justice, liberty and right," not contained in that law, and which, therefore, Judge Black says "are no proper elements of a judicial opinion upon it." Fortunately, neither the wisdom of those who framed that law, nor of those from whom it was chiefly derived, was so short-sighted. The necessary provisions are to be found in it, not implied only, but expressed, not in its spirit alone, but in its letter. Guided by these, we think it clear that the acts in question are unconstitutional, because they are a delegation of legislative power; because they authorize taxation of a part of the State for the benefit of the whole; because the money so to be raised is revenue, which can only be raised by the General Assembly, and by bills originating in the House of Representatives.

CECIL.

Philadelphia, Oct. 1853.

RECENT AMERICAN DECISIONS.

In the District Court of the United States, for the District of Wisconsin. August, Special Term, 1858.

EDWARD A. WRIGHT, ET AL. *vs.* CHARLES N. SHUMWAY, ET ALS.

IN EQUITY.

1. A mortgage given to secure a debt then due and payable may be redeemed or foreclosed at any time.

2. A covenant on the part of a settler upon unsurveyed lands of the United States to purchase those lands as soon as they are surveyed and offered for sale by the Government, and then mortgage them to a creditor for the security of a debt, is not a contract in violation of Sections 4 and 5 of an Act of Congress, entitled "An Act for the relief of the purchasers of public lands, and for the suppression of fraudulent practices at the public sales of the land of the United States. [4 U. S. Statutes at Large, 390.]

3. An equitable mortgage springs from an agreement that there shall be a lien. A covenant, by a debtor with his creditor, to purchase certain lands therein described, and to mortgage them to said creditor as a security for a debt, is an equitable mortgage, and will be enforced in equity by a decree of sale of the premises, in pursuance of a prayer of a bill for that purpose.

4. Where a settler on public lands, entitled to a pre-emption, procures a capitalist to pay the purchase money into the land office, and allows him to take the receiver's receipt in his own name, or makes an assignment to him of his certificates of location as his security for such payment, upon receiving back a bond for a deed upon repaying on a certain day the said purchase money with interest, and the annual taxes on the land; this is, in equity, a mortgage of the premises, redeemable by the settler or his assigns, at or before the time the said money becomes payable, according to the conditions of the bond.

The opinion of the Court was delivered by—

MILLER, J.—The defendants, Charles N. Shumway, John P. Shumway, Jabez N. Rogers and John S. Harris, in the year 1849, became indebted to these plaintiffs by several promissory notes, in the sum of twelve hundred dollars. On the fourteenth day of December, 1850, Charles N. Shumway and John P. Shumway, having settled upon and being in possession of the following described unsurveyed public lands, executed and delivered to the plaintiffs a deed or instrument under seal, by which they, for the consideration therein expressed, of one dollar, did "sell, assign and convey to the parties of the second part, all their right, title and interest in those certain pieces of land, situate in the township of Buffalo, in Marquette County, now occupied by the said Charles and John N. Shumway, and on which are now standing the saw-mill, dwellings, tavern stand and other buildings owned by the said parties of the first part, or any of them. Said land being six hundred and forty acres, and embracing the mill-site on White River, and place known as Wautoma. Together with all the water privileges, rights and easements and other appurtenances, and the buildings erected on the said land. The property hereby assigned being intended to include all the claims held by or for the said parties of the first part on the lands now occupied by them, and yet unsurveyed and not sold by the United States, at said Wautoma, to have and to hold the same to the said Edward and Augustus and their heirs forever. This grant is intended as a security for the indebtedness of the said parties of the first part to the said parties of the second part, consisting of three notes, in all about twelve hundred dollars, besides interest. And the said parties of the first part hereby covenant and agree to and with the said parties of the se-

cond part, that they will purchase the said land of the United States whenever the same shall be surveyed and exposed to sale; and will mortgage the same, with the appurtenances, to the said parties of the second part, their survivors or assigns, to secure the indebtedness aforesaid, or such part thereof as may then be unpaid, so soon as the said land shall be exposed to sale." This deed was acknowledged by the grantors before a Notary Public, and filed with the Town Clerk as a chattel mortgage; and in October, 1852, it was recorded in the office of the Register of Deeds of the proper county, as a mortgage of real estate.

On the 16th December, 1850, the defendant, Jabez N. Rogers, by his deed duly executed and acknowledged, confirmed the aforesaid deed, and conveyed to these plaintiffs his interest in these premises, for the purpose of securing this debt.

