitution of the United States.

An idea seemed to be entertained that all that was necessary to constitute a war was organized hostility in the district of country in a state of rebellion — that conflicts on land and on sea — the taking of towns and capture of fleets — in fine, the magnitude and dimensions of the resistance against the Government — constituted war with all the belligerent rights belonging to civil war. With a view to enforce this idea, we had, during the argument, an imposing historical detail of the several measures adopted by the Confederate States to enable them to resist the authority of the General Government, and of many bold and daring acts of resistance and of conflict. It was said that war was to be ascertained by looking at the armies and navies or public force of the contending parties, and the battles lost and won — that in the language of one of the learned counsel, "Whenever the situation of opposing hostilities has assumed the proportions and pursued the methods of war, then peace is driven out, the ordinary authority and administration of law are suspended, and war in fact and by necessity is the status of the nation until peace is restored and the laws resumed their dominion."

Now, in one sense, no doubt this is war, and may be a war of the most extensive and threatening dimensions and effects, but it is a statement simply of its existence in a material sense, and has no relevancy or weight when the question is, what constitutes war in a legal sense, in the sense of the law of nations, and of the Constitution of the United States? For it must be a war in this sense to attach to it all the consequences that belong to belligerent rights. Instead, therefore, of inquiring after armies and navies, and victories lost and won, or organized rebellion against the General Government, the inquiry should be into the law of nations and into the municipal fundamental laws of the Government. For we find there that to constitute a civil war in the sense in which we are speaking, before it can exist, in contemplation of law, it must be recognized or declared by the sovereign power of the State, and which sovereign power by our Constitution is lodged in the Congress of the United States — civil war, therefore, under our system of government, can exist only by an Act of Congress, which requires the assent of two of the great departments of the Government, the Executive and Legislative.

We have thus far been speaking of the war power under the Constitution of the United States, and as known and recognized by the law of nations. But we are asked, what would become of the peace and integrity of the Union in case of an insurrection at home or invasion from abroad if this power could not be exercised by the President in the recess of Congress, and until that body could be assembled?

The framers of the Constitution fully comprehended this question, and provided

for the contingency. Indeed, it would have been surprising if they had not, as a rebellion had occurred in the State of Massachusetts while the Convention was in session, and which had become so general that it was quelled only by calling upon the military power of the State. 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." Another clause, "that 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;" and, again, "He shall take care that the laws shall be faithfully executed." Congress passed laws on this subject in 1792 and 1795. 1 United States Laws, pp. 264, 424.

The last Act provided that whenever the United States shall be invaded or be in imminent danger of invasion from a foreign nation, it shall be lawful for the President to call forth such number of the militia most convenient to the place of danger, and in case of insurrection in any State against the government thereof it shall be lawful for the President, on the application of the Legislature of such State, if in session, or if not, of the Executive of the State, to call forth such number of militia of any other State or States as he may judge sufficient to suppress such insurrection.

The 2d section provides, that when the laws of the United States shall be opposed, or the execution obstructed in any State by combinations too powerful to be suppressed by the course of judicial proceedings, it shall be lawful for the President to call forth the militia of such State, or of any other State or States as may be necessary to suppress such combinations; and by the Act 3 March, 1807 (2 U. S. Laws, 443), it is provided that in case of insurrection or obstruction of the laws, either in the United States or of any State or Territory, where it is lawful for the President to call forth the militia for the purpose of suppressing such insurrection, and causing the laws to be executed, it shall be lawful to employ for the same purpose such part of the land and naval forces of the United States as shall be judged necessary.

It will be seen, therefore, that ample provision has been made under the Constitution and laws against any sudden and unexpected disturbance of the public peace from insurrection at home or invasion from abroad. The whole military and naval power of the country is put under the control of the President to meet the emergency. He may call out a force in proportion to its necessities, one regiment or fifty, one ship-of-war or any number at his discretion. If, like the insurrection in the State of Pennsylvania in 1793, the disturbance is confined to a small district of country, a few regiments of the militia may be sufficient to suppress it. If of the dimension of the present, when it first broke out, a much larger force would be required. But whatever its numbers, whether great or small, that may be required, ample provision is here made; and whether great or small, the nature of the power is the same. It is the exercise of a power under the municipal laws of the country and not under the law of nations; and, as we see, furnishes the most ample means of repelling attacks from abroad or suppressing disturbances at home until the assembling of Congress, who can, if it be deemed necessary, bring into operation the war power, and thus change the nature and character of the contest. Then, instead of being carried on under the municipal law of 1795, it would be under the law of nations, and the Acts of Congress as war measures with all the rights of war.

It has been argued that the authority conferred on the President by the Act of 1795 invests him with the war power. But the obvious answer is, that it proceeds from a different clause in the Constitution and which is given for different purposes and objects, namely, to execute the laws and preserve the public order and tranquillity of the country in a time of peace by preventing or suppressing any public disorder or disturbance by foreign or domestic enemies. Certainly, if there is any force in this argument, then we are in a state of war with all the rights of war, and all the penal consequences attending it every time this power is exercised by calling out a military force to execute the laws or to suppress insurrection or rebellion; for the nature of the power cannot depend upon the numbers called out. If so, what numbers will constitute war and what numbers will not? It has also been argued that this power of the President from necessity should be construed as vesting him with the war power,

or the Republic might greatly suffer or be in danger from the attacks of the hostile party before the assembling of Congress. But we have seen that the whole military and naval force are in his hands under the municipal laws of the country. He can meet the adversary upon land and water with all the forces of the Government. The truth is, this idea of the existence of any necessity for clothing the President with the war power, under the Act of 1795, is simply a monstrous exaggeration; for, besides having the command of the whole of the army and navy, Congress can be assembled within any thirty days, if the safety of the country requires that the war power shall be brought into operation.

The Acts of 1795 and 1807 did not, and could not under the Constitution, confer on the President the power of declaring war against a State of this Union, or of deciding that war existed, and upon that ground authorize the capture and confiscation of the property of every citizen of the State whenever it was found on the waters. The laws of war, whether the war be civil or *inter gentes*, as we have seen, convert every citizen of the hostile State into a public enemy, and treat him accordingly, whatever may have been his previous conduct. This great power over the business and property of the citizen is reserved to the legislative department by the express words of the Constitution. It cannot be delegated or surrendered to the Executive. Congress alone can determine whether war exists or should be declared; and until they have acted, no citizen of the State can be punished in his person or property, unless he has committed some offence against a law of Congress passed before the act was committed, which made it a crime, and defined the punishment. The penalty of confiscation for the acts of others with which he had no concern cannot lawfully be inflicted.

In the breaking out of a rebellion against the established Government, the usage in all civilized countries, in its first stages, is to suppress it by confining the public forces and the operations of the Government against those in rebellion, and at the same time extending encouragement and support to the loyal people with a view to their co-operation in putting down the insurgents. This course is not only the dictate of wisdom, but of justice. This was the practice of England in Monmouth's rebellion in the reign of James the Second, and in the rebellions of 1715 and 1745, by the Pretender and his son, and also in the beginning of the rebellion of the Thirteen Colonies of 1776. It is a personal war against the individuals engaged in resisting the authority of the Government. This was the character of the war of our Revolution till the passage of the Act of the Parliament of Great Britain of the 16th of George Third, 1776. By that act all trade and commerce with the Thirteen Colonies was interdicted and all ships and cargoes belonging to the inhabitants subjected to forfeiture as if the same were the ships and effects of open enemies. From this time the war became a territorial civil war between the contending parties, with all the rights of war known to the law of nations. Down to this period the war was personal against the rebels, and encouragement and support constantly extended to the loyal subjects who adhered to their allegiance, and although the power to make war existed exclusively in the King, and of course this personal war carried on under his authority, and a partial exercise of the war power, no captures of the ships or cargo of the rebels as enemies' property on the sea, or confiscation in Prize Courts as rights of war, took place until after the passage of the Act of Parliament. Until the passage of the Act the American subjects were not regarded as enemies in the sense of the law of nations. The distinction between the loyal and rebel subjects was constantly observed. That Act provided for the capture and confiscation as prize of their property as if the same were the property "of open enemies." For the first time the distinction was obliterated.

So the war carried on by the President against the insurrectionary districts in the Southern States, as in the case of the King of Great Britain in the American Revolution, was a personal war against those in rebellion, and with encouragement and support of loyal citizens with a view to their co-operation and aid in suppressing the insurgents, with this difference, as the war-making power belonged to the King, he might have recognized or declared the war at the beginning to be a civil war, which would draw after it all the rights of a belligerent, but in the case of the

President no such power existed: the war therefore from necessity was a personal war, until Congress assembled and acted upon this state of things.

Down to this period the only enemy recognized by the Government was the persons engaged in the rebellion, all others were peaceful citizens, entitled to all the privileges of citizens under the Constitution. Certainly it cannot rightfully be said that the President has the power to convert a loyal citizen into a belligerent enemy or confiscate his property as enemy's property.

Congress assembled on the call for an extra session the 4th of July, 1861, and among the first acts passed was one in which the President was authorized by proclamation to interdict all trade and intercourse between all the inhabitants of States in insurrection and the rest of the United States, subjecting vessel and cargo to capture and condemnation as prize, and also to direct the capture of any ship or vessel belonging in whole or in part to any inhabitant of a State whose inhabitants are declared by the proclamation to be in a state of insurrection, found at sea or in any part of the rest of the United States. Act of Congress of 13th of July, 1861, secs. 5, 6. The 4th section also authorized the President to close any port in a Collection District obstructed so that the revenue could not be collected, and provided for the capture and condemnation of any vessel attempting to enter.

The President's Proclamation was issued on the 16th of August following, and embraced Georgia, North and South Carolina, part of Virginia, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida.

This Act of Congress, we think, recognized a state of civil war between the Government and the Confederate States, and made it territorial. The Act of Parliament of 1776, which converted the rebellion of the Colonies into a civil territorial war, resembles, in its leading features, the act to which we have referred. Government in recognizing or declaring the existence of a civil war between itself and a portion of the people in insurrection usually modifies its effects with a view as far as practicable to favor the innocent and loyal citizens or subjects involved in the war. It is only the urgent necessities of the Government, arising from the magnitude of the resistance, that can excuse the conversion of the personal into a territorial war, and thus confound all distinction between guilt and innocence; hence the modification in the Act of Parliament declaring the territorial war.

It is found in the 44th section of the Act, which for the encouragement of well affected persons, and to afford speedy protection to those desirous of returning to their allegiance, provided for declaring such inhabitants of any colony, county, town, port, or place, at peace with his Majesty, and after such notice by proclamation there should be no further captures. The Act of 13th of July provides that the President may, in his discretion, permit commercial intercourse with any such part of a State or section, the inhabitants of which are declared to be in a state of insurrection (§ 5), obviously intending to favor loyal citizens and encourage others to return to their loyalty. And the 8th section provides that the Secretary of the Treasury may mitigate or remit the forfeitures and penalties incurred under the Act. The Act of 31st July is also one of a kindred character. That appropriates $2,000,000 to be expended under the authority of the President in supplying and delivering arms and munitions of war to loyal citizens residing in any of the States of which the inhabitants are in rebellion, or in which it may be threatened, We agree, therefore, that the Act 13th July, 1861, recognized a state of civil war between the government and the people of the States described in that proclamation.

The cases of the *United States* v. *Palmer* (3 Wh. 610); *Divina Pastora*, and 4 Ibid. 52, and that class of cases to be found in the reports are referred to as furnishing authority for the exercise of the war power claimed for the President in the present case. These cases hold that when the government of the United States recognizes a state of civil war to exist between a foreign nation and her colonies, but remaining itself neutral, the courts are bound to consider as lawful all those acts which the new government may direct against the enemy, and we admit the President who conducts the foreign relations of the government may fitly recognize or refuse to do so, the existence of civil war in the foreign nation under the circumstances stated.

But this is a very different question from the one before us, which is whether the

President can recognize or declare a civil war, under the Constitution, with all its belligerent rights, between his own government and a portion of its citizens in a state of insurrection. That power, as we have seen, belongs to Congress. We agree when such a war is recognized or declared to exist by the war-making power, but not otherwise, it is the duty of the courts to follow the decision of the political power of the government.

The case of *Luther* v. *Borden et al.*, (7 How., 45,) which arose out of the attempt of an assumed new government in the State to overthrow the old and established Government of Rhode Island by arms. The Legislature of the old Government had established martial law, and the Chief Justice in delivering the opinion of the court observed, among other things, that "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 overcome the unlawful opposition."

But it is only necessary to say, that the term "war" must necessarily have been used here by the Chief Justice in its popular sense, and not as known to the law of nations, as the State of Rhode Island confessedly possessed no power under the Federal Constitution to declare war.

Congress on the 6th of August, 1862, passed an Act confirming all acts, proclamations, and orders of the President, after the 4th of March, 1861, respecting the army and navy, and legalizing them, so far as was competent for that body, and it has been suggested, but scarcely argued, that this legislation on the subject had the effect to bring into existence an *ex post facto* civil war with all the rights of capture and confiscation, *jure belli*, from the date referred to. An *ex post facto* law is defined, when, after an action, indifferent in itself, or lawful, is committed, the Legislature then, for the first time, declares it to have been a crime, and inflicts punishment upon the person who committed it. The principle is sought to be applied in this case. Property of the citizen or foreign subject engaged in lawful trade at the time, and illegally captured, which must be taken as true if a confirmatory act be necessary, may be held and confiscated by subsequent legislation. In other words, trade and commerce authorized at the time by Acts of Congress and treaties may, by *ex post facto* legislation, be changed into illicit trade and commerce, with all its penalties and forfeitures annexed and enforced. The instance of the seizure of the Dutch ships in 1803 by Great Britain before the war, and confiscation after the declaration of war, which is well known, is referred to as an authority. But there the ships were seized by the war power, the orders of the Government, the seizure being a partial exercise of that power, and which was soon after exercised in full.

The precedent is one which has not received the approbation of jurists, and is not to be followed. See W. B. Lawrence, 2d ed. Wheaton's Elements of Int. Law, pt. 4, ch. 1, sec. 11, and note. But, admitting its full weight, it affords no authority in the present case. Here the captures were without any Constitutional authority, and void; and, on principle, no subsequent ratification could make them valid.

Upon the whole, after the most careful consideration of this case which the pressure of other duties has admitted, I am compelled to the conclusion that no civil war existed between this Government and the States in insurrection till recognized by the Act of Congress 13th of July, 1861; that the President does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war; that this power belongs exclusively to the Congress of the United States, and, consequently, that the President had no power to set on foot a blockade under the law of nations, and that the capture of the vessel and cargo in this case, and in all cases before us in which the capture occurred before the 13th of July, 1861, for breach of blockade, or as enemies' property, are illegal and void, and that the decrees of condemnation should be reversed and the vessel and cargo restored.

THE PROTECTOR.

SUPREME COURT OF THE UNITED STATES. 1871.

[12 *Wall.* 700.]

APPEAL from the Circuit Court of the United States for the District of Louisiana.

This was a motion by *Mr. P. Phillips* to dismiss an appeal from a decree of the Circuit Court of the United States in the Southern District of Alabama. A motion to dismiss an appeal from the same decree, for the reason that it was not brought within one year from the passage of the Act of March 2, 1867 (14 Stat. at Large, 545), had been made and denied at the December Term, 1869. 9 Wall. 689. The appeal was subsequently dismissed on another ground. 11 Wall. 82. The ground of this present motion was that more than five years, excluding the time of the rebellion, elapsed after the rendering of the decree, before the appeal was brought.

By the Act of 1789 it is provided that writs of error shall not be brought but within five years from the rendering or passing the judgment or decree complained of. By the Act of 1803, appeals from decrees were allowed, subject to the same rules, regulations, and restrictions as writs of error. 2 Stat. at Large, 244. As a writ of error is not brought (*Brooks* v. *Norris*, 11 How. 204) until it is filed in the court where the judgment was rendered, so an appeal, as this court considers, is not brought until it is rendered or filed in the same way. The decree in this case was rendered on the 5th of April, 1861, and the present appeal was allowed on the 6th of May. 1871, and filed in the clerk's office of the proper court, or brought, on the 17th of May, 1871.

In *Hanger* v. *Abbott* (6 Wall. 532; *The Protector*, 9 Id. 659) it was held that the Statute of Limitations did not run, during the rebellion, against citizens of States adhering to the national government having demands against citizens of the insurgent States. And the question of course was whether, making allowance for the suspension of time produced by the rebellion, the appeal was or was not in season.

Mr. Phillips contended that it was not; *Mr. F. S. Blount*, *contra*, urging that it was.

THE CHIEF JUSTICE delivered the opinion of the court.

The question in the present case is, when did the rebellion begin and end? In other words, what space of time must be considered as excepted from the operation of the Statute of Limitations by the war of the rebellion?

Acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and the close of the late Civil War, that it would be difficult, if not impossible, to say on

what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken.

The proclamation of intended blockade by the President may therefore be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second. But the war did not begin or close at the same time in all the States. There were two proclamations of intended blockade: the first of the 19th of April, 1861 (12 Stat. at Large, 1258), embracing the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas; the second, of the 27th of April, 1861 (Id. 1259), embracing the States of Virginia, and North Carolina; and there were two proclamations declaring that the war had closed: one issued on the 2d of April, 1866 (14 Stat. at Large, 811), embracing the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana, and Arkansas; and the other issued on the 20th of August, 1866 (Id. 814), embracing the State of Texas.

In the absence of more certain criteria, of equally general application, we must take the dates of these proclamations as ascertaining the commencement and the close of the war in the States mentioned in them. Applying this rule to the case before us, we find that the war began in Alabama on the 19th of April, 1861, and ended on the 2d of April, 1866. More than five years, therefore, had elapsed from the close of the war till the 17th of May, 1871, when this appeal was brought. The motion to dismiss, therefore, must be *Granted.*

JOHNSON *v.* DUNCAN ET AL.

SUPREME COURT OF LOUISIANA. 1815.

[3 *Martin*, 530.][1]

MARTIN, J. A motion that the court might proceed in this case has been resisted on two grounds: —

1. That the city and its environs were, by general orders of the officer commanding the military district, put on the 15th of December last under strict martial law.

[1] On p. 528 the reporter says: "The city of New Orleans being besieged by a British army on the first Monday [the 2d] of January, 1815, the court was not opened." On p. 529 of the February term, he says: "The din of war prevented any business being done during this term." The case here given is the only one in the March term, and on p. 558 it is said, "There was not any business done during the Month of April" The "Battle of New Orleans" had taken place on January 8, 1815, before the news had come of the signing of the treaty of peace at Ghent, on December 24, 1814. — ED.

2d. That by the 3d section of an Act of Assembly, approved on the 18th of December last, all proceedings in any civil case are suspended.

1. At the close of the argument, on Monday last, we thought it our duty, lest the smallest delay should countenance the idea, that this court entertain any doubt on the first ground, instantly to declare *viva voce* (although the practice is to deliver our opinions in writing) that the exercise of an authority, vested by law in this court, could not be suspended by any man.

In any other State but this, in the population of which are many individuals who, not being perfectly acquainted with their rights, may easily be imposed on, it could not be expected that the judges of this court should, in complying with the constitutional injunction in all cases to adduce the reasons on which their judgment is founded, take up much time to show that this court is bound utterly to disregard what is thus called martial law; if anything be meant thereby, but the strict enforcing of the rules and articles for the government of the army of the United States, established by Congress or any Act of that body relating to military matters, on all individuals belonging to the army or militia in the service of the United States. Yet, we are told that by this proclamation of martial law the officer who issued it has conferred on himself, over all his fellow-citizens, within the space which he has described, a supreme and unlimited power, which being incompatible with the exercise of the functions of civil magistrates, necessarily suspends them.

This bold and novel assertion is said to be supported by the 9th section of the first article of the Constitution of the United States, in which are detailed the limitations of the power of the legislature of the Union. It is there provided that the privilege of the writ of *habeas corpus* shall not be suspended, unless, when in cases of invasion or rebellion, the public safety may require it. We are told that the commander of the military district is the person who is to suspend the writ, and is to do so, whenever in his judgment the public safety appears to require it; that, as he may thus paralyze the arm of the justice of his country in the most important case, the protection of the personal liberty of the citizen, it follows that, as he who can do the more can do the less, he can also suspend all other functions of the civil magistrate, which he does by his proclamation of martial law.

This mode of reasoning varies *toto cœlo* from the decision of the Supreme Court of the United States, in the case of *Swartwout and Bollman*, arrested in this city in 1806 by General Wilkinson. The court there declared that the Constitution had exclusively vested in Congress the right of suspending the privilege of the writ of *habeas corpus*, and that body was the sole judge of the necessity that called for the suspension. "If, at any time," said the Chief Justice, "the public safety shall require the suspension of the powers vested in the courts of the United States by this Act (the *Habeas Corpus* Act), it is for the legislature to say so. This question depends on political considerations, on

which the legislature is to decide. Till the legislative will be expressed, this court can only see its duties, and must obey the law." 4 Cranch, 101.

The high authority of this decision seems however to be disregarded; and a contrary opinion is said to have been lately acted upon, to the distress and terror of the good people of this State: it is therefore meet to dispel the clouds which designing men endeavor to cast on this article of the Constitution, that the people should know that their rights, thus defined, are neither doubtful nor insecure, but supported on the clearest principles of our laws.

Approaching, therefore, the question, as if I were without the above conclusive authority, I find it provided by the Constitution of this State that "no power of suspending the laws of this State shall be exercised, unless by the legislature, or under its authority." The proclamation of martial law, therefore, if intended to suspend the functions of this court or its members, is an attempt to exercise powers thus exclusively vested in the legislature. I therefore cannot hesitate in saying that it is in this respect null and void. If, however, there be aught in the Constitution or laws of the United States that really authorizes the commanding officer of a military district to suspend the laws of this State, as that Constitution and these laws are paramount to those of the State, they must regulate the decision of this court.

This leads me to the examination of the power of suspending the writ of *habeas corpus*, and that which it is said to include, of proclaiming martial law, as noticed in the Constitution of the United States. As in the whole article cited, no mention is made of the power of any other branch of government but the legislative, it cannot be said that any of the limitations which it contains extend to any of the other branches. *Iniquum est perimi de pacto id de quo cogitatum non est.* If, therefore, this suspending power exist in the executive (under whose authority it has been endeavored to exercise it), it exists without any limitation, then the President possesses without a limitation a power which the legislature cannot exercise without a limitation. Thus he possesses a greater power alone than the House of Representatives, the Senate, and himself jointly.

Again, the power of repealing a law and that of suspending it (which is a partial repeal) are legislative powers. For *eodem modo, quo quid constituitur, eodem modo destruitur.* As every legislative power, that may be exercised under the Constitution of the United States, is exclusively vested in Congress, all others are retained by the people of the several States.

In England, at the time of the invasion of the Pretender, assisted by the forces of hostile nations, the *Habeas Corpus* Act was indeed suspended, but the executive did not thus of itself stretch its own authority; the precaution was deliberated upon and taken by the representatives of the people. Delolme, 409. And there the power is safely lodged without the danger of its being abused. Parliament may repeal

the law on which the safety of the people depends; but it is not their own caprices and arbitrary humors, but the caprices and arbitrary humors of other men which they will have gratified, when they shall have thus overthrown the columns of public liberty. Id. 275.

If it be said that the laws of war, being the laws of the United States, authorize the proclamation of martial law, I answer that in peace or in war no law can be enacted but by the legislative power. In England, from whence the American jurist derives his principles in this respect, "martial law cannot be used without the authority of Parliament." 5 Comyns, 229. The authority of the monarch himself is insufficient. In the case of *Grant* v. *Sir C. Gould*, 2 Hen. Bl. 69, which was on a prohibition (applied for in the Court of Common Pleas) to the defendant as judge advocate of a court martial to prevent the execution of the sentence of that military tribunal, the counsel, who resisted the motion, said it was not to be disputed that martial law can only be exercised in England, so far as it is authorized by the Mutiny Act and the Articles of War, all which are established by Parliament, or its authority, and the court declared it totally inaccurate to state any other martial law, as having any place whatever within the realm of England. In that country, and in these States, by martial law is understood the jurisprudence of these cases, which are decided by military judges or courts martial. When martial law is established, and prevails in any country, said Lord Loughborough, in the case cited, it is totally of a different nature from that which is inaccurately called martial law (because the decisions are by a court martial) but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, which was contrary to the Constitution, and which has been for a century totally exploded. When martial law prevails, continues the judge, the authority under which it is exercised claims jurisdiction over all military persons in all circumstances: even their debts are subject to inquiry by military authority, every species of offence committed by any person who appertains to the army is tried, not by a civil judicature, but by the judicature of the corps or regiment to which he belongs.

This is martial law as defined by Hale and Blackstone, and which the court declared not to exist in England. Yet, it is confined to military persons. Here it is contended, and the court must admit, if we sustain the objection, that it extends to all persons, that it dissolves for a while the government of the State.

Yet, according to our laws, all military courts are under a constant subordination to the ordinary courts of law. Officers, who have abused their powers though only in regard to their own soldiers, are liable to prosecution in a court of law, and compelled to make satisfaction. Even any flagrant abuse of authority by members of a court martial, when sitting to judge their own people, and determine in cases entirely of a military kind, makes them liable to the animadversion of the civil judge. Delolme, 447, Jacobs Law Dict. Verbo Court Martial. How preposterous then the idea that a military commander may, by his own

authority, destroy the tribunal established by law as the asylum of those oppressed by military despotism!

2. It is further contended that the 3d section of the Act of Assembly, approved on the 18th December last, suspends all proceedings in civil cases, until the 1st of May next: but it is answered that this section is unconstitutional and void, inasmuch as it violates the Constitution of the United States, which provides that no State shall pass any law impairing the obligations of contracts, these laws delaying for upwards of four months the recovery of sums due on contracts.

It is no longer a question in the United States, whether unconstitutional Acts of the Legislature be of any force and effect. This State is among those, the constitution of which contains an express provision on this subject: "All laws contrary to this Constitution shall be null and void;" and this court, in the case of the syndics of *Brooks* v. *Weyman* [3 Martin], 12, determined it was their province to inquire into and pronounce upon the constitutionality of any law invoked before them. If therefore the section under consideration really impairs the obligations of contracts, we must declare it null and void. . . . [Here follows a discussion of this point.] It does not, however, necessarily follow that an Act called for by other circumstances than the apparent necessity of relieving debtors, one of the consequences of which is nevertheless to work some delay in the prosecution of suits, and consequently to retard the recovery and payment of debts, must always be declared unconstitutional.

In making a contract each party must know that his legal remedy must depend on the laws of the country in which he may institute his suit. That the *lex loci* as to his remedy, even in the States that compose the Federal Union, is susceptible of juridical improvement; that the number of courts of original and appellate jurisdiction, the nature and extent of the respective jurisdiction of these, the number, time, and duration of their sessions must from time to time, especially in new and growing settlements, be regulated by the legislature, according to the wants and exigencies of the country.

If, for example, the sessions of the district courts, which in Louisiana are now held in each parish three times a year, were found too frequent, too inconvenient to jurors, witnesses, and suitors, and too expensive to the State, no one can say that the Legislature could not enact that the sessions of these tribunals should be semi-annual only.

In most of the parish courts of this State, the trial by jury is not in use. Should the people of these parishes solicit the introduction of a jury in these courts, would the Constitution be violated by this improvement in our judicial system? In Pennsylvania and Louisiana, courts of equity, as contradistinguished from courts of law, are unknown. Should the people of these States, noticing the advantages resulting from the division of law and equity proceedings in the neighboring States, see

fit to try the experiment, is there aught in the Constitution of the United States that forbids their representatives in general assembly to accede to their wishes? Yet semi-annual sessions of our district courts, the introduction of the trial by jury, and the institution of courts of equity must lengthen the period between the inception of many a suit and its final determination, and consequently delay some plaintiffs. But as the laws introducing such alterations in the juridical system would be productive of advantages in which both parties to the contract might occasionally participate, they would not, it is presumed, be considered as impairing the obligations of contracts.

Again, in time of war, domestic commotion or epidemy, circumstances may imperiously demand, for a while, even a total suspension of judicial proceedings. A suspension which, in many cases, may be peculiarly beneficial to a plaintiff, who might be nonsuited, if the court in which he may have instituted his suit were to proceed while his duty and that of his agents and the interest of the State called them to a distant part of the country. It would be dangerous in such times, and often impossible, to insist on the regular attendance of the officers of the court, of jurors, witnesses, and parties. No one would, in such cases, doubt the ability, nay, the obligation of the court to adjourn to the probable period of returning tranquillity. Can it be said that the interposition of the legislature, if it happened to be in session, declaring the necessity of such an adjournment, and with a view to that order and regularity which uniformity produces, fixing a day on which juridical business will be resumed throughout the State, would be an act impairing the obligations of contracts?

Even if that day was fixed by half a dozen of weeks beyond that on which any of the courts of the State might conceive they might safely re-enter on the execution of their duties, would not such a court recognize some advantage in their forbearance from pressing business to the injury of such suitors, who, entertaining a different opinion, and having no previous knowledge of the determination of the court, might stand aloof, in the fair persuasion that the happy period was not yet arrived?

I presume that in any time obnoxious to the due administration of justice it is the duty, and within the power, of the legislature, to pass laws to avert or diminish the consequences of the general calamity; and a law called for by such circumstances, and fairly intended to meet the exigency of the day, could not be properly classed among those which impair the obligations of contracts, though one of its consequences would be some delay in the recovery of debts.

Testing, therefore, the section under consideration by the principles which I have thus endeavored to lay down, I find it stated in the preamble that "the present crisis will oblige a great number of citizens to take up arms in the defence of the State and compel them to leave their private affairs in a state of abandonment, which may expose them to great distress, if the legislature should not, by measures adapted to the circumstances, come to their relief." The 3d section next provides

that "no civil suit or action shall be commenced, or prosecuted before any court of record, or any tribunal of the State, till the first of May next."

In fact, at the time the Act was approved, the enemy was fast approaching, and five days after made his appearance within five miles of the city of New Orleans. Shortly after, the whole militia of the State was called *en masse* into service, and they were not discharged till the middle of March. During the most of this period the fate of the contest was doubtful.

It was, therefore, advantageous to all parties that the administration of civil justice should be confined to cautionary steps, which were not suspended. This was beneficial to all parties. Plaintiffs were relieved from attendance upon the courts, and the same indulgence was granted to defendants.

The object of this section of the Act was, therefore, to prevent the ill administration of justice which must have been the consequence of keeping the courts open, while the presence of the enemy disallowed any other attempt but that of expelling him. Another object was to facilitate to every member and officer of the court, and to every individual of the community, the means of rendering himself as useful as he could in repelling the invading foe. From the moment the danger subsided, I mean from the discharge of the militia then called out *en masse*, about six weeks will elapse, a time barely sufficient for the return home of our fellow-citizens who dwell at the greatest distance from the spot which has been the theatre of the war. Violent diseases of the political, as well as of the natural, body are followed by a convalescence, during which, even ordinary exertions may be hurtful. It does not appear to me that the suspension was for a longer time than the courts themselves would have taken, if they had been left to the exercise of their own discretion, unaided by a legislative provision. I am not, therefore, prepared to say that the interference of the legislature was anything else than the exercise of legitimate authority. The suspension of civil proceedings, under some authority or other, for a short time, was a measure imperiously called for; it has been beneficial to plaintiffs as well as to defendants in several cases, and although it may create a little delay in the collection of debts, I do not find myself led by duty or inclination to consider the Act as impairing the obligations of contracts, and I think it the duty of the court to comply with the object by enforcing the law.

[DERBIGNY, J., gave a concurring opinion, at the end of which he said]: "Unexpected fortunate events have changed the face of things before the epoch assigned for resuming the usual course of judicial proceedings; but if the delay fixed by the legislature in their discretion was not unreasonable, they have done nothing more than they had a right to do, and the law must be obeyed.

"The court, therefore, direct that the motion of the appellees be overruled."

The Reporter adds: "The doctrine established in the first part of the opinion of the court in the above case, is corroborated by the decision of the District Court of the United States for the Louisiana District, in the case of *United States* v. *Jackson*, in which the defendant, having acted in opposition to it, was fined $1,000. In *Lamb's Case*, Judge Bay, of South Carolina, recognized the definition of martial law, given by this court, expressing himself thus: 'If by martial law is to be understood that dreadful system, the law of arms, which in former times was exercised by the King of England and his lieutenants when his word was the law, and his will the power by which it was exercised, I have no hesitation in saying that such a monster could not exist in this land of liberty and freedom. The political atmosphere of America would destroy it in embryo. It was against such a tyrannical monster that we triumphed in our revolutionary conflict. Our fathers sealed the conquest by their blood, and their posterity will never permit it to tarnish our soil by its unhallowed feet, or harrow up the feelings of our gallant sons by its ghastly appearance. All our civil institutions forbid it: and the manly hearts of our countrymen are steeled against it. But, if by this military code are to be understood the rules and regulations for the government of our men in arms, when marshalled in defence of our country's rights and honor, then I am bound to say, there is nothing unconstitutional in such a system.' Car. Law Rep. 330."

Ex parte JOHN MERRYMAN.

Circuit Court of the United States for Maryland.
April Term. 1861.

[*Taney's Reports*, 246.]

[The statement of facts gives a petition on behalf of Merryman, confined at Fort McHenry, Baltimore, for a writ of *habeas corpus*, to be directed to Brigadier-General Cadwalader, in command at that place, and an order of the Chief Justice granting the petition, — both dated May 26, 1861. On the return day, May 27, Colonel Lee, in behalf of Gen. Cadwalader, appeared in court with a written communication from that officer, addressed to the Chief Justice and informing him that the prisoner had been arrested under the order of Major-General Kleim and brought to Fort McHenry] "on the 20th [25th] inst. . . . charged with various acts of treason, and with being publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government. He is also informed that it can be clearly established, that the prisoner has made often and unreserved declarations of his association with this organized

force, as being in avowed hostility to the government, and in readiness to co-operate with those engaged in the present rebellion against the government of the United States. He has further to inform you, that he is duly authorized by the President of the United States, in such cases, to suspend the writ of *habeas corpus*, for the public safety.

"This is a high and delicate trust, and it has been enjoined upon him that it should be executed with judgment and discretion, but he is nevertheless, also instructed that in times of civil strife, errors, if any, should be on the side of the safety of the country. He most respectfully submits for your consideration, that those who should co-operate in the present trying and painful position in which our country is placed, should not, by any unnecessary want of confidence in each other, increase our embarrassments.