These lands were surveyed and offered for sale by the United States, in June 1852. In November, 1852, John P. Shumway proved up a pre-emption right, and entered one hundred and sixty acres, which included the village of Wautoma, and assigned the certificate of location to John Fitzgerald, in consideration of the payment by him of the purchase money at the land office, at the request of said Shumway; and on the same day Fitzgerald entered in his own name, one other quarter section of this land, for Charles N. Shumway, of which he claimed a right of pre-emption. These two quarter sections were parcels of the lands described in this deed; and they were purchased by and in the name of Fitzgerald, at the instance and request of the Shumways, he giving to each of them a bond, in the penalty of five hundred dollars, conditioned that he, the said Fitzgerald, shall make to them respectively a deed for a quarter section, as described in the bond, on paying to him two hundred dollars, with interest, within two years thereafter, and also paying the annual taxes.

After these two quarter sections were entered at the land office as aforesaid, a demand was made by the plaintiffs, of the Shumways, of a mortgage, in pursuance of the covenant in this deed, which they refused.

The Bill was taken as confessed against John S. Harris, and

also against Jabez N. Rogers, he not claiming any interest in the premises. The Shumways and Fitzgerald made defence.

It was contended, on the part of the defendants, that this deed is a contract, in violation of sections 4 and 5 of an Act of Congress, entitled "An Act for the relief of the purchasers of public lands, and for the suppression of fraudulent practices at the public sales of the lands of the United States," [4 Statutes at Large, 390,] and therefore void. I do not think that this is a contract prohibited by this Act of Congress. The plaintiffs were merchants doing business in the City of New York, and not contemplating the purchase of this land, or of any interest therein, either at a public sale by the Government, or in any other manner, but merely desiring a security for their demand, accepted this deed for the purpose. The land was not intended by the Shumways to be the subject of a public sale by the Government. At the date of the deed they had the peaceable and undisturbed possession, with the tacit or implied assent of the United States; and had erected "a saw-mill, dwellings, a tavern-stand and other buildings, and had thereby an inchoate right of pre-emption. In consideration of their indebtedness, they executed and delivered this deed as a security merely, and not as a conveyance. But even if the land was to have been purchased by the Shumways at a public sale, there is nothing in this deed to prevent competition in bidding, or to stop these plaintiffs from becoming the purchasers; but on the contrary, the covenant on the part of the Shumways to purchase the land and then to mortgage it, might have induced competition, and required them to bid it off at a much higher rate than the *minimum* price.

The defendants objected to this deed as void for want of consideration; and also, that if the debt was a consideration, it was then due and payable, and no time is mentioned for its payment, or for the purchase of the land, or giving the mortgage, and therefore it is vague and uncertain. A conveyance, contract or mortgage founded on a past consideration is valid. Where the mortgage money is due and payable, or no time is mentioned in a mortgage for its payment, a redemption or foreclosure may be decreed at any time; and a mortgage intended to secure a certain

debt is valid in equity for that purpose, whatever form the debt may assume. This deed is declared to be for the security of the debt therein specified, with a covenant to purchase the land and to mortgage it whenever it should be surveyed and offered for sale by the Government. The time of performance of this covenant is not specifically mentioned, but a time is sufficiently stated. The consideration expressed in this deed is sufficient to authorize the Court to enforce a performance of its covenants.

The defendants' counsel argued that this deed is of no validity, as no title to the land was legally vested in the Shumways at the time of its delivery. This deed does not purport to be a mortgage of the fee; but, nevertheless, it may be valid as a mortgage in equity. In equity, whatever property, personal or real, is capable of an absolute sale, may be the subject of a mortgage. Therefore, rights in remainder and reversion, possibilities coupled with an interest, rents, franchises and choses in action, are capable of being mortgaged. 2 Story's Equity Jur., § 1021. And courts of equity support assignments of, or contracts pledging property, or contingent interests therein, and also things which have no present, actual, potential existence, but rest in mere possibility. Mr. Justice Story in his opinion in *Mitchell* vs. *Winslow*, 2 Story's Rep., 630, remarks: "It seems to me a clear result of all the authorities, that whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then in *esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice." If a mortgage be made of an estate to which the mortgagor has not a good title, and then he who has the real title, conveys to the mortgagor or his representative, with a good title, the mortgagee will be entitled in equity to the benefit of it, for it will be considered as a gift into the old stock. *Seabourne* vs. *Parvel*, 2 Vern., 10; *Porter* vs. *Emery*, 1 Cha. Rep., 97; *Hort* vs. *Middlehurst*, 3 Atkyns, 376, *Goodright* vs. *Meade*,

3 Burrows, 1703; *McGinnis* vs. *Noble*, 7 Watts & Serg., 454; *Lessee of Harmer's Heirs* vs. *Morris and Gwynne*, 1 McLean, 44; S. C., 7 Peters, 544.