"He, therefore, respectfully requests that you will postpone further action upon this case, until he can receive instructions from the President of the United States, when you shall hear further from him.

"I have the honor to be, with high respect,

"Your obedient servant,

"GEORGE CADWALADER,

"Brevet Major-General U. S. A. Commanding."

The Chief Justice then inquired of the officer whether he had brought with him the body of John Merryman, and on being answered that he had no instructions but to deliver the return, the Chief Justice said: —

"General Cadwalader was commanded to produce the body of Mr. Merryman before me this morning, that the case might be heard, and the petitioner be either remanded to custody, or set at liberty, if held on insufficient grounds; but he has acted in disobedience to the writ, and I therefore direct that an attachment be at once issued against him, returnable before me here, at twelve o'clock to-morrow." The order was then passed as follows: "Ordered that an attachment forthwith issue against General George Cadwalader for a contempt in refusing to produce the body of John Merryman, according to the command of the writ of *habeas corpus*, returnable and returned before me to-day, and that said attachment be returned before me at twelve o'clock to-morrow, at the room of the Circuit Court.

"R. B. TANEY.

"MONDAY, May 27, 1861."

The clerk issued the writ of attachment as directed.

At twelve o'clock, on the 28th May, 1861, the Chief Justice again took his seat on the bench, and called for the marshal's return to the writ of attachment. It was as follows: "I hereby certify to the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, that by virtue of the within writ of attachment, to me directed, on the 27th day of May, 1861, I proceeded, on this 28th day of May, 1861, to Fort McHenry, for the purpose of serving the said writ. I sent in my name at the outer gate; the messenger returned

with the reply, 'that there was no answer to my card,' and therefore could not serve the writ, as I was commanded. I was not permitted to enter the gate. So answers WASHINGTON BONIFANT,

"U. S. Marshal for the District of Maryland."

After it was read, the Chief Justice said, that the marshal had the power to summon the *posse comitatus* to aid him in seizing and bringing before the court the party named in the attachment, who would, when so brought in, be liable to punishment by fine and imprisonment; but where, as in this case, the power refusing obedience was so notoriously superior to any the marshal could command, he held that officer excused from doing anything more than he had done. The Chief Justice then proceeded as follows: —

"I ordered this attachment yesterday, because, upon the face of the return the detention of the prisoner was unlawful, upon the grounds: —

"1. That the President, under the Constitution of the United States, cannot suspend the privilege of the writ of *habeas corpus*, nor authorize a military officer to do it.

"2. A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law.

"It is, therefore, very clear that John Merryman, the petitioner, is entitled to be set at liberty and discharged immediately from imprisonment.

"I forbore yesterday to state orally the provisions of the Constitution of the United States, which make those principles the fundamental law of the Union, because an oral statement might be misunderstood in some portions of it, and I shall therefore put my opinion in writing, and file it in the office of the clerk of the Circuit Court, in the course of this week."

He concluded by saying, that he should cause his opinion, when filed, and all the proceedings, to be laid before the President in order that he might perform his constitutional duty, to enforce the laws, by securing obedience to the process of the United States.

TANEY, C. J. The application in this case for a writ of *habeas corpus* is made to me under the 14th Section of the Judiciary Act of 1789, which renders effectual for the citizen the constitutional privilege of the writ of *habeas corpus*. That Act gives to the courts of the United States, as well as to each justice of the Supreme Court, and to every district judge, power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. The petition was presented to me, at Washington, under the impression that I would order the prisoner to be brought before me there; but as he was confined in Fort McHenry, in the city of Baltimore, which is in my circuit,

I resolved to hear it in the latter city, as obedience to the writ, under such circumstances, would not withdraw General Cadwalader, who had him in charge, from the limits of his military command.

The petition presents the following case: The petitioner resides in Maryland, in Baltimore County; while peaceably in his own house, with his family, it was, at two o'clock on the morning of the 25th of May, 1861, entered by an armed force, professing to act under military orders; he was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority.

The commander of the fort, General George Cadwalader, by whom he is detained in confinement, in his return to the writ, does not deny any of the facts alleged in the petition. He states that the prisoner was arrested by order of General Kleim, of Pennsylvania, and conducted as aforesaid to Fort McHenry, by his order, and placed in his (General Cadwalader's) custody, to be there detained by him as a prisoner.

A copy of the warrant or order under which the prisoner was arrested was demanded by his counsel, and refused; and it is not alleged in the return, that any specific act, constituting any offence against the laws of the United States, has been charged against him upon oath, but he appears to have been arrested upon general charges of treason and rebellion without proof, and without giving the names of the witnesses, or specifying the acts which, in the judgment of the military officer, constituted these crimes. Having the prisoner thus in custody upon these vague and unsupported accusations, he refuses to obey the writ of *habeas corpus*, upon the ground that he is duly authorized by the President to suspend it.

The case, then, is simply this: a military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland upon vague and indefinite charges, without any proof, so far as appears; under this order, his house is entered in the night, he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement; and when a *habeas corpus* is served on the commanding officer, requiring him to produce the prisoner before a justice of the Supreme Court, in order that he may examine into the legality of the imprisonment, the answer of the officer is that he is authorized by the President to suspend the writ of *habeas corpus* at his discretion, and in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

As the case comes before me, therefore, I understand that the President not only claims the right to suspend the writ of *habeas corpus* himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him. No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the President claimed this power,

and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by Act of Congress.

When the conspiracy of which Aaron Burr was the head became so formidable, and was so extensively ramified, as to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed, on his part, no power to suspend it, but communicated his opinion to Congress, with all the proofs in his possession, in order that Congress might exercise its discretion upon the subject, and determine whether the public safety required it. And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it.

Having, therefore, regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that, upon his own responsibility, and in the exercise of his own discretion, he refused obedience to the writ, I should have contented myself with referring to the clause in the Constitution, and to the construction it received from every jurist and statesman of that day, when the case of Burr was before them. But being thus officially notified that the privilege of the writ has been suspended, under the orders, and by the authority of the President, and believing, as I do, that the President has exercised a power which he does not possess under the Constitution, a proper respect for the high office he fills requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of his act, without a careful and deliberate examination of the whole subject.

The clause of the Constitution, which authorizes the suspension of the privilege of the writ of *habeas corpus*, is in the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. It begins by providing "that all legislative powers therein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." And after prescribing the manner in which these two branches of the legislative department shall be chosen, it proceeds to enumerate specifically the legislative powers which it thereby grants; and at the conclusion of this specification, a clause is inserted giving Congress "the 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."

The power of legislation granted by this latter clause is, by its words, carefully confined to the specific objects before enumerated. But as this limitation was unavoidably somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal

principles, essential to the liberty of the citizen, and to the rights and equality of the States, by denying to Congress, in express terms, any power of legislation over them. It was apprehended, it seems, that such legislation might be attempted, under the pretext that it was necessary and proper to carry into execution the powers granted; and it was determined that there should be no room to doubt, where rights of such vital importance were concerned; and accordingly, this clause is immediately followed by an enumeration of certain subjects, to which the powers of legislation shall not extend. The great importance which the framers of the Constitution attached to the privilege of the writ of *habeas corpus*, to protect the liberty of the citizen, is proved by the fact, that its suspension, except in cases of invasion or rebellion, is first in the list of prohibited powers; and even in these cases the power is denied, and its exercise prohibited, unless the public safety shall require it.

It is true, that in the cases mentioned, Congress is, of necessity, the judge of whether the public safety does or does not require it; and their judgment is conclusive. But the introduction of these words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise, before they give the government of the United States such power over the liberty of a citizen.

It is the second article of the Constitution that provides for the organization of the executive department, enumerates the powers conferred on it, and prescribes its duties. And if the high power over the liberty of the citizen now claimed, was intended to be conferred on the President, it would undoubtedly be found in plain words in this article; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power.

The article begins by declaring that the executive power shall be vested in a President of the United States of America, to hold his office during the term of four years; and then proceeds to prescribe the mode of election, and to specify, in precise and plain words, the powers delegated to him, and the duties imposed upon him. The short term for which he is elected, and the narrow limits to which his power is confined, show the jealousy and apprehension of future danger which the framers of the Constitution felt in relation to that department of the government, and how carefully they withheld from it many of the powers belonging to the executive branch of the English government which were considered as dangerous to the liberty of the subject; and conferred (and that in clear and specific terms) those powers only which were deemed essential to secure the successful operation of the government.

He is elected, as I have already said, for the brief term of four years, and is made personally responsible, by impeachment, for malfeasance in office; he is, from necessity, and the nature of his duties, the commander-in-chief of the army and navy, and of the militia, when called

into actual service; but no appropriation for the support of the army can be made by Congress for a longer term than two years, so that it is in the power of the succeeding House of Representatives to withhold the appropriation for its support, and thus disband it, if, in their judgment, the President used or designed to use it for improper purposes. And although the militia when in actual service is under his command, yet the appointment of the officers is reserved to the States, as a security against the use of the military power for purposes dangerous to the liberties of the people, or the rights of the States.

So, too, his powers in relation to the civil duties and authority necessarily conferred on him are carefully restricted, as well as those belonging to his military character. He cannot appoint the ordinary officers of government, nor make a treaty with a foreign nation or Indian tribe, without the advice and consent of the Senate, and cannot appoint even inferior officers unless he is authorized by an Act of Congress to do so. He is not empowered to arrest any one charged with an offence against the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the Constitution expressly provides that no person "shall be deprived of life, liberty, or property, without due process of law," — that is, judicial process.

Even if the privilege of the writ of *habeas corpus* were suspended by Act of Congress, and a party not subject to the rules and articles of war were afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison, or brought to trial before a military tribunal, for the article in the amendments to the Constitution immediately following the one above referred to (that is, the sixth article) provides 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, 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."

The only power, therefore, which the President possesses, where the "life, liberty, or property" of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires "that he shall take care that the laws shall be faithfully executed." He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the Constitution.

It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the

assistance of the executive arm; but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.

With such provisions in the Constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the President, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of *habeas corpus*, or the arrest of a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of *habeas corpus*, and the judicial power also, by arresting and imprisoning a person without due process of law.

Nor can any argument be drawn from the nature of sovereignty, or the necessity of government for self-defence in times of tumult and danger. The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the Constitution, and neither of its branches, executive, legislative, or judicial, can exercise any of the powers of government beyond those specified and granted; for the tenth article of the amendments to the Constitution, in express terms, provides 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."

Indeed, the security against imprisonment by executive authority, provided for in the fifth article of the amendments to the Constitution, which I have before quoted, is nothing more than a copy of a like provision in the English Constitution, which had been firmly established before the Declaration of Independence. Blackstone states it in the following words: "To make imprisonment lawful, it must be either by process of law from the courts of judicature, or by warrant from some legal officer having authority to commit to prison." 1 Bl. Com. 137.

The people of the United Colonies, who had themselves lived under its protection, while they were British subjects, were well aware of the necessity of this safeguard for their personal liberty. And no one can believe that, in framing a government intended to guard still more efficiently the rights and liberties of the citizen, against executive encroachment and oppression, they would have conferred on the President a power which the history of England had proved to be dangerous and oppressive in the hands of the Crown; and which the people of England had compelled it to surrender, after a long and obstinate struggle on the part of the English executive to usurp and retain it.

The right of the subject to the benefit of the writ of *habeas corpus*, it must be recollected, was one of the great points in controversy, during the long struggle in England between arbitrary government and free institutions, and must therefore have strongly attracted the attention of the statesmen engaged in framing a new, and, as they supposed, a freer government than the one which they had thrown off by the revolution. From the earliest history of the common law, if a person were im-

prisoned, no matter by what authority, he had a right to the writ of *habeas corpus*, to bring his case before the King's Bench; if no specific offence were charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offence were charged which was bailable in its character, the court was bound to set him at liberty on bail. The most exciting contests between the Crown and the people of England, from the time of Magna Charta, were in relation to the privilege of this writ, and they continued until the passage of the statute of 31 Charles II., commonly known as the great *Habeas Corpus* Act.

This statute put an end to the struggle, and finally and firmly secured the liberty of the subject against the usurpation and oppression of the executive branch of the government. It nevertheless conferred no new right upon the subject, but only secured a right already existing; for, although the right could not justly be denied, there was often no effectual remedy against its violation. Until the statute of 13 William III., the judges held their offices at the pleasure of the king, and the influence which he exercised over timid, time-serving and partisan judges, often induced them, upon some pretext or other, to refuse to discharge the party, although entitled by law to his discharge, or delayed their decision, from time to time, so as to prolong the imprisonment of persons who were obnoxious to the king for their political opinions, or had incurred his resentment in any other way.

The great and inestimable value of the *Habeas Corpus* Act of the 31 Charles II. is that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties promptly, in the manner specified in the statute.

A passage in Blackstone's Commentaries, showing the ancient state of the law on this subject and the abuses which were practised through the power and influence of the Crown, and a short extract from Hallam's Constitutional History, stating the circumstances which gave rise to the passage of this statute, explain briefly, but fully, all that is material to this subject.

Blackstone says: "To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty by rendering its protection impossible. But the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made, that the court, upon a *habeas corpus*, may examine into its validity, and according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner. And yet early in the reign of Charles I. the court of King's Bench, relying on some arbitrary precedents (and those perhaps misunderstood), determined that they would not, upon a *habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned,

in case he was committed by the special command of the king or by the lords of the Privy Council. This drew on a parliamentary inquiry, and produced the *Petition of Right* (3 Charles I.), which recites this illegal judgment, and enacts that no freeman hereafter shall be imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of 'notable contempts, and stirring up sedition against the king and the government,' the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable; and when at length they agreed that it was, they, however, annexed a condition of finding sureties for their good behavior, which still protracted their imprisonment, the Chief Justice, Sir Nicholas Hyde, at the same time declaring that 'if they were again remanded for that cause, perhaps the court would not afterwards grant a *habeas corpus,* being already made acquainted with the cause of the imprisonment.' But this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four and twenty years." 3 Bl. Com. 133, 134.

It is worthy of remark, that the offences charged against the prisoner in this case, and relied on as a justification for his arrest and imprisonment, in their nature and character, and in the loose and vague manner in which they are stated, bear a striking resemblance to those assigned in the warrant for the arrest of Mr. Selden. And yet, even at that day, the warrant was regarded as such a flagrant violation of the rights of the subject that the delay of the time-serving judges to set him at liberty, upon the *habeas corpus* issued in his behalf, excited the universal indignation of the bar.

The extract from Hallam's "Constitutional History" is equally impressive and equally in point. "It is a very common mistake, and that not only among foreigners, but many from whom some knowledge of our constitutional laws might be expected, to suppose that this statute of Charles II. enlarged in a great degree our liberties, and forms a sort of epoch in their history. But though a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any right upon the subject. From the earliest records of the English law, no freeman could be detained in prison except upon a criminal charge or conviction, or for a civil debt. In the former case, it was always in his power to demand of the Court of King's Bench a writ of *habeas corpus ad subjiciendum*, directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner, with the warrant of commitment, that the court might judge of its sufficiency, and remand the party, admit him to bail, or discharge him, according to the nature of the charge. This writ issued of right, and could not be refused by the court. It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided for in Magna Charta (if indeed it is not more ancient), that

the statute of Charles II. was enacted, but to cut off the abuses by which the government's lust of power, and the servile subtlety of the crown lawyers, had impaired so fundamental a privilege." 3 Hallam's Const. Hist. 19.

While the value set upon this writ in England has been so great, that the removal of the abuses which embarrassed its employment has been looked upon as almost a new grant of liberty to the subject, it is not to be wondered at that the continuance of the writ thus made effective should have been the object of the most jealous care. Accordingly, no power in England short of that of Parliament can suspend or authorize the suspension of the writ of *habeas corpus*. I quote again from Blackstone (1 Bl. Com. 136): "But the happiness of our Constitution is that it is not left to the executive power to determine when the danger of the State is so great as to render this measure expedient. It is the Parliament only or legislative power that, whenever it sees proper, can authorize the Crown by suspending the *habeas corpus* for a short and limited time, to imprison suspected persons without giving any reason for so doing." If the President of the United States may suspend the writ, then the Constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen than the people of England have thought it safe to intrust to the Crown; a power which the Queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First.

But I am not left to form my judgment upon this great question from analogies between the English government and our own, or the commentaries of English jurists, or the decisions of English courts, although upon this subject they are entitled to the highest respect, and are justly regarded and received as authoritative by our courts of justice. To guide me to a right conclusion, I have the Commentaries on the Constitution of the United States of the late Mr. Justice Story, not only one of the most eminent jurists of the age, but for a long time one of the brightest ornaments of the Supreme Court of the United States; and also the clear and authoritative decision of that court itself, given more than half a century since, and conclusively establishing the principles I have above stated.

Mr. Justice Story, speaking, in his Commentaries, of the *habeas corpus* clause in the Constitution, says: "It is obvious that cases of a peculiar emergency may arise, which may justify, nay even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion where the public safety may require it. A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being

abused, in bad times, to the worst of purposes. Hitherto, no suspension of the writ has ever been authorized by Congress, since the establishment of the Constitution. It would seem, as the power is given to Congress to suspend the writ of *habeas corpus*, in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body." 3 Story's Com. on the Constitution, § 1336.

And Chief Justice Marshall, in delivering the opinion of the Supreme Court in the case of *Ex parte Bollman & Swartwout*, uses this decisive language, in 4 Cranch, 95: "It may be worthy of remark, that this Act (speaking of the one under which I am proceeding) was passed by the first Congress of the United States, sitting under a constitution which had declared 'that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.' Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of *habeas corpus*." And again on page 101: "If at any time the public safety should require the suspension of the powers vested by this Act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide; until the legislative will be expressed, this court can only see its duty, and must obey the laws." I can add nothing to these clear and emphatic words of my great predecessor.

But the documents before me show, that the military authority in this case has gone far beyond the mere suspension of the privilege of the writ of *habeas corpus*. It has by force of arms thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. For, at the time these proceedings were had against John Merryman, the district judge of Maryland, the commissioner appointed under the Act of Congress, the district attorney and the marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time, there had never been the slightest resistance or obstruction to the process of any court or judicial officer of the United States, in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact and the evidence to support it, to the district attorney; it would then have become the duty of that officer to bring the matter before the district judge or commissioner, and if there was sufficient legal evidence to

justify his arrest, the judge or commissioner would have issued his warrant to the marshal to arrest him; and upon the hearing of the case, would have held him to bail, or committed him for trial, according to the character of the offence, as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military.

Yet under these circumstances, a military officer, stationed in Pennsylvania, without giving any information to the district attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the district of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if indeed he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without a hearing, even before himself, to close custody, in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.

The Constitution provides, as I have before said, that "no person shall be deprived of life, liberty, or property, without due process of law." It declares that "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 warrant 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." It provides that the party accused shall be entitled to a speedy trial in a court of justice.

These great and fundamental laws, which Congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the Constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.

In such a case, my duty was too plain to be mistaken. I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the President of

the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to "take care that the laws be faithfully executed," to determine what measures he will take to cause the civil process of the United States to be respected and enforced.[1]

[1] This case led to much discussion. See an article by Joel Parker, entitled "Habeas Corpus and Martial Law," 93 N. A. Rev. 471 (Oct., 1861), and three pamphlets by Horace Binney (Phila. 1862 and 1865). With these compare a paper by B. R. Curtis, called forth by later acts of the Executive, and entitled "Executive Power," in 2 Life of B. R. Curtis, 306 (Oct., 1862).

From WINTHROP'S *Military Law and Precedents*, edition of 1896. [The following passage is mainly found in the first edition of Winthrop's valuable work, entitled "Military Law," at pages 53–57. The second edition, not yet out, will probably appear at an early date. In allowing the reprinting here of what follows, the learned author has favored me with his own revision of the passage. I have generally omitted the notes.]

"The most considerable and important part of the exercise of martial law is the making of arrests of civilians charged with offences against the laws of war. But to arrest and hold at will, or with a view to trial by a military tribunal, is practically to suspend the citizen's privilege of the writ of *habeas corpus*. On the other hand, the suspending of the writ by military authority is essentially an exercise of the power of martial law. Thus the two powers are closely connected, the one substantially including or involving the other, and it becomes material to inquire whether, under the provision of the Constitution relating to the suspension of the privilege of the writ, the President, or a military commander representing him, is authorized to order or effect such suspension.

"In the early instance of the 'Whiskey Insurrection' in Pennsylvania, in 1794–95, no suspension of the writ was resorted to: sundry of the insurgents were indeed arrested by military authority; but they were duly brought to trial before a civil court.

"During the Burr conspiracy of 1806, Brig. Gen. Wilkinson, commanding in Louisiana, without formally suspending the writ, suspended it in fact so far as to disregard writs issued by the local courts, and even to imprison for a brief period a county judge. But in the case of two of the supposed conspirators whom Wilkinson caused to be arrested under a charge of treason, the Supreme Court of the United States, in passing upon the question of their criminality, expressed incidentally the opinion that the suspension was a power to be exercised by 'the legislature.' (*Ex parte Bollman & Swartwout*, 4 Cranch, 100, *per* Marshall, C. J.) This *dictum* was long accepted as settling that the Constitution was to be construed as empowering not the President but Congress alone to suspend the privilege of the writ.

"Early in the recent war, however, the question whether the President was not authorized to exercise the power independently of Congress was raised and considerably discussed. Upon this question having been referred by the President to the Attorney-General, the latter, in July, 1861, gave it as his opinion that, while Congress alone could repeal the laws authorizing the issue of the writ, or suspend all right to or privilege of the same in general, the President was empowered to suspend the privilege in cases of particular individuals found necessary to be arrested by him during the emergency on account of complicity with the public enemy. By proclamation of May 10, 1861, the President had already authorized the commander of the Union forces in Florida 'to suspend there the writ of *habeas corpus*,' if he found it necessary. Later, in an order issued from the War Department on August 13, 1862, he suspended the writ as to persons liable to draft who should absent themselves from their places of residence or from the country in order to avoid it; and subsequently, by his proclamation of Sept. 24, 1862 (heretofore cited as making subject to martial law all insurgent enemies, their aiders and abettors throughout the United States), he further ordered: 'That the writ of *habeas corpus* is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort,

camp, arsenal, military prison, or other place of confinement by any military authority, or by the sentence of any court-martial or military commission.'

"Meantime, however, in the leading case of *Ex parte Merryman*, Chief Justice Taney had held, on circuit at Baltimore, that the power to suspend the writ did not subsist in the Executive, but was a legislative function pertaining to Congress alone. The *dictum* of Chief Justice Marshall was thus reasserted as a positive ruling, and this ruling has been concurred in by a series of decisions in the United States and State courts, and by other recognized authorities.

"Further, Congress, by an express provision of the Act of March 3, 1863, c. 81, specifically vested in the President the authority, 'whenever in his judgment the public safety might require it, to suspend the privilege of the writ in any case arising in any part of the United States,'—thus impliedly asserting that the power so to authorize rested in itself alone. Pursuant to this Act, the President issued his proclamation of September 15, 1863, already referred to, in which he suspended the writ throughout the United States and during the existing rebellion, in all cases where, 'by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command, or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled, drafted, or mustered or enlisted in, or belonging to, the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law, or the Rules and Articles of War, or the rules or regulations prescribed for the military or naval service by authority of the President of the United States; or for resisting a draft, or for any other offence against the military or naval service.' It is added: 'And I do hereby require all magistrates, attorneys, and other civil officers within the United States, and all officers and others in the military and naval services of the United States, to take distinct notice of this suspension, and to give it full effect, and all citizens of the United States to conduct and govern themselves accordingly.'

"Subsequently, under the authority of the same Act, the President, by proclamation of July 5, 1864, in declaring martial law in the State of Kentucky, suspended also the privilege of the writ of *habeas corpus* in the classes of cases specified in that proclamation, as hereinbefore set forth.

"The Act of 1863 expired with the termination of the rebellion in 1866, and no subsequent suspension has been ordered by the President except in the single case of the unlawful combinations of the so-called 'Kuklux,' in South Carolina, in 1871, in which, by proclamations of October 17 and November 10 of that year, issued in accordance with the special authority given by Congress, in the Act of April 20, 1871, c. 22, s. 4 (and limited as to its exercise to the end of the next regular session of Congress), he suspended the writ in ten counties of that State.

"Thus, as a general principle of law, it may be deemed to be settled by the rulings of the courts and weight of legal authority, as well as by the action of Congress and practice of the Executive, that the President is not empowered of his own authority to suspend the privilege of the writ of *habeas corpus*, and that a declaration of martial law made by him or a military commander, in a district not within the theatre of war, will not justify such suspension in the absence of the sanction of Congress The result must be that (except in so far as it may be permitted, in the case of the insurrection, rebellion, etc., authorized by secs. 5297 and 5298, Rev. Sts., to be suppressed by the President by the use of military force) martial law proper will in the future rarely be initiated in the United States where Congress has omitted to provide the means for rendering its exercise effectual. But, in the event of a practical exercise of the same in an adequate emergency, and of the consequent arrest and holding by military authority, in good faith, and what is believed to be the full and proper performance of duty, of undoubted public enemies or other criminals, in temporary disregard of judicial process sued out for their release, it can scarcely be questioned that Congress, if it does not expressly ratify the act, will at least protect or indemnify the officers and soldiers concerned by legislation corresponding to that enacted for a similar purpose

Ex parte MILLIGAN.

Supreme Court of the United States. 1867.

[4 *Wall.* 2.]

This case came before the court upon a certificate of division from the judges of the Circuit Court for Indiana, on a petition for discharge from unlawful imprisonment. [The rest of the statement of facts is omitted.]

Mr. J. E. McDonald, *Mr. J. S. Black*, *Mr. J. H. Garfield*, and *Mr. David Dudley Field*, for the petitioner; *Mr. Speed*, A. G., *Mr. Stanbery*, and *Mr. B. F. Butler*, special counsel of the United States, *contra*.

Mr. Justice Davis delivered the opinion of the court.

On the 10th day of May, 1865, Lambdin P. Milligan presented a petition to the Circuit Court of the United States for the District of Indiana, to be discharged from an alleged unlawful imprisonment. The case made by the petition is this: Milligan is a citizen of the United States; has lived for twenty years in Indiana; and, at the time of the grievances complained of, was not, and never had been in the military or naval service of the United States. On the 5th day of October, 1864, while at home, he was arrested by order of General Alvin P. Hovey, commanding the military district of Indiana; and has ever since been kept in close confinement.

On the 21st day of October, 1864, he was brought before a military commission, convened at Indianapolis, by order of General Hovey, tried on certain charges and specifications; found guilty, and sentenced to be hanged; and the sentence ordered to be executed on Friday, the 19th day of May, 1865.

On the 2d day of January, 1865, after the proceedings of the military commission were at an end, the Circuit Court of the United States for Indiana met at Indianapolis and empanelled a grand jury, who were

at the close of active hostilities in the late civil war,[1] while — as then — authorizing actions for damages commenced against such persons in State courts to be removed to a court of the United States."[2]

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[1] See the remarks of Chief Justice Chase at the close of his opinion in *Ex parte Milligan*, 4 Wall 141. On this subject, Halleck (p. 380) expresses himself as follows: "Even if it were plain that the words of the Constitution were intended to give this power exclusively to Congress, we think that in a case of public danger, at once so imminent and grave as to admit of no other remedy, the maxim *salus populi suprema lex* should form the rule of action, and that a suspension of this writ, by the executive and military authorities of the United States, would be justified by the pressure of a visible public necessity: if an Act of indemnity were required, it would be the duty of Congress to pass it. Compare also Pratt, 216."

[2] The series of indemnity Acts here referred to were those of March 3, 1863, c. 81; May 11, 1866, c. 80; and March 2, 1867, c. 155. As to their effect, see *Beard* v. *Burts*, 95 U. S. 434; *Beckwith* v. *Bean*, 98 Id. 283; *Mitchell* v. *Clarke*, 110 Id. 638-640.

charged to inquire whether the laws of the United States had been violated; and, if so, to make presentments. The court adjourned on the 27th day of January, having, prior thereto, discharged from further service the grand jury, who did not find any bill of indictment or make any presentment against Milligan for any offence whatever; and in fact, since his imprisonment, no bill of indictment has been found or presentment made against him by any grand jury of the United States.

Milligan insists that said military commission had no jurisdiction to try him upon the charges preferred, or upon any charges whatever; because he was a citizen of the United States and the State of Indiana, and had not been, since the commencement of the late rebellion, a resident of any of the States whose citizens were arrayed against the government, and that the right of trial by jury was guaranteed to him by the Constitution of the United States.

The prayer of the petition was, that under the Act of Congress, approved March 3d, 1863, entitled, "An Act relating to *habeas corpus* and regulating judicial proceedings in certain cases," he may be brought before the court, and either turned over to the proper civil tribunal to be proceeded against according to the law of the land or discharged from custody altogether.

With the petition were filed the order for the commission, the charges and specifications, the findings of the court, with the order of the War Department reciting that the sentence was approved by the President of the United States, and directing that it be carried into execution without delay. The petition was presented and filed in open court by the counsel for Milligan; at the same time the District Attorney of the United States for Indiana appeared, and, by the agreement of counsel, the application was submitted to the court. The opinions of the judges of the Circuit Court were opposed on three questions, which are certified to the Supreme Court:

1st. "On the facts stated in said petition and exhibits, ought a writ of *habeas corpus* to be issued?"

2d. "On the facts stated in said petition and exhibits, ought the said Lambdin P. Milligan to be discharged from custody as in said petition prayed?"

3d. "Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said Milligan in manner and form as in said petition and exhibits is stated?"

The importance of the main question presented by this record cannot be overstated; for it involves the very framework of the government and the fundamental principles of American liberty.

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public

safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation.

But we are met with a preliminary objection. It is insisted that the Circuit Court of Indiana had no authority to certify these questions; and that we are without jurisdiction to hear and determine them.

The sixth section of the "Act to amend the judicial system of the United States," approved April 29, 1802, declares "that whenever any question shall occur before a Circuit Court upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court at their next session to be held thereafter; and shall by the said court be finally decided: And the decision of the Supreme Court and their order in the premises shall be remitted to the Circuit Court and be there entered of record, and shall have effect according to the nature of the said judgment and order: *Provided*, That nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits."

It is under this provision of law that a Circuit Court has authority to certify any question to the Supreme Court for adjudication. The inquiry, therefore, is whether the case of Milligan is brought within its terms.

It was admitted at the bar that the Circuit Court had jurisdiction to entertain the application for the writ of *habeas corpus* and to hear and determine it; and it could not be denied; for the power is expressly given in the 14th section of the Judiciary Act of 1789, as well as in the later Act of 1863. Chief Justice Marshall, in *Bollman's case*, 4 Cranch, 75, construed this branch of the Judiciary Act to authorize the courts as well as the judges to issue the writ for the purpose of inquiring into the cause of the commitment; and this construction has never been departed from. But it is maintained with earnestness and ability that a certificate of division of opinion can occur only in a cause; and that the proceeding by a party, moving for a writ of *habeas corpus*, does not become a cause until after the writ has been issued and a return made.

Independently of the provisions of the Act of Congress of March 3, 1863, relating to *habeas corpus*, on which the petitioner bases his claim for relief, and which we will presently consider, can this position be sustained?

It is true that it is usual for a court on application for a writ of *habeas corpus*, to issue the writ, and on the return, to dispose of the case; but the court can elect to waive the issuing of the writ and consider whether, upon the facts presented in the petition, the prisoner, if brought before it, could be discharged. One of the very points on

which the case of Tobias Watkins, reported in 3 Peters, page 193, turned, was, whether, if the writ was issued, the petitioner would be remanded upon the case which he had made. The Chief Justice, in delivering the opinion of the court, said: "The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently the writ ought not to be awarded if the court is satisfied that the prisoner would be remanded to prison."

The judges of the Circuit Court of Indiana were, therefore, warranted by an express decision of this court in refusing the writ, if satisfied that the prisoner on his own showing was rightfully detained.

But it is contended, if they differed about the lawfulness of the imprisonment, and could render no judgment, the prisoner is remediless; and cannot have the disputed question certified under the Act of 1802. His remedy is complete by writ of error or appeal, if the court renders a final judgment refusing to discharge him; but if he should be so unfortunate as to be placed in the predicament of having the court divided on the question whether he should live or die, he is hopeless and without remedy. He wishes the vital question settled, not by a single judge at his chambers, but by the highest tribunal known to the Constitution; and yet the privilege is denied him; because the Circuit Court consists of two judges instead of one.

Such a result was not in the contemplation of the Legislature of 1802; and the language used by it cannot be construed to mean any such thing. The clause under consideration was introduced to further the ends of justice, by obtaining a speedy settlement of important questions where the judges might be opposed in opinion.

The Act of 1802 so changed the judicial system that the Circuit Court, instead of three, was composed of two judges; and without this provision or a kindred one, if the judges differed, the difference would remain, the question be unsettled, and justice denied. The decisions of this court upon the provisions of this section have been numerous. In *United States* v. *Daniel*, 6 Wheaton, 542, the court, in holding that a division of the judges on a motion for a new trial could not be certified, say: "That the question must be one which arises in a cause depending before the court relative to a proceeding belonging to the cause." Testing Milligan's case by this rule of law, is it not apparent that it is rightfully here; and that we are compelled to answer the questions on which the judges below were opposed in opinion? If, in the sense of the law, the proceeding for the writ of *habeas corpus* was the "cause" of the party applying for it, then it is evident that the "cause" was pending before the court, and that the questions certified arose out of it, belonged to it, and were matters of right and not of discretion.

But it is argued that the proceeding does not ripen into a cause, until there are two parties to it. This we deny. It was the cause of Milligan when the petition was presented to the Circuit Court. It would have been the cause of both parties, if the court had issued the writ and brought those who held Milligan in custody before it. Webster defines

the word "cause" thus: "A suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right, or supposed right" — and he says, "this is a legal, scriptural, and popular use of the word, coinciding nearly with case, from *cado*, and action, from *ago*, to urge and drive."

In any legal sense, action, suit, and cause, are convertible terms. Milligan supposed he had a right to test the validity of his trial and sentence; and the proceeding which he set in operation for that purpose was his "cause" or "suit." It was the only one by which he could recover his liberty. He was powerless to do more; he could neither instruct the judges nor control their action, and should not suffer, because, without fault of his, they were unable to render a judgment. But the true meaning to the term "suit" has been given by this court. One of the questions in *Weston* v. *City Council of Charleston*, 2 Peters, 449, was whether a writ of prohibition was a suit; and Chief Justice Marshall says: "The term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him." Certainly, Milligan pursued the only remedy which the law afforded him.