This deed purports to be a mortgage by the Shumways, of all their property or interest then existing, whatever it might be, with an express covenant to purchase the land of the United States, whenever it shall be surveyed and exposed to sale; and then to mortgage it to these plaintiffs, to secure their indebtedness. By an express written agreement to make a mortgage, a lien is created on the land in equity, on the principle that what has been agreed to be performed, shall be performed. *Hankey* vs. *Vernon*, 2 Cox. 12; 3 Powell on Mort. 1047, a. b. An equitable mortgage springs from an agreement express or implied, that there shall be a lien. The agreement in this case, to purchase the land therein described, and then to mortgage it, is express, and is a specific lien which will be enforced in equity. *Finch* vs. *The Earl of Winchelsea*, 1 *Peer Williams*, 277; *Fremault* vs. *Dedire*, ib. 249; *Deacon* vs. *Smith*, 3 Atkyns, 323; *Tooke* vs. *Hastings*, 2 Vern. 97; *Lyde* vs. *Mynn*, 4 Sim. 505; *Laundell and Wife* vs. *Breary*, ib. 481; *Mitchell* vs. *The Archbishop of York*, 6 Sim. 224; *Burn* vs. *Burn*, 3 Vesey, jr., 581; *Legoide* vs. *Hodges*, 1 id. 477. The same principle seems also to be well established in the Courts of this country. In the matter of Howe and Wife, 1 Paige Rep. 131; *Delaire* vs. *Keenan*, 3 Desauss, 74; *Menude* vs. *Delaire*, 2 id. 564; *Dow* vs. *Ken*, Spears, 413; *Campbell* vs. *Mosely*, 6 Litt. 358; *Fleming* vs. *Harrison*, 2 Bibb. 171; *Richter* vs. *Selin*, 8 S. & R. 425; *Tyson* vs. *Passmore*, 2 Barr. Pa. Rep. 122; *Nicholas* vs. *Longworth*, 1 McLean, 395. I do not deem it necessary to enter upon a minute statement of these authorities, and many others, as I consider the principle to be settled beyond all controversy. This deed is then an equitable mortgage, to be enforced by bill, in equity.

The legal title to this land is in Fitzgerald, subject to the equity of the Shumways, to redeem, on or before the days of payment specified in the bonds of Fitzgerald, to them, for conveyance. On or before the days of payment, as specified in said bond, Fitz-

gerald is obligated to convey to the Shumways, or to their assigns, or to the purchasers, under a decree in this case, upon the payment to him of the amount he advanced for the land, to the government, with interest according to the conditions of the bond. When the land was purchased of the government, the Shumways were in the possession thereof, holding the same against the world, with the tacit or implied assent of the United States; and they so continue until this day. The bonds of Fitzgerald, for deeds are not conveyances of the land, neither are they leases; but they are obligations whereby the Shumways, or their representatives or assigns, may compel, by bills in equity, conveyances of the fee, upon the payment of the purchase money according to their conditions. The purchase of the land by Fitzgerald, at the instance and request of the Shumways, the settlers and improvers in possession, and their acceptance of bonds for conveyances, is the same in equity as if they had made the purchase in their own names, with money borrowed of Fitzgerald, and secured by mortgages of the land.

It is not necessary to determine the question of priority of lien, as the plaintiffs consent to a decree of sale of the two quarter sections entered by Fitzgerald subject to his lien, according to the conditions of his bonds to the Shumways, the premises being considered quite valuable and abundant for the payment of both liens.

A decree of sale according to the prayer of the bill is proper. The plaintiffs might have come into Court with a bill praying specific performance of the contract to mortgage, but such a useless proceeding is not required. The deed under consideration, is an equitable mortgage of the premises, and is considered in this Court, as to these parties, the same as a mortgage executed and delivered in legal form.

Supreme Court of Pennsylvania at Pittsburg, September, 1853.

SHARPLESS ET AL *vs.* THE MAYOR, &C., OF PHILADELPHIA.[1]

1st. In determining whether an act of the Legislature is constitutional, we must look to the body of the constitution itself for the reasons. The general principles of justice, liberty and right, not contained nor expressed in that instrument, are no proper elements to base a judicial decision upon.

2d. If such an act be a written general grant of legislative power; that is, if being a law, and if it be not forbidden expressly or impliedly, either by the State or Federal Constitution, it is valid.

3d. To make it void, it must be clearly not an exercise of legislative authority, or else be forbidden so plainly as to leave the case free from all doubt.

4th. An act of Assembly authorizing subscriptions by a city to the stock of a railroad corporation, is not forbidden in article first, section thirteenth of the State Constitution; that section not being a restriction upon the legislative authority of the two Houses, but a bestowal of privilege upon the separate branches.

5th. Such act does not impair the obligation of any existing contracts, nor does it attempt an impossibility by creating a contract; but merely authorizes the corporations to make one, if they shall see proper.

6th. This is not such an injury to plaintiffs lands, goods, or person, that they are entitled to judicial remedy for it, agreeably to section eleven, article nine. It is no injury at all, except on the gratuitous assumption that it is forbidden in some other part of the constitution.

7th. It does not violate the right of acquiring, possessing, or protecting property secured by section first, article nine. The right of property is not so absolute but that it may be taxed for public benefit.

8th. This is not a taking of private property for public use without compensation, contrary to section tenth, article nine. When property is not seized and directly appropriated to public use, though subjected in the hands of the owner to greater burdens than before it is not taken.

9th. It cannot be said that the plaintiffs will be deprived of their property in violation of section eleventh, article nine. The settled meaning of the word "deprive," as there used, is the same as that of "taken" in section ten.

10th. An act of Assembly to authorize the taking of private property

[1] The within points stated by Ch. J. Black, form an abstract of the opinion of the Court. This being the majority opinion, has already been widely distributed by the newspapers, and will appear in due season in Harris' Reports. For these reasons, as well as by reason of its very great length, we have not given it to our readers. The minority opinions cannot appear in the regular volume of reports, and we shall therefore admit them to our pages. We give in this number the dissenting opinion of Mr. Justice Lowrie, and shall give in our next the opinion of Mr. Justice Lewis. *Eds. Am. L. R.*

for private use would be unconstitutional, because it would not be legislation, but a mere decree between private parties; but this is no taking in any sense, for any purposes or for any uses.

11th. Plaintiffs have no ground for complaint against the Acts of Assembly now in question because they authorize the creation of a public debt, of which they may be required hereafter to pay a part in the shape of taxes, for by taxation alone can any harm ever come to them.

12th. If it be within the scope of our legislative powers, with consent of the local authorities, to permit assessments of local taxes, for the purpose of assisting the corporation to build railroads, bearing to tax payers the relation which these roads do, then the laws complained of are unobjectionable.

13th. Taxation is a legislative right and duty which must be exercised by the General Assembly through the medium of laws passed by them under their authority.

14th. The power of the Assembly with reference to taxation is limited by their own discretion. For its abuse, members are accountable to nobody but their own constituents.

15th. By taxation is meant a certain mode of raising revenue, for public purposes, in which the community that pays it have an interest. The right of the State to lay taxes has no greater extent than this.

16th. The act of a Legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which, although public, is one in which the people, from whom they are exacted, have no interest, would not be law, but a sentence commanding a judicial payment of a certain sum by one portion or class of people to another—the power to make such a law is not legislative but judicial, and was not given to the Assembly by the general grant of legislative authority.

17th. But to make a tax law unconstitutional, when thus granted, it must be apparent that the community taxed can have no possible interest in the purpose to which their money is to be applied. This is more especially true if it be a local tax. Local authorities have themselves levied taxes in pursuance of an act of Assembly.

18th. If, therefore, making a railroad be a mere private affair, or if the people of Philadelphia have manifestly no interest in the railroads which run to and towards the city from Easton, and from Wheeling, then the laws are unconstitutional.

19th. But if railroads are not private affairs, are but public improvements, then it is the right and duty of the State to advance commerce and promote the welfare of the people, by making them, or causing them to be made, at the public expense.

20th. If the State declines to make desirable or public improvements she may permit it to be done by companies. The fact that it is made by a private corporation does not take away its character as a public work.