Again, in *Cohens* v. *Virginia*, 6 Wheaton, 264, he says: "In law language a suit is the prosecution of some demand in a court of justice." Also, "To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is to continue that demand." When Milligan demanded his release by the proceeding relating to *habeas corpus*, he commenced a suit; and he has since prosecuted it in all the ways known to the law. One of the questions in *Holmes* v. *Jennison et al.*, 14 Peters, 540, was, whether under the 25th section of the Judiciary Act a proceeding for a writ of *habeas corpus* was a "suit." Chief Justice Taney held, that, "if a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court to recover his liberty." There was much diversity of opinion on another ground of jurisdiction; but that, in the sense of the 25th section of the Judiciary Act, the proceeding by *habeas corpus* was a suit, was not controverted by any except Baldwin, Justice, and he thought that "suit" and "cause" as used in the section, mean the same thing.

The court do not say that a return must be made and the parties appear and begin to try the case before it is a suit. When the petition is filed and the writ prayed for, it is a suit, — the suit of the party making the application. If it is a suit under the 25th section of the Judiciary Act when the proceedings are begun, it is, by all the analogies of the law, equally a suit under the 6th section of the Act of 1802.

But it is argued, that there must be two parties to the suit, because the point is to be stated upon the request of "either party or their counsel."

Such a literal and technical construction would defeat the very pur-

pose the legislature had in view, which was to enable any party to bring the case here, when the point in controversy was a matter of right and not of discretion; and the words "either party," in order to prevent a failure of justice, must be construed as words of enlargement, and not of restriction. Although this case is here *ex parte*, it was not considered by the court below without notice having been given to the party supposed to have an interest in the detention of the prisoner. The statements of the record show that this is not only a fair, but conclusive inference. When the counsel for Milligan presented to the court the petition for the writ of *habeas corpus*, Mr. Hanna, the District Attorney for Indiana, also appeared; and, by agreement, the application was submitted to the court, who took the case under advisement, and on the next day announced their inability to agree, and made the certificate. It is clear that Mr. Hanna did not represent the petitioner, and why is his appearance entered? It admits of no other solution than this, — that he was informed of the application, and appeared on behalf of the government to contest it. The government was the prosecutor of Milligan, who claimed that his imprisonment was illegal; and sought, in the only way he could, to recover his liberty. The case was a grave one; and the court, unquestionably, directed that the law officer of the government should be informed of it. He very properly appeared, and, as the facts were uncontroverted and the difficulty was in the application of the law, there was no useful purpose to be obtained in issuing the writ. The cause was, therefore, submitted to the court for their consideration and determination.

But Milligan claimed his discharge from custody by virtue of the Act of Congress "relating to *habeas corpus*, and regulating judicial proceedings in certain cases," approved March 3, 1863. Did that Act confer jurisdiction on the Circuit Court of Indiana to hear this case?

In interpreting a law, the motives which must have operated with the legislature in passing it are proper to be considered. This law was passed in a time of great national peril, when our heritage of free government was in danger. An armed rebellion against the national authority, of greater proportions than history affords an example of, was raging; and the public safety required that the privilege of the writ of *habeas corpus* should be suspended. The President had practically suspended it, and detained suspected persons in custody without trial; but his authority to do this was questioned. It was claimed that Congress alone could exercise this power; and that the legislature, and not the President, should judge of the political considerations on which the right to suspend it rested. The privilege of this great writ had never before been withheld from the citizen; and as the exigence of the times demanded immediate action, it was of the highest importance that the lawfulness of the suspension should be fully established. It was under these circumstances, which were such as to arrest the attention of the country, that this law was passed. The President was authorized by it to suspend the privilege of the writ of *habeas corpus*, whenever, in

his judgment, the public safety required; and he did, by proclamation, bearing date the 15th of September, 1863, reciting, among other things, the authority of this statute, suspend it. The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.

It is proper, therefore, to inquire under what circumstances the courts could rightfully refuse to grant this writ, and when the citizen was at liberty to invoke its aid.

The second and third sections of the law are explicit on these points. The language used is plain and direct, and the meaning of the Congress cannot be mistaken. The public safety demanded, if the President thought proper to arrest a suspected person, that he should not be required to give the cause of his detention on return to a writ of *habeas corpus*. But it was not contemplated that such person should be detained in custody beyond a certain fixed period, unless certain judicial proceedings, known to the common law, were commenced against him. The Secretaries of State and War were directed to furnish to the judges of the courts of the United States a list of the names of all parties, not prisoners of war, resident in their respective jurisdictions, who then were or afterwards should be held in custody by the authority of the President, and who were citizens of States in which the administration of the laws in the Federal tribunals was unimpaired. After the list was furnished, if a grand jury of the district convened and adjourned, and did not indict or present one of the persons thus named, he was entitled to his discharge; and it was the duty of the judge of the court to order him brought before him to be discharged, if he desired it. The refusal or omission to furnish the list could not operate to the injury of any one who was not indicted or presented by the grand jury; for, if twenty days had elapsed from the time of his arrest and the termination of the session of the grand jury, he was equally entitled to his discharge as if the list were furnished; and any credible person, on petition verified by affidavit, could obtain the judge's order for that purpose.

Milligan, in his application to be released from imprisonment, averred the existence of every fact necessary under the terms of this law to give the Circuit Court of Indiana jurisdiction. If he was detained in custody by the order of the President, otherwise than as a prisoner of war; if he was a citizen of Indiana and had never been in the military or naval service, and the grand jury of the district had met, after he had been arrested, for a period of twenty days, and adjourned without taking any proceedings against him, then the court had the right to entertain his petition and determine the lawfulness of his imprisonment. Because the word "court" is not found in the body of the second section, it was argued at the bar, that the application should have been made to a judge of the court, and not to the court itself; but this is not so, for power is expressly conferred in the last proviso of the section on the court equally with a judge of it to discharge from imprisonment. It was the manifest design of Congress to secure a certain

remedy by which any one, deprived of liberty, could obtain it, if there was a judicial failure to find cause of offence against him. Courts are not, always, in session, and can adjourn on the discharge of the grand jury; and before those who are in confinement could take proper steps to procure their liberation. To provide for this contingency, authority was given to the judges out of court to grant relief to any party who could show, that, under the law, he should be no longer restrained of his liberty.

It was insisted that Milligan's case was defective because it did not state that the list was furnished to the judges; and, therefore, it was impossible to say under which section of the Act it was presented.

It is not easy to see how this omission could affect the question of jurisdiction. Milligan could not know that the list was furnished, unless the judges volunteered to tell him; for the law did not require that any record should be made of it or anybody but the judges informed of it. Why aver the fact when the truth of the matter was apparent to the court without an averment? How can Milligan be harmed by the absence of the averment, when he states that he was under arrest for more than sixty days before the court and grand jury, which should have considered his case, met at Indianapolis? It is apparent, therefore, that under the *Habeas Corpus* Act of 1863 the Circuit Court of Indiana had complete jurisdiction to adjudicate upon this case, and, if the judges could not agree on questions vital to the progress of the cause, they had the authority (as we have shown in a previous part of this opinion), and it was their duty to certify those questions of disagreement to this court for final decision. It was argued that a final decision on the questions presented ought not to be made, because the parties who were directly concerned in the arrest and detention of Milligan, were not before the court; and their rights might be prejudiced by the answer which should be given to those questions. But this court cannot know what return will be made to the writ of *habeas corpus* when issued; and it is very clear that no one is concluded upon any question that may be raised to that return. In the sense of the law of 1802 which authorized a certificate of division, a final decision means final upon the points certified; final upon the court below, so that it is estopped from any adverse ruling in all the subsequent proceedings of the cause.

But it is said that this case is ended, as the presumption is, that Milligan was hanged in pursuance of the order of the President.

Although we have no judicial information on the subject, yet the inference is that he is alive; for otherwise learned counsel would not appear for him and urge this court to decide his case. It can never be in this country of written constitution and laws, with a judicial department to interpret them, that any chief magistrate would be so far forgetful of his duty, as to order the execution of a man who denied the jurisdiction that tried and convicted him; after his case was before Federal judges with power to decide it, who, being unable to agree on

the grave questions involved, had, according to known law, sent it to the Supreme Court of the United States for decision. But even the suggestion is injurious to the Executive, and we dismiss it from further consideration. There is, therefore, nothing to hinder this court from an investigation of the merits of this controversy.

The controlling question in the case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious States, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man?

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty, and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle, and secured in a written Constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says, "That the trial of all crimes, except in case of impeachment, shall be by jury;" and in the fourth, fifth, and sixth Articles of the Amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure; and directs that a judicial warrant shall not issue "without proof of probable cause supported by oath or affirmation." The fifth declares "that no person shall be held to answer for a capital or otherwise in-

famous crime unless on presentment by 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 be deprived of life, liberty, or property, without due process of law." And the sixth guarantees the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished. It is in these words: "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." These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States 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. 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. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? and if so, what are they?

Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their author-

ity? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President, because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction."

But it is said that the jurisdiction is complete under the "laws and usages of war."

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in States which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them. And soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a State, eminently distinguished for patriotism, by judges commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment; for its records disclose that it was constantly engaged in the trial of similar offences, and was never interrupted in its administration of criminal justice. If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," the law said, arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course

of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to the various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, this right — one of the most valuable in a free country — is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth Amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," — language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, "excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;" and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth Amendment, to those persons who were subject to indictment or presentment in the fifth.

The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common-law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. All other persons, citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of State or political necessity. When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise: but if society is disturbed by civil commotion — if the passions of men are aroused and the restraints of law weakened, if not disregarded — these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

It is claimed that martial law covers with its broad mantle the pre-

ceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if, in his opinion, the exigencies of the country demand it, and of which he is to judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for, and to the exclusion of, the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of, and superior to, the civil power," — the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew — the history of the world told them — the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus*.

It is essential to the safety of every government that in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of *habeas corpus*. In every

war, there are men of previously good character, wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit, in the exercise of a proper discretion, to make arrests, should not be required to produce the persons arrested in answer to a writ of *habeas corpus*. The Constitution goes no further. It does not say after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on States in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late Rebellion, required that the loyal States should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theatre of military operations; and, as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power

of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one State, when, in another, it would be "mere lawless violence."

We are not without precedents in English and American history illustrating our views of this question; but it is hardly necessary to make particular reference to them.

From the first year of the reign of Edward the Third, when the Parliament of England reversed the attainder of the Earl of Lancaster, because he could have been tried by the courts of the realm, and declared, "that in time of peace no man ought to be adjudged to death for treason or any other offence without being arraigned and held to answer; and that regularly when the king's courts are open it is a time of peace in judgment of law," down to the present day, martial law, as claimed in this case, has been condemned by all respectable English jurists as contrary to the fundamental laws of the land, and subversive of the liberty of the subject.

During the present century, an instructive debate on this question occurred in Parliament, occasioned by the trial and conviction by court-martial, at Demerara, of the Rev. John Smith, a missionary to the negroes, on the alleged ground of aiding and abetting a formidable rebellion in that colony. Those eminent statesmen, Lord Brougham and Sir James Mackintosh, participated in that debate; and denounced the trial as illegal; because it did not appear that the courts of law in

Demerara could not try offences, and that "when the laws can act, every other mode of punishing supposed crimes is itself an enormous crime."

So sensitive were our Revolutionary fathers on this subject, although Boston was almost in a state of siege, when General Gage issued his proclamation of martial law they spoke of it as an "attempt to supersede the course of the common law, and instead thereof to publish and order the use of martial law." The Virginia Assembly, also, denounced a similar measure on the part of Governor Dunmore "as an assumed power, which the king himself cannot exercise; because it annuls the law of the land and introduces the most execrable of all systems, martial law."

In some parts of the country, during the War of 1812, our officers made arbitrary arrests and, by military tribunals, tried citizens who were not in the military service. These arrests and trials, when brought to the notice of the courts, were uniformly condemned as illegal. The cases of *Smith* v. *Shaw*, and *McConnell* v. *Hampden* (reported in 12 Johnson, 257 and 234), are illustrations, which we cite, not only for the principles they determine, but on account of the distinguished jurists concerned in the decisions, one of whom for many years occupied a seat on this bench.

It is contended, that *Luther* v. *Borden*, decided by this court, is an authority for the claim of martial law advanced in this case. The decision is misapprehended. That case grew out of the attempt in Rhode Island to supersede the old colonial government by a revolutionary proceeding. Rhode Island, until that period, had no other form of local government than the charter granted by King Charles II. in 1663; and as that limited the right of suffrage, and did not provide for its own amendment, many citizens became dissatisfied, because the legislature would not afford the relief in their power; and without the authority of law, formed a new and independent constitution, and proceeded to assert its authority by force of arms. The old government resisted this; and as the rebellion was formidable, called out the militia to subdue it, and passed an act declaring martial law. Borden, in the military service of the *old* government, broke open the house of Luther, who supported the *new*, in order to arrest him. Luther brought suit against Borden; and the question was, whether, under the Constitution and laws of the State, Borden was justified. This court held that a State "may use its military power to put down an armed insurrection too strong to be controlled by the civil authority;" and, if the Legislature of Rhode Island thought the peril so great as to require the use of its military forces and the declaration of martial law, there was no ground on which this court could question its authority; and as Borden acted under military orders of the charter government, which had been recognized by the political power of the country, and was upheld by the State judiciary, he was justified in breaking into and entering Luther's house. This is the extent of the decision. There was no

question in issue about the power of declaring martial law under the Federal Constitution, and the court did not consider it necessary even to inquire "to what extent nor under what circumstances that power may be exercised by a State."

We do not deem it important to examine further the adjudged cases; and shall, therefore, conclude without any additional reference to authorities.

To the third question, then, on which the judges below were opposed in opinion, an answer in the negative must be returned.

It is proper to say, although Milligan's trial and conviction by a military commission was illegal, yet, if guilty of the crimes imputed to him, and his guilt had been ascertained by an established court and impartial jury, he deserved severe punishment. Open resistance to the measures deemed necessary to subdue a great rebellion, by those who enjoy the protection of government, and have not the excuse even of prejudice of section to plead in their favor, is wicked; but that resistance becomes an enormous crime when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States. Conspiracies like these, at such a juncture, are extremely perilous; and those concerned in them are dangerous enemies to their country, and should receive the heaviest penalties of the law, as an example to deter others from similar criminal conduct. It is said the severity of the laws caused them; but Congress was obliged to enact severe laws to meet the crisis; and as our highest civil duty is to serve our country when in danger, the late war has proved that rigorous laws, when necessary, will be cheerfully obeyed by a patriotic people, struggling to preserve the rich blessings of a free government.

The two remaining questions in this case must be answered in the affirmative. The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.

If the military trial of Milligan was contrary to law, then he was entitled, on the facts stated in his petition, to be discharged from custody by the terms of the Act of Congress of March 3, 1863. The provisions of this law having been considered in a previous part of this opinion, we will not restate the views there presented. Milligan avers he was a citizen of Indiana, not in the military or naval service, and was detained in close confinement, by order of the President, from the 5th day of October, 1864, until the 2d day of January, 1865, when the Circuit Court for the District of Indiana, with a grand jury, convened in session at Indianapolis; and afterwards, on the 27th day of the same month, adjourned without finding an indictment or presentment against him. If these averments were true (and their truth is conceded for the purposes of this case), the court was required to liberate him on taking

certain oaths prescribed by the law, and entering into recognizance for his good behavior.

But it is insisted that Milligan was a prisoner of war, and, therefore, excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the States in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

This case, as well as the kindred cases of Bowles and Horsey, were disposed of at the last term, and the proper orders were entered of record. There is, therefore, no additional entry required.

[CHASE, C. J., for himself and JUSTICES WAYNE, SWAYNE, and MILLER, gave an opinion concurring in the order for the petitioner's discharge, but differing with the majority opinion on important points. This opinion agreed that the writ of *habeas corpus* should issue, that the petitioner was entitled, under the statute, to his discharge, and that, by reason of the statute, the military commission had no jurisdiction to try him; but declared that Congress had power to authorize the military commission in Indiana. It concluded as follows:] —

We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.

Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded and all are exposed to invasion, it is within the power of Congress to determine in what States or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety.

In Indiana, for example, at the time of the arrest of Milligan and his co-conspirators, it is established by the papers in the record, that the State was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion. It appears, also, that a powerful secret association, composed of citizens and others, existed within the State, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the State and national arsenals, armed co-operation with the enemy, and war against the national government.

We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged

in this conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.

In Indiana, the judges and officers of the courts were loyal to the government. But it might have been otherwise. In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.

We have confined ourselves to the question of power. It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them. With that prohibition we are satisfied, and should have remained silent if the answers to the questions certified had been put on that ground, without denial of the existence of a power which we believe to be constitutional and important to the public safety, — a denial which, as we have already suggested, seems to draw in question the power of Congress to protect from prosecution the members of military commissions who acted in obedience to their superior officers, and whose action, whether warranted by law or not, was approved by that upright and patriotic President under whose administration the Republic was rescued from threatened destruction.

We have thus far said little of martial law, nor do we propose to say much. What we have already said sufficiently indicates our opinion that there is no law for the government of the citizens, the armies, or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution. And wherever our army or navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress.

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within States or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the national government, when the public danger required its exercise. The first of these may be called jurisdiction under military law, and is found in Acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied

sanction of Congress; while the third may be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces.

We have no apprehension that this power, under our American system of government, in which all official authority is derived from the people, and exercised under direct responsibility to the people, is more likely to be abused than the power to regulate commerce, or the power to borrow money. And we are unwilling to give our assent by silence to expressions of opinion which seem to us calculated, though not intended, to cripple the constitutional powers of the government, and to augment the public dangers in times of invasion and rebellion.[1]

In *Miller* v. *United States*, 11 Wall. 268, 304 (1870), on error to the United States Circuit Court for the Eastern District of Michigan, Strong, J., for the court (Justices Field and Clifford dissenting), said, in affirming a decree to forfeit certain personal property of Samuel Miller, "of Amherst County, Virginia, a rebel citizen and inhabitant of the United States," now deceased: "It remains to consider the objection urged on behalf of the plaintiff in error that the Acts of Congress under which these proceedings to confiscate the stock have been taken are not warranted by the Constitution, and that they are in conflict with some of its provisions. The objection starts with the assumption that the purpose of the Acts was to punish offences against the sovereignty of the United States, and that they are merely statutes against crimes. If this were a correct assumption, if the Act of 1861, and the fifth, sixth, and seventh sections of the Act of July 17, 1862, were municipal regulations only, there would be force in the objection that Congress has disregarded the restrictions of the fifth and sixth amendments of the Constitution. Those restrictions, so far as material to the argument, are, 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; that no person shall be deprived of his property without due

[1] Of this case it is said, in 2 Winthrop's "Military Law," 38: "It is the opinion of the author that the view of the minority of the court is the sounder and more reasonable one, and that the conclusion of the majority was influenced by a confusing of martial law proper with that military government which exists only at a time and on the theatre of war, and which was clearly distinguished from martial law by the Chief Justice, in the dissenting opinion, — the first complete judicial definition of the subject." — Ed.

process of law, and 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 if the assumption of the plaintiff in error is not well made, if the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States, if, on the contrary, they are an exercise of the war powers of the government, it is clear they are not affected by the restrictions imposed by the fifth and sixth amendments. This we understand to have been conceded in the argument. The question, therefore, is, whether the action of Congress was a legitimate exercise of the war power. The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right. If there were any uncertainty respecting the existence of such a right it would be set at rest by the express grant of power to make rules respecting captures on land and water. It is argued that though there are no express constitutional restrictions upon the power of Congress to declare and prosecute war, or to make rules respecting captures on land and water, there are restrictions implied in the nature of the powers themselves. Hence it is said the power to prosecute war is only a power to prosecute it according to the law of nations, and a power to make rules respecting captures is a power to make such rules only as are within the laws of nations. Whether this is so or not we do not care to inquire, for it is not necessary to the present case. It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is that right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. *The Venus*, 8 Cranch, 253. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes

to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation.

"It is also to be observed that when the Acts of 1861 and 1862 were passed, there was a state of war existing between the United States and the rebellious portions of the country. Whether its beginning was on the 27th or the 30th of April, 1861, or whether it was not until the Act of Congress of July 13th of that year, is unimportant to this case, for both Acts were passed after the existence of war was alike an actual and a recognized fact. *Prize Cases,* 2 Black, 635. War existing, the United States were invested with belligerent rights in addition to the sovereign powers previously held. Congress had then full power to provide for the seizure and confiscation of any property which the enemy or adherents of the enemy could use for the purpose of maintaining the war against the government. It is true the war was not between two independent nations. But because a civil war, the government was not shorn of any of those rights that belong to belligerency. Mr. Wheaton, in his work on International Law, § 296, asserts the doctrine to be that 'the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as it respects neutral nations.' It would be absurd to hold that, while in a foreign war enemy's property may be captured and confiscated as a means of bringing the struggle to a successful completion, in a civil war of equal dimensions, requiring quite as urgently the employment of all means to weaken the belligerent in arms against the government, the right to confiscate the property that may strengthen such belligerent does not exist. There is no such distinction to be made. Every reason for the allowance of a right to confiscate in case of foreign wars exists in full force when the war is domestic or civil. It is, however, unnecessary to pursue this branch of the subject farther. In the *Amy Warwick*, 2 Sprague, 123, and in the *Prize Cases*, 2 Black, 673, it was decided that in the War of the Rebellion the United States sustained the double character of a belligerent and a sovereign, and had the rights of both. *Rose* v. *Himely*, 4 Cranch, 272; *Cherriot* v. *Foussat*, 3 Binney, 252; *Dobree* v. *Napier*, 3 Scott, 225; *Santissima Trinidad*, 7 Wheaton, 306; *United States* v. *Palmer*, 3 Wheaton, 635.

"We come, then, directly to the question whether the Act of 1861, and the fifth, sixth, and seventh sections of the Act of 1862 were an exercise of this war power, the power of confiscation, or whether they must be regarded as mere municipal regulations for the punishment of crime. The answer to this question must be found in the nature of the statutes and of the proceedings directed under them. In the case of *Rose* v. *Himely*, 4 Cranch, 272, Chief Justice Marshall, in delivering the opinion of the court, said: 'But admitting a sovereign, who is endeavoring

to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act. If as a legislator, he publishes a law ordaining punishment for certain offences, which law is to be applied by courts, the nature of the law and of the proceedings under it will decide whether it is an exercise of belligerent rights or exclusively of his sovereign power; and whether the court, in applying this law to particular cases, acts as a prize court or as a court enforcing municipal regulations.'

"Apply this test to the present case.

"It is hardly contended that the Act of 1861 was enacted in virtue of the sovereign rights of the government. It defined no crime. It imposed no penalty. It declared nothing unlawful. It was aimed exclusively at the seizure and confiscation of property used, or intended to be used, to aid, abet, or promote the rebellion, then a war, or to maintain the war against the government. It treated the property as the guilty subject. It cannot be maintained that there is no power to seize property actually employed in furthering a war against the government, or intended to be thus employed. It is the Act of 1862, the constitutionality of which has been principally assailed. That Act had several purposes, as indicated in its title. As described, it was 'An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes.' The first four sections provided for the punishment of treason, inciting or engaging in rebellion or insurrection, or giving aid and comfort thereto. They are aimed at individual offenders, and they were undoubtedly an exercise of the sovereign, not the belligerent rights of the government. But when we come to the fifth and the following sections we find another purpose avowed, not punishing treason and rebellion, as described in the title, but that other purpose, described in the title as 'seizing and confiscating the property of rebels.' The language is, 'that to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same, and the proceeds thereof, for the support of the army of the United States.' Then follows a description of six classes of persons, those referred to as the persons whose property should be liable to seizure. The sixth section describes still another class. Now, the avowed purpose of all this was, not to reach any criminal personally, but 'to insure the speedy termination of the rebellion,' then present, which was a war, which Congress had recognized as a war, and which this court has decided was then a war. The purpose avowed then was legitimate, such as Congress, in the situation of the country, might constitutionally entertain, and the provisions made to carry out the purpose, viz., confiscation, were legitimate, unless applied to others than enemies. It is argued, however, that the enactments were for the confiscation of property of rebels, designated as such, and that the

law of nations allows confiscation only of enemy's property. But the argument overlooks the fact that the rebellion then existing was a war. And, if so, those engaged in it were public enemies. The statute referred exclusively to the rebellion then in progress. Whatever may be true in regard to a rebellion which does not rise to the magnitude of a war, it must be that when it has become a recognized war those who are engaged in it are to be regarded as enemies. And they are not the less such because they are also rebels. They are equally well designated as rebels or enemies. Regarded as *descriptio personarum*, the words 'rebels' and 'enemies,' in such a state of things, are synonymous. And, if this is true, it is evident the statute, in denominating the war rebellion, and the persons whose property it attempts to confiscate rebels, may, at least, have intended to speak of a war and of public enemies. Were this all that could be said it would be enough, for when a statute will bear two constructions, one of which would be within the constitutional power of Congress to enforce, and the other a transgression of the power, that must be adopted which is consistent with the Constitution. It is always a presumption that the legislature acts within the scope of its authority. But there is much more in this case. It is impossible to read the entire Act without observing a clear distinction between the first four sections, which look to the punishment of individual crime, and which were, therefore, enacted in virtue of the sovereign power, and the subsequent sections, which have in view a state of public war, and which direct the seizure of the property of those who were in fact enemies, for the support of the armies of the country. The ninth, tenth, and eleventh sections are in this view significant. They declared that all slaves of persons engaged in rebellion against the government of the United States, or who should in any way give aid and comfort thereto, escaping within our lines, or captured from such persons, or deserted by them, should be deemed captives of war, and forever free; that escaping slaves of such owners should not be delivered up, and that no person engaged in the military or naval service should, under any pretence whatever, surrender slaves to claimants. The Act then goes on to provide for the employment of persons of African descent in the suppression of the rebellion. Can it be that all this was municipal legislation, that it had no reference to the war power of the government, that it was not an attempt to enforce belligerent rights? We do not think so. We are not to strain the construction of an Act of Congress in order to hold it unconstitutional.

"It has been argued, however, that the provisions of the Act for confiscation are not confined in their operation to the property of enemies, but that they are applicable to the property of persons not enemies within the laws of nations. If by this is meant that they direct the seizure and confiscation of property not confiscable under the laws of war, we cannot yield to it our assent. It may be conceded that the laws of war do not justify the seizure and confiscation of any private property except that of enemies. But who are to be regarded as en-

emies in a domestic or civil war? In case of a foreign war all who are inhabitants of the enemy's country, with rare exceptions, are enemies whose property is subject to confiscation; and it seems to have been taken for granted in this case that only those who during the war were inhabitants of the Confederate States were liable to have their property confiscated. Such a proposition cannot be maintained. It is not true even in case of a foreign war. It is ever a presumption that inhabitants of an enemy's territory are enemies, even though they are not participants in the war, though they are subjects of neutral States, or even subjects or citizens of the government prosecuting the war against the State within which they reside. But even in foreign wars persons may be enemies who are not inhabitants of the enemy's territory. The laws of nations nowhere declare the contrary. And it would be strange if they did, for those not inhabitants of a foreign State may be more potent and dangerous foes than if they were actually residents of that State. By uniting themselves to the cause of a foreign enemy they cast in their lot with his, and they cannot be permitted to claim exemptions which the subjects of the enemy do not possess. Depriving them of their property is a blow against the hostile power quite as effective, and tending quite as directly to weaken the belligerent with whom they act, as would be confiscating the property of a non-combatant resident. Clearly, therefore, those must be considered as public enemies, and amenable to the laws of war as such, who, though subjects of a State in amity with the United States, are in the service of a State at war with them, and this not because they are inhabitants of such a State, but because of their hostile acts in the war. Even under municipal law this doctrine is recognized. Thus in *Vaughan's Case*, 2 Salkeld, 635, Lord Holt laid down the doctrines, 'If the States (Dutch) be in alliance, and the French at war with us, and certain Dutchmen turn rebels to the States, and fight under the command of the French king, they are enemies to us, for the French subjection makes them French subjects in respect of all nations but their own.' So, 'if an Englishman assist the French, and fight against the king of Spain, our ally, this is an adherence to the king's enemies.'

"Still less is it true that the laws of nations have defined who, in the case of a civil war, are to be regarded and may be treated as enemies. Clearly, however, those must be considered such who, though subjects or citizens of a lawful government, are residents of the territory under the power or control of the party resisting that government. Thus much may be gathered from the *Prize Cases*. And why are not all who act with that party? Have they not voluntarily subjected themselves to that party, identified themselves with it? And is it not as important to take from them the sinews of war, their property, as it is to confiscate the property of rebel enemies resident within the rebel territory? It is hard to conceive of any reason for confiscating the property of one class that does not equally justify confiscating the property of the other. We have already said that no recognized usage of nations excludes

from the category of enemies those who act with, or aid or abet and give comfort to enemies, whether foreign or domestic, though they may not be residents of enemy's territory. It is not without weight, that when the Constitution was formed its framers had fresh in view what had been done during the Revolutionary War. Similar statutes for the confiscation of property of domestic enemies, of those who adhered to the British government, though not residents of Great Britain, were enacted in many of the States, and they have been judicially determined to have been justified by the laws of war. They show what was then understood to be confiscable property, and who were public enemies. At least they show the general understanding that aiders and abettors of the public enemy were themselves enemies, and hence that their property might lawfully be confiscated. It was with these facts fresh in memory, and with a full knowledge that such legislation had been common, almost universal, that the Constitution was adopted. It did prohibit *ex post facto* laws. It did prohibit bills of attainder. They had also been passed by the States. But it imposed no restriction upon the power to prosecute war or confiscate enemy's property. It seems to be a fair inference from the omission that it was intended the government should have the power of carrying on war as it had been carried on during the Revolution, and therefore should have the right to confiscate as enemy's property, not only the property of foreign enemies, but also that of domestic, and of the aiders, abettors, and comforters of the public enemy. The framers of the Constitution guarded against excesses that had existed during the Revolutionary struggle. It is incredible that if such confiscations had not been contemplated as possible and legitimate, they would not have been expressly prohibited, or at least restricted. We are therefore of opinion that neither the Act of 1861 nor that of 1862 is invalid, because other property than that of public enemies is directed to be confiscated. We do not understand the Acts, or either of them, to be applicable to any other than the property of enemies. All the classes of persons described in the fifth and sixth sections of the Act of 1862 were enemies within the laws and usages of war.

"It is further objected on behalf of the plaintiff in error, that under the statute of 1862 the property of all enemies was not made liable to confiscation. From this it is inferred that, whether persons were within the law or not depended, not on their being enemies, but on certain overt criminal acts described and defined by the law. The fact asserted, namely, that all enemies were not within the purview of the enactment we may admit, but we dissent from the inference. Plainly, it was competent for Congress to determine how far it would exert belligerent rights, and it is quite too large a deduction from the fact that the property only of certain classes of enemies was directed to be confiscated, that it was not intended to confiscate the property of enemies at all. If it be true that all the persons described in the fifth, sixth, and seventh sections were enemies, as we have endeavored to show

they were, it cannot matter by what name they were called, or how they were described. The express declaration of the seventh section was that their property should be condemned 'as enemies' property,' and become the property of the United States, to be disposed of as the court should decree, the proceeds being paid into the treasury for the purposes described, to wit, the support of the army. It was, therefore, as enemies' property, and not as that of offenders against municipal law, that the statute directed its confiscation.

"Upon the whole, then, we are of opinion the confiscation Acts are not unconstitutional, and we discover no error in the proceedings in this case. *Decree affirmed.*"

In *Mitchell* v. *Clark*, 110 U. S. 633 (1884), on error to the Supreme Court of Missouri, it appeared that the plaintiff below sued the plaintiffs in error for rent due on a lease of two storehouses in St. Louis for the months of August, September, and October, 1862, at the rate of $583.33 per month. The defendants entered four pleas.

Mr. Justice Miller delivered the opinion of the court. . . .

The second and fourth pleas both set up the Act of March 3, 1863, 12 Stat. 755, as a defence; the second plea relying upon the fourth section of the Act as a full defence to any suit at all in such case as the present, and the fourth plea setting up the specific defence of the statute of limitation found in the seventh section of that Act.

The fourth section is as follows:

"That any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done under and by virtue of such order, or under color of any law of Congress, and such defence may be made by special plea or under the general issue."

And the seventh section declares:

"That no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or act omitted to be done, at any time during the present 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 Act of Congress, unless the same shall have been commenced within two years next after such arrest, imprisonment, trespass, or wrong may have been done or committed, or act may have been omitted to have been done; *Provided*, That in no case shall the limitation herein provided commence to run until the passage of this Act, so that no party shall, by virtue of this Act, be debarred of his remedy by suit or prosecution until two years from and after the passage of this Act."

The Act of May 11, 1866, to amend this Act, 14 U. S. Stat. 46, by its first section declares that the benefit of this defence shall extend to any acts done or omitted to be done during said rebellion by any officer or person, under and by virtue of any order, written or verbal, general or special, issued by the President or Secretary of War, or by any military officer of the United States holding command of the department,

district, or place within which such acts . . . were done or omitted to be done, either by the person or officer to whom the order was addressed, or for whom it was intended.

The Act of 1863 also makes elaborate provision for the removal of this class of cases, including any act done under color of authority derived from the President, from a State court into a Federal court, which provision is also made more effectual by the Act of 1866.

It is not at all difficult to discover the purpose of all this legislation.

Throughout a large part of the theatre of the civil war the officers of the army, as well as many civil officers, were engaged in the discharge of very delicate duties among a class of people who, while asserting themselves to be citizens of the United States, were intensely hostile to the government, and were ready and anxious at all times, though professing to be non-combatants, to render every aid in their power to those engaged in active efforts to overthrow the government and destroy the Union.

For this state of things Congress had provided no adequate legislation, no law by which the powers of these officers were so enlarged as to enable them to deal with this class of persons dwelling in the midst of those who were loyal to the government.

Some statutes were passed, after delay, of a general character, but it was seen that many acts had probably been done by these officers in defence of the life of the nation for which no authority of law could be found, though the purpose was good and the act a necessity.

For most of these acts there was constitutional power in Congress to have authorized them if it had acted in the matter in advance. It is possible that in a few cases, for acts performed in haste and in the presence of an overpowering emergency, there was no constitutional power anywhere to make them good.

But who was to determine this question? and for service so rendered to the government by its own officers and by men acting under the compulsory power of these officers, could Congress grant no relief?

That an Act passed after the event, which in effect ratifies what has been done, and declares that no suit shall be sustained against the party acting under color of authority, is valid, so far as Congress could have conferred such authority before, admits of no reasonable doubt. These are ordinary Acts of indemnity passed by all governments when the occasion requires it.

In the legislation to which we have referred in the Act of 1863, and the amendatory Act of 1866, Congress seems to have well considered this subject. By the fourth section of the Act of 1863 it undoubtedly intended to afford an absolute defence, as far as it had power to do so, in this class of cases.

By sections five and six it was enacted that the person sued for any of this class of acts, performed or omitted under orders of officers of the government, even when there was only color of authority, could, instead of having his case tried in a State court, where both court and

jury might be prejudiced against him, remove his case into a court of the United States for trial.

That this Act is constitutional, so far as it authorizes this removal was settled in the case of *The Mayor* v. *Cooper*, 6 Wall. 247.

The defendant, however, for some reason did not attempt to remove this case into the Circuit Court of the United States, probably because the Supreme Court of the State had decided in the case of the *State* v. *Gatzweiler*, 49 Mo. 17, that the limitation clause of the Act of Congress was valid and was binding on the State court.

The third measure of relief which those statutes provided for said case was this statute of limitations, found in the seventh section of the Act of 1863.

This limitation of the right of action, like the right of removal, did not depend by the terms of the statute on the validity of the authority set up by the party. In one case it is obvious that that question must be inquired into after the removal. In the other, if the action had not been brought within two years, it was immaterial; for the plaintiff could not recover, however void the authority under which defendant acted.

Had Congress power to pass such a law? The suit being one which, under the Act of Congress, could be removed into the courts of the United States, Congress could certainly prescribe for it the law of limitations for those courts. If for such actions in those courts, why not in all courts? Otherwise there would be two rules of limitation of actions in different courts holding pleas of the same cause.

But there are other considerations which lead to the conclusion that Congress must have the right to prescribe the rule of limitations for all courts in this class of cases.

The act complained of is done for the benefit of the government by one of its officers, or by his imperative orders, which could not be resisted. If done under a necessity or a mistake, the government should not see him suffer. In such a case as the present, where the money collected went into the military chest, and was either turned over to the treasury or used to pay the military expenses of the United States, the government is bound in equity, if not legally, to repay the defendant, if judgment goes against him, what it received, with interest and costs. It has a right to say in such cases that the suit, which is to establish this liability, must be brought within reasonable time in whatever court it is brought, and to determine what is that reasonable time. The government which thus exposes its officers and others, acting under its compulsory exercise of power, to be sued, while not denying redress for the illegal exercise of such power, must have the authority to require that suits brought for such redress shall be commenced within reasonable time.

The question in all such cases is one that arises under the Constitution and laws of the United States, because the act questioned is one done or omitted under color of authority claimed to be derived from the government, and, therefore, involves the consideration whether such authority did in fact, or could in law, exist. It is one, consequently,

that falls within the constitutional jurisdiction of the judicial power of the United States. Hence it follows that Congress might vest that jurisdiction exclusively in the courts of the United States, and might regulate all the incidents of suits brought in any jurisdiction authorized to entertain them. . . .

That a similar statute in regard to suits by or against an assignee in bankruptcy governs the State courts, see *Jenkins* v. *The Bank*, 106 U. S. 571, and *Jenkins* v. *Lowenthal*, 110 U. S. 222.

It is no answer to this to say that it 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.

Such is the case before us, for the statute leaves two years after its passage, and two years after cause of action accrued, within which suit could be brought.

It is said that the plea does not bring the case within the provisions of the Act of Congress, because this is an action to recover of the defendant the rents which are due from him to the plaintiff on a contract in writing, and that the trespass committed on the defendant by order of General Schofield is no answer to plaintiff's right under the contract.

But we are of opinion that both the language and the spirit of the statute embrace the present case.

The plea makes it plain that it was the purpose of the Schofield order to seize the debt due from defendant to plaintiff, to confiscate it for military purposes. The sum enforced from Mitchell was the precise sum due to Clark for those rents. It was to answer Clark's obligation or default that the order was made and enforced against Mitchell. He could not help himself.

It could as well be said that the garnishee in attachment is not protected when paying under the order of the court, because there was error in the proceeding against his creditor.

In all the confiscation of debts in the cases arising out of the late rebellion the same thing was done by the courts that was done here by the military power, namely, a debt due by a debtor, who was present, was seized and paid over to the United States. Can it be held that this was no proceeding against the creditor? It cannot be denied that such a procedure, if well conducted, is a good defence. It was the purpose of this statute to make it a defence here, though done without authority, if the creditor's right was not asserted by suit within two years.

The language of the statute is, that no suit shall be maintained unless brought within two years, for any wrongs done or committed or act omitted to be done, by virtue or under cover of authority, derived from or exercised by, or under, the President. The act done here was the payment, under summary confiscation, of the debt due Clark to the military officer.

The act omitted was the omission by Mitchell, during all these years, under that order, to pay to Clark. The two years' statute was intended to cover the act done by Mitchell in paying according to the order of Schofield, and the omission, in refusing to pay to Clark. . . .

We concur in the opinion of the lower courts in Missouri that the plea of the statute of limitations is a good plea and is sufficiently set out; and for the error in sustaining the demurrer to this plea

The judgment of the Supreme Court of Missouri is reversed, and the case remanded to that court for further proceedings, not inconsistent with this opinion.

[The dissenting opinion of FIELD, J., is omitted.]

IN *Dinsman* v. *Wilkes*, 12 How. 390 (1851), on error to the Circuit Court of the District of Columbia, in an action of trespass by a marine in the United States service against the commander of an exploring expedition (s. c. at an earlier stage, 7 How. 89), TANEY, C. J., for the court, said: "It is an action by a marine against his commanding officer, for punishment inflicted upon him for refusing to do duty in a foreign port, upon the ground that the time of his enlistment had expired, and that he was entitled to his discharge. The case is one of much delicacy and importance as regards our naval service. For it is essential to its security and efficiency that the authority and command confided to the officer, when it has been exercised from proper motives, should be firmly supported in the courts of justice, as well as on shipboard. And if it is not, the flag of the United States would soon be dishonored in every sea. But at the same time it must be borne in mind that the nation would be equally dishonored if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or ill-will, or the wantonness of power, without giving him redress in the courts of justice.

"At the time these events happened Captain Wilkes was in a distant sea, charged with the execution of a high public duty. He was bound, by all lawful means in his power, to preserve the strength and efficiency of the squadron intrusted to his care, and was equally bound to respect the rights of every individual under his command. It is hardly necessary to inquire whether the plaintiff was or was not entitled to his discharge at the time he demanded it. It is, however, very clear that he was not. But to guard against a misconstruction of this opinion, it is proper to say that the right to determine the question was, for the time being, in Captain Wilkes. In his position as commander, the law not only conferred upon him this power, but made it his duty to exercise it.

If, in his judgment, the plaintiff was entitled to his discharge, it was his duty to give it, even if it was inconvenient to weaken the force he commanded. But if he believed he was not entitled, it was his duty to detain him in the service. Captain Wilkes might err in his decision. But that decision, for the time being, was final and conclusive; and it was the duty of the plaintiff to submit to it, as the judgment of the tribunal which he was bound by law to obey; and for any error of judgment in this respect, no action would lie against the defendant.

"Nor did the belief of the plaintiff as to his rights furnish any justification for his disobedience to orders. For there would be an end of all discipline if the seamen and marines on board a ship of war, on a distant service, were permitted to act upon their own opinion of their rights, and to throw off the authority of the commander whenever they supposed it to be unlawfully exercised. And whether the plaintiff was legally entitled to his discharge or not, his disobedience, when the question had been decided against him by the proper tribunal, was an act of insubordination for which he was liable to punishment.

"So, too, as regards the degree of punishment to which he was subjected. It was the duty of Captain Wilkes to maintain proper discipline and order among the officers and men under his command, and if a spirit of disobedience and insubordination manifested itself in the squadron, he was bound to suppress it; and he might use severe measures for that purpose, if he deemed such measures necessary. And if, in his judgment, the continued refusal of the plaintiff to do duty made it proper to confine him on shore, rather than on shipboard, in order to reduce him to obedience, — or necessary as an example to deter others from a like offence, — he was justified in so doing; and while he acted honestly and from a sense of duty, and with a single eye to the welfare of the service in which he was engaged, the law protects him. He is not liable to an action for a mere error in judgment, even if the jury suppose that milder measures would have accomplished his object.

"But, on the other hand, he was equally bound to respect and protect the rights of those under his command, and to cause them to be respected by others; to watch over their health and comfort; and, above all, never to inflict any severer or harsher punishment than he, at the time, conscientiously believed to be necessary to maintain discipline and due subordination in his ships. The almost despotic powers with which the law clothes him, for the time, and which are absolutely necessary for the safety and efficiency of the ship, make it more especially his duty not to abuse it. And if, from malice to an individual, or vindictive feeling, or a disposition to oppress, he inflicted punishment beyond that which, in his sober judgment, he would have thought necessary, he is liable to this action.

"This is not a case where the punishment alleged to have been inflicted was forbidden by law, or beyond the power which the law confided to him. For in such a case he would be liable whatever were his motives. But the fact to be ascertained in this case is whether, in the exercise of

that discretion and judgment with which the law clothed him for the time, and which is in the nature of judicial discretion, he acted from improper feelings, and abused the power confided to him to the injury of the plaintiff.

"The case, therefore, turns upon the motive which induced Captain Wilkes to inflict the punishments complained of. And this question is one exclusively for the jury, to be decided by them upon the whole testimony. And the rule of law by which they must be governed in making up their verdict is contained in a single proposition. It is this:

"If they believe, from the whole testimony, that the defendant, in all the acts complained of, was actuated alone by an upright intention to maintain the discipline of his command and the interest of the service in which he was engaged, then the plaintiff is not entitled to recover. But if they find that the punishment of the plaintiff was in any manner or in any degree increased or aggravated by malice or a vindictive feeling towards him on the part of Captain Wilkes, or by a disposition to oppress him, then the plaintiff is entitled to recover.

"And, in deciding this question, they are to take into consideration the service in which Captain Wilkes was engaged; the place where these transactions happened; the condition of the vessels under his command; the spirit and temper of the marines and seamen, as he understood it to be, in his own vessel and the other vessels of the squadron, gathering his knowledge from his own observation as well as the information of others; also the nature and character of the voyage yet before him, and which it was his duty, if possible, to accomplish; and how far the conduct and example of the plaintiff might, in the judgment of the defendant, be calculated to embarrass or frustrate it altogether, unless he was reduced to obedience. And further, that, under the order to imprison him in the fort, if the jury believe it to be truly stated in the defendant's testimony, the plaintiff was left at liberty to relieve himself from confinement at any moment by returning to his duty.

"But, on the other hand, the jury must likewise take into consideration the different punishments he received; his confinement in the fort on shore; the situation and condition of the place; the character of the persons by whose authority it was governed; his food; his clothing and general treatment; and whether Captain Wilkes, through proper officers, inquired into his treatment and condition during the time of his confinement. For, certainly, when, from whatever motives he had placed him out of the protection which the ordinary place of confinement on shipboard afforded, in a prison belonging to and under the control of an uncivilized people, it was his duty, through proper and trustworthy officers, to inquire into his situation and treatment, and to see that it was not cruel or barbarous in any respect; and that he did not suffer for the want of those necessaries which the humanity of civilized countries always provides even for the hardened offender."

MITCHELL *v.* HARMONY.

SUPREME COURT OF THE UNITED STATES. 1851.

[13 *How.* 115.]

[ERROR to the United States Circuit Court for the Southern District of New York. Mitchell, an army officer, was sued in trespass by Harmony for seizing his property in the Mexican State of Chihuahua. Verdict for the plaintiff for $90,806.14, and costs $5,048.94. *Crittenden*, for plaintiff in error; *Cutting* and *Vinton*, for defendant in error.]

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

This is an action of trespass, brought by the defendant in error against the plaintiff in error, to recover the value of certain property taken by him in the province of Chihuahua during the late war with Mexico.

It appears that the plaintiff, who is a merchant of New York, and who was born in Spain, but is a naturalized citizen of the United States, had planned a trading expedition to Santa Fé, New Mexico, and Chihuahua, in the Republic of Mexico, before hostilities commenced; and had set out from Fort Independence, in Missouri, before he had any knowledge of the declaration of war. As soon as the war commenced, an expedition was prepared, under the command of General Kearney, to invade New Mexico; and a detachment of troops was sent forward to stop the plaintiff and other traders until General Kearney came up, and to prevent them from proceeding in advance of the army.

The trading expedition in which the plaintiff and the other traders were engaged was, at the time they set out, authorized by the laws of the United States. And when General Kearney arrived they were permitted to follow in the rear and to trade freely in all such places as might be subdued and occupied by the American arms. The plaintiff and other traders availed themselves of this permission, and followed the army to Santa Fé.

Subsequently General Kearney proceeded to California, and the command in New Mexico devolved on Colonel Doniphan, who was joined by Colonel Mitchell, who served under him, and against whom this action was brought. . . .

When Colonel Doniphan commenced his march for Chihuahua, the plaintiff and the other traders continued to follow in the rear and trade with the inhabitants, as opportunity offered. But after they had entered that province and were about to proceed in an expedition against the city of that name, distant about three hundred miles, the plaintiff determined to proceed no further, and to leave the army. And when this determination was made known to the commander at San Elisario he gave orders to Colonel Mitchell, the defendant, to compel him to remain with and accompany the troops. Colonel Mitchell executed the order, and the plaintiff was forced, against his will, to accompany the American

forces with his wagons, mules, and goods, in that hazardous expedition. . . . It is admitted that the plaintiff, against his will, was compelled by the defendant to accompany the troops with the property in question when they marched from San Elisario to Chihuahua; and that he was informed that force would be used if he refused. This was unquestionably a taking of the property, by force, from the possession and control of the plaintiff; and a trespass on the part of the defendant, unless he can show legal grounds of justification.

He justified the seizure on several grounds. 1. That the plaintiff was engaged in trading with the enemy. 2. That he was compelled to remain with the American forces, and to move with them, to prevent the property from falling into the hands of the enemy. 3. That the property was taken for public use. 4. That if the defendant was liable for the original taking, he was released from damages for its subsequent loss, by the act of the plaintiff, who had resumed the possession and control of it before the loss happened. 5. That the defendant acted in obedience to the order of his commanding officer, and therefore is not liable.

The first objection was overruled by the court, and we think correctly. . . . It is certainly true, as a general rule, that no citizen can lawfully trade with a public enemy; and if found to be engaged in such illicit traffic his goods are liable to seizure and confiscation. But the rule has no application to a case of this kind; nor can an officer of the United States seize the property of an American citizen, for an act which the constituted authorities, acting within the scope of their lawful powers, have authorized to be done. . . .

The second and third objections will be considered together, as they depend on the same principles. Upon these two grounds of defence the Circuit Court instructed the jury, that the defendant might lawfully take possession of the goods of the plaintiff, to prevent them from falling into the hands of the public enemy; but in order to justify the seizure the danger must be immediate and impending, and not remote or contingent. And that he might also take them for public use and impress them into the public service, in case of an immediate and pressing danger or urgent necessity existing at the time, but not otherwise. . . . The instruction is objected to on the ground that it restricts the power of the officer within narrower limits than the law will justify. And that when the troops are employed in an expedition into the enemy's country, where the dangers that meet them cannot always be foreseen, and where they are cut off from aid from their own government, the commanding officer must necessarily be intrusted with some discretionary power as to the measures he should adopt; and if he acts honestly, and to the best of his judgment, the law will protect him. But it must be remembered that the question here is not as to the discretion he may exercise in his military operations or in relation to those who are under his command. His distance from home, and the duties in which he is engaged, cannot enlarge his power over the property of a citizen, nor give to him,

in that respect, any authority which he would not, under similar circumstances, possess at home. And where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country, or in his own.

There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.

But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it is so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good.

But it is not alleged that Colonel Doniphan was deceived by false intelligence as to the movements or strength of the enemy at the time the property was taken. His camp at San Elisario was not threatened. He was well informed upon the state of affairs in his rear, as well as of the dangers before him. And the property was seized, not to defend his position, nor to place his troops in a safer one, nor to anticipate the attack of an approaching enemy, but to insure the success of a distant and hazardous expedition, upon which he was about to march.

The movement upon Chihuahua was undoubtedly undertaken from high and patriotic motives. It was boldly planned and gallantly executed, and contributed to the successful issue of the war. But it is not for the court to say what protection or indemnity is due from the public

to an officer who, in his zeal for the honor and interest of his country, and in the excitement of military operations, has trespassed on private rights. That question belongs to the political department of the government. Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is, whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it.

The case mentioned by Lord Mansfield, in delivering his opinion in *Mostyn* v. *Fabrigas,* 1 Cowp. 180, illustrates the principle of which we are speaking. Captain Gambier, of the British navy, by the order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property, and without the authority of law, and the officer who executed the order was held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed.

This case shows how carefully the rights of private property are guarded by the laws in England; and they are certainly not less valued nor less securely guarded under the Constitution and laws of the United States.

We think, therefore, that the instructions of the Circuit Court on the second and third points were right. . . .

The fifth point may be disposed of in a few words. If the power exercised by Colonel Doniphan had been within the limits of a discretion confided to him by law, his order would have justified the defendant even if the commander had abused his power, or acted from improper motives. But we have already said that the law did not confide to him a discretionary power over private property. Urgent necessity would alone give him the right; and the verdict finds that this necessity did not exist. Consequently the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed. The case of Captain Gambier, to which we have just referred, is directly in point upon this question. And upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify.

But in this case the defendant does not stand in the situation of an officer who merely obeys the command of his superior. For it appears that he advised the order, and volunteered to execute it, when, according to military usage, that duty more properly belonged to an officer of inferior grade.

We do not understand that any objection is taken to the jurisdiction

of the Circuit Court over the matters in controversy. The trespass, it is true, was committed out of the limits of the United States. But an action might have been maintained for it in the Circuit Court for any district in which the defendant might be found, upon process against him, where the citizenship of the respective parties gave jurisdiction to a court of the United States. The subject was before this court in the case of *McKenna* v. *Fisk*, reported in 1 How. 241, where the decisions upon the question are referred to, and the jurisdiction in cases of this description maintained.

Upon the whole, therefore, it is the opinion of this court that there is no error in the instructions given by the Circuit Court, and that the judgment must be affirmed with costs.

[The dissenting opinion of DANIEL, J., is omitted.]

UNITED STATES *v.* CLARK.

UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. 1887.

[31 *Fed. Rep.* 710.]

ON complaint before the District Judge, as committing magistrate, for murder upon the Fort Wayne military reservation.

Arthur Stone, the deceased, was a private soldier of Company I, Twenty-third Regiment, United States Infantry, and, at the time of the homicide, was under conviction of a court-martial for "conduct prejudicial to good order and military discipline," and had been sentenced "to be dishonorably discharged the service of the United States, forfeiting all pay and allowances due or to become due, and to be confined at hard labor, at such military prison as the reviewing authority may direct, for two years." The prisoner was the sergeant of the guard having him in custody at the time. On the eleventh day of July, at "retreat," all the prisoners in the guard-house, six in number, had been taken out of the guard-house for roll-call and inspection, and were standing in a line, with their backs to the guard-house, in charge of a squad of armed soldiers. As Capt. Wieton, officer of the day, and the prisoner, the sergeant of the guard, were entering the guard-house to inspect it, and just as the prisoner was crossing the threshold of the outer door, deceased, who was standing at the end of the line of prisoners, broke from the ranks, ran around the corner of a fence in line with the guard-house, and towards the public highway in front of the military reserve, from which it was separated by a board fence about six feet in height. As he left the ranks, an outcry was raised, and the quartermaster sergeant, who happened to see the escape, and a private by the name of Duff, started in pursuit, calling upon him to halt; the sergeant adding, "There is a load after you." Clark, hearing the outcry, turned and seized a cartridge

from his box, hastily loaded his musket, and ran around the guard-house in the direction which Stone had taken. At this time Stone was about thirty yards ahead of his nearest pursuer, Duff, who did not seem to be gaining upon him, and stood little if any chance of overtaking him before he could gain the street. Just as he was crossing a military road within the reserve, and about to leap a rail fence parallel with this road, and about thirty-five yards from the outer fence, and about eighty yards from the guard-house, Clark fired, and hit Stone in the back just above the hips, inflicting a wound from which he died in the course of the evening. No ill feeling existed between the men; in fact they had always been upon very friendly terms, and it was at least doubtful whether Clark knew it was Stone when he fired.

C. P. Black, District Attorney, *Chas. T. Wilkins*, Assistant District Attorney, and *Levi T. Griffin*, for the prosecution; *Asa B. Gardner*, Judge Advocate General, *Sylvester Larned*, *Allen Fraser*, and *James C. Smith*, for the defence.

Brown, J. In view of the fact that this was a homicide committed by one soldier, in the performance of his alleged duty, upon another soldier, within a military reservation of the United States, I had at first some doubt whether a civil court could take cognizance of the case at all; but, as crimes of this nature have repeatedly been made the subject of inquiry by civil tribunals, I have come to the conclusion that I ought not to decline to hear this complaint. Indeed, it is difficult to see how I could refuse to do so without abdicating that supremacy of the civil power which is a fundamental principle of the Anglo-Saxon polity. While there is no statute expressly conferring such jurisdiction, there is a clear recognition of it in the fifty-ninth article of war, which provides that "when any officer or soldier is accused of a capital crime, or of any offence against the person or property of any citizen of any of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment to which the person so accused belongs, are required (except in time of war), upon application duly made by or in behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending him and securing him, in order to bring him to trial." This article makes no exception of crimes committed by one soldier upon another, nor of cases where there is concurrent jurisdiction in the military courts. Tytler, in his work upon Military Law, says: —

> "The martial or military law, as contained in the Mutiny Act and articles of war, does in no respect supersede or interfere with the civil or municipal laws of the realm. . . . Soldiers are, equally with all other classes of citizens, bound to the same strict observance of the laws of the country, and the fulfilment of all their social duties, and are alike amenable to the ordinary civil and criminal courts of the country for all offences against those laws, and breaches of those duties."

In the case of *U. S.* v. *Cornell*, 2 Mason, 61, 91, Mr. Justice Story took cognizance of a murder committed by one soldier upon another in

Fort Adams, Newport harbor. The case was vigorously contested, and the point was made that the State courts had jurisdiction of the offence, but there was no claim that there was not jurisdiction in some civil tribunals. A like case was that of a murder committed in Fort Pulaski, at the mouth of the Savannah River, and tried in 1872 before Mr. Justice Woods and Judge Erskine. *U. S.* v. *Carr*, 1 Woods, 480. No question was raised as to the jurisdiction. The subject of the civil responsibility of the army was very carefully considered by Attorney-General Cushing, in *Steiner's Case*, 6 Ops. Atty.-Gen., 413, and the conclusion reached that an act criminal both by military and general law is subject to be tried either by a military or civil court, and that a conviction or acquittal by the civil authorities of the offence against the general law does not discharge from responsibility for the military offence involved in the same facts. The converse of this proposition is equally true.

2. The character of the act involved in this case presents a more serious question. The material facts are undisputed. There is no doubt that the deceased was killed by the prisoner under the performance of a supposed obligation to prevent his escape by any means in his power. There is no evidence that the prisoner fired before the necessity for his doing so had become apparent. Stone was called upon several times to halt, with a hail by the quartermaster-sergeant that there was "a load after him." Duff, his nearest pursuer, was not gaining upon him, and in another half minute he would have scaled the two fences between him and the highway, and would probably have been lost in the houses that lie on the other side of the street. A court of inquiry, called for the purpose of fully investigating the circumstances, was of the opinion that if Clark had not performed his duty as efficiently as he did, by firing on deceased, he certainly would have effected his escape; and found that no further action was necessary in the case. The prisoner and the deceased had always been good friends, and it is at least doubtful whether Clark recognized him at the time of firing the fatal shot. The prisoner has heretofore borne a most excellent reputation, was never court-martialed nor punished, and was pronounced by all the witnesses who testified upon the subject to be an exceptionally good soldier. There is not the slightest reason to suppose that he was not acting in obedience to what he believed to be his duty in the premises. There was some conflicting testimony as to whether he was standing or kneeling at the time he fired, but I am not able to see its materiality. If he was authorized to shoot at all, he was at liberty to take such position as would insure the most accurate aim, whether his object was to hit the deceased in the leg or in the body. Clark says that he aimed low, for the purpose of merely disabling him, but, owing to a sudden descent in the ground, the shot took effect in the back instead of the leg. For the purpose of this examination, however, I am bound to presume that he intended to kill, as a man is always presumed to intend the natural and probable consequences of his acts. The case then reduces itself to the

naked legal proposition whether the prisoner is excused in law in killing the deceased.

The general rule is well settled, by elementary writers upon criminal law, that an officer having custody of a person charged with felony may take his life, if it becomes absolutely necessary to do so to prevent his escape; but he may not do this if he be charged simply with a misdemeanor; the theory of the law being that it is better that a misdemeanant escape than that human life be taken. I doubt, however, whether this law would be strictly applicable at the present day. Suppose, for example, a person were arrested for petit larceny, which is a felony at the common law, might an officer under any circumstances be justified in killing him? I think not. The punishment is altogether too disproportioned to the magnitude of the offence. Perhaps, under the statute of this State (2 How. St. § 9430), wherein a felony is "construed to mean an offence for which the offender, on conviction, shall be liable by law to be punished by death, or by imprisonment in the State prison," the principle might still be applied. If this statute were applicable to this case, it would operate as a justification, since Stone had been convicted and sentenced to hard labor in a military prison. Under the recent case of *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. Rep. 935, it was adjudged by the Supreme 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 Constitution.

Manifestly, however, the case must be determined by different considerations. Stone had been court-martialed for a military offence, in which there is no distinction between felonies and misdemeanors. His crime was one wholly unknown to the common law, and the technical definitions of that law are manifestly inappropriate to cases which are not contemplated in the discussion of common-law writers upon the subject. We are bound to take a broader view, and to measure the rights and liabilities of the prisoner by the exigencies of the military service, and the circumstances of the particular case. It would be extremely unwise for the civil courts to lay down general principles of law which would tend to impair the efficiency of the military arm, or which would seem to justify or condone conduct prejudicial to good order and military discipline. An army is a necessity — perhaps I ought to say an unfortunate necessity — under every system of government, and no civilized State in modern times has been able to dispense with one. To insure efficiency, an army must be, to a certain extent, a despotism. Each officer, from the general to the corporal, is invested with an arbitrary power over those beneath him, and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offences unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offence.

The articles of war, which he takes an oath, upon his enlistment, to observe, are in fact a military code of Draconic severity, and authorize harsh punishments for offences which seem to be of a trivial nature. Thus, by the articles of war, all the following crimes are punishable by death, or such other punishment as a court-martial may direct: Striking a superior officer; drawing or lifting up a weapon, or offering any violence, against him; or disobeying any lawful command. Article 21. Exciting or joining in any mutiny or sedition. Article 22. Failing to use his utmost endeavors to suppress such mutiny or sedition, or failing to give information thereof to his commanding officer. Article 23. A sentinel sleeping upon his post or leaving it before he is relieved. Article 39. Occasioning false alarms in camp or quarters. Article 41. Misbehaving himself before the enemy; running away, or shamefully abandoning any post which he is commanded to defend; speaking words inducing others to do the like; casting away his arms or ammunition, or quitting his post or colors to plunder or pillage. Article 42. Compelling the commander of any post to surrender it to the enemy, or to abandon it. Article 43. Making known the watchword to any person not entitled to receive it, or giving the watchword different from that which he has received. Article 44. Relieving the enemy with money, victuals, or ammunition, or harboring or protecting an enemy. Article 45. Holding correspondence or giving intelligence to an enemy. Article 46. Deserting in time of war. Article 47. Advising or persuading another to desert in time of war. Article 51. Doing violence to any person bringing provisions or other necessaries to camp or quarters of troops in foreign parts. Article 56. Forcing a safeguard in a foreign territory or during a rebellion. Article 57. Some of these articles are applicable only to a state of war, but some of them treat of offences which may equally well be committed in time of peace. Besides these, there are a number of minor offences punishable as a court-martial may direct, and a general and very sweeping article (No. 62) providing that all crimes not capital, and all disorders and neglects to the prejudice of good order and military discipline, shall be justiciable by a court-martial, and punishable at the discretion of the court.

Now, while the punishment in Stone's case seems to the civilian quite disproportionate to the character of his offence, as charged in the specifications, which was no more nor less than the utterance of a malicious falsehood, when gauged by the penalties attached by Congress to the several offences contained in the articles of war, it does not seem so excessive; at any rate, it was the lawful judgment of a court having jurisdiction of his case, and it was his duty to abide by it, or pursue his remedy in the method provided by law. In seeking to escape, the deceased was undoubtedly guilty of other conduct prejudicial to good order and military discipline, and was liable to such further punishment as a court-martial might inflict. In suffering him to escape, the prisoner became amenable to Article 69, and, failing to use his utmost endeavor to prevent it, was himself subject to such punishment as a

court-martial might direct. Did he exceed his authority in using his musket?

I have made the above citations from the military code to show that the common-law distinction between felonies and misdemeanors is of no possible service in gauging the duty of a military guard with respect to a soldier in the act of escaping. His position is more nearly analogous to that of an armed sentinel stationed upon the walls of a penitentiary to prevent the escape of convicts. The penitentiary — and for this purpose we may use the house of correction in Detroit as an example — may contain convicted murderers, felons of every grade, as well as others charged with vagrancy or simple breaches of the peace, and criminals of all descriptions between the two. If the guard sees one of those prisoners scaling the wall, and there be no other means of arresting him, may he not fire upon him without stopping to inquire whether he is a felon or a misdemeanant? If he prove to be a felon, he will be fully justified; if he prove to be a misdemeanant, is he therefore guilty of murder? There are undoubtedly cases where a person who has no malice in fact may be charged with malice in law, and held guilty of murder through a misapprehension of the law. Thus, if a sheriff charged with the execution of a malefactor by hanging should carry out the sentence by shooting or beheading; or, commanded to hang upon a certain day, should hang upon another day; or if an unauthorized person should execute the sentence, — it would probably be murder at common law. But these cases are an exception to the general rule, that actual malice must exist to justify a conviction for murder. While human life is sacred, and the man who takes it is held strictly accountable for his act, a reputable citizen, who certainly does not lose his character as such by enlisting in the army, ought not to be branded as a murderer upon a mere technicality, unless such technicality be so clear as to admit of no reasonable doubt. Thus, if a sentinel stationed at the gate of a fort should wantonly shoot down a civilian endeavoring to enter in the daytime, or an officer should recklessly slay a soldier for some misconduct or breach of discipline, no supposed obligation upon his part to do this would excuse so gross an outrage.

In this connection it is urged by the defence that the finding of the court of inquiry acquitting the prisoner of all blame is a complete bar to this prosecution. I do not so regard it. If the civil courts have jurisdiction of murder, notwithstanding the concurrent jurisdiction by court-martial of military offences, it follows logically that the proceedings in one cannot be pleaded as a bar to proceedings in the other; and if the finding of such court should conflict with the well-recognized principles of the civil law, I should be compelled to disregard it. *State* v. *Rankin*, 4 Cold. 145. At the same time, I think that weight should be given, and in a case of this kind great weight, to the finding, as an expression of the opinion of the military court of the magnitude of Stone's offence, and of the necessity of using a musket to prevent his escape. I am the more impressed with this view from the difficulty of applying common-

law principles to a case of this description. There is a singular and almost total absence of authority upon the subject of the power of a military guard in time of peace. But considering the nature of military government, and the necessity of maintaining good order and discipline in a camp, I should be loth to say that life might not be taken in suppressing conduct prejudicial to such discipline.

In charging the jury in *U. S.* v. *Carr*, 1 Woods, 484, Mr. Justice Woods instructed them to "inquire whether, at the moment he fired his piece at the deceased, with his surroundings at that time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened speedily to ripen into a mutiny. If he had reasonable ground so to believe, and did so believe, then the killing was not unlawful. . . . But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required."

So, in the case of *McCall* v. *McDowell*, 1 Abb. (U. S.) 212, 218, it is said that "except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the order of his commander. Otherwise he is placed in the dangerous dilemma of being liable in damages to third persons for obedience to an order, or to the loss of his commission and disgrace for disobedience thereto. . . . The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in the army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as he may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions." It is true this was a civil case for false imprisonment, and these observations were made with reference to a question of malice which was material as bearing upon the plaintiff's right to punitory damages, as it is also a necessary ingredient in the definition of murder. . . .

The same principle was applied in the criminal case of *Riggs* v. *State*, 3 Cold. 85. Riggs was a private soldier who had been convicted of murder in killing a man while acting under the orders of his superior officer. The court held that an order illegal in itself, and not justifiable by the rules and usages of war, so that a man of ordinary sense and understanding would know, when he heard it read or given, that the order was illegal, would afford the private no protection for a crime under such order; but that an order given by an officer to his private which does not expressly and clearly show on its face, or the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him.

I have no doubt the same principle would apply to the acts of a subordinate officer, performed in compliance with his supposed duty as a soldier; and unless the act were manifestly beyond the scope of his authority, or, in the words used in the above case, were such that a man of ordinary sense and understanding would know that it was illegal, that it would be a protection to him, if he acted in good faith and without malice. As there is no reason in this case to suppose that Clark was not doing what he conceived to be his duty, and the act was not so clearly illegal that a reasonable man might not suppose it to be legal, — indeed, I incline to the opinion that it was legal, — and as there was an entire absence of malice, I think he ought to be discharged.

But, even if this case were decided upon common-law principles, the result would not be different. By the statutes of the State in which the homicide was committed, a felony is defined to be any crime punishable by imprisonment in the State's prison. Stone had been convicted of a military offence, and sentenced to hard labor in the military prison for two years, and, so far as the analogies of the common law are applicable at all, he must be considered, in a case of this kind, as having been convicted of a felony.

It may be said that it is a question for a jury, in each case, whether the prisoner was justified by the circumstances in making use of his musket, and if this were a jury trial I should submit that question to them; but as I am bound to find as a matter of fact that there is reasonable cause to believe the defendant guilty, not merely of a homicide, but of a *felonious* homicide, and as I would, acting in another capacity, set aside a conviction, if a verdict of guilty were rendered, I shall assume the responsibility of directing his discharge.

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