21st. The right of the company by which it is made to be compensated for the expense of constructing it, by taking tolls for its use, though it gives the corporation an interest in it, it does not extinguish the interest of the public, nor make the work private, because, to say nothing of other advantages, though the public may pay toll, still they can travel on it much cheaper than without it.

22d. The State may, therefore, rightfully aid in the execution of such public works by delegating to corporations the right of eminent domain, as she always does, or by the execution of the taxing power, as she does very often.

23d. The right of local authorities to tax a particular city for local improvement is as clear a right as to lay a general tax for any public purpose whatsoever.

24th. If the State having constitutional power can create a State debt by a subscription in behalf of the whole people to the stock of private corporations engaged in making public works, it follows from what has been before said that she may authorize a city or district to do the same thing, provided such city or district has a special interest in the work to be so aided.

25th. There is not a case in which we can determine as matter of law that the city has no interest in the proposed railroads. That this is true as matter of fact has not even been asserted in argument; only a little more than intimated.

26th. If the Legislature and the Councils decide that the city has an interest large enough to justify these subscriptions, we cannot gainsay this without declaring all interest to be flatly impossible, and to do that would be absurd.

27th. Finally, if the authorities of the city, in accordance with their charter, and with certain laws supplementary thereto, are about to create a public debt for public purposes, in which the city has an interest, it will be as valid and binding as if it had been legally contracted to accomplish any other public purpose for the benefit of the city. Opinion per BLACK, Ch. J. WOODWARD & KNOX, J. J. assenting, LEWIS & LOWRIE, J. J. dissenting.

The following dissenting opinion was delivered by

LOWRIE, J.—It is insisted that a municipal corporation, even with the consent of the Legislature and of a majority of its voters, has no constitutional right to become a stockholder in a rail-road corporation, and may not borrow money to enable it to do so. The measure derives no essential virtue from the vote of the people of the town or city, or from the will of their officers; for the citizen claims the more authoritative protection of the State. He owes no allegiance to towns or cities, or to local majorities of any kind, but only to the State, which alone is sovereign; and it is this allegiance alone that enforces his obedience to local authorities. Towns and cities may command and act where the Legislature can give them authority to do so, and has given it; and without this, neither town officers nor town majorities, even though unanimous, have any legitimate control over the property or rights of the citizen. All the

efficacy of the subscription is therefore dependent upon the act of the Legislature, and if under the constitution, such an act is excluded from the province of government, then of course, no legislative sanction and no combination of governmental majorities can make it valid.

The principle involved in this case has been so often acted on by the Legislatures of our own and of other States, and its correctness has been so often affirmed by judges, whose learning and talents I may emulate, but cannot hope to equal; that it is with the utmost diffidence that I venture to express a contrary opinion.

When a proposed measure promises a present advantage, and there is no apparent wrong to any one in carrying it out; it is not unusual to enter upon it without scrutinizing with any suspicious care, the tendency of the principle on which it is based, and even without studying what the principle of it is. The example being once set, is followed by many similar instances; and it is not until the practice begins to run to an extreme, and to develop its dangerous results, that we begin to suspect its fundamental principle, or to doubt the propriety of the action of those who led the way. This thought may furnish some apology for the boldness that questions the first impressions of Legislature and of Courts; and it is not without considerable illustration in the laws, arguments and decisions on this very subject. It would be surprising, if the first attempts to define the application of a principle should be entirely successful. And even if they were, they could not be known to be correct until they had stood the test of many subsequent disputes. Like a boundary line through a wilderness country—it may require many experimental surveys, conditional lines, temporary concessions and earnest contests, before its true place can be defined and settled.

In the case of the *Commonwealth* vs. *Mc Williams*, 11 State R. 70, this Court *seems* to have affirmed the constitutionality of such an act as this we are now considering; because no unconstitutional principle was pointed out by the Counsel or seen by the Court, as being involved in the measure. The only positive principle, enunciated by the Court, in support of the measure, is that the Legisla-

ture may authorize local taxation for local improvements. Without that principle, (not needed by the case) that act of Assembly could not have been sustained, and I shall endeavor to show that, even with it, it could not be.

Several other cases in other States carry the principle of local taxation even farther. *Godden* vs. *Crump*, 8 Leigh, 120; *Harrison* vs. *Holland*, 3 Grattan, 347; *Thomas* vs. *Leland*, 24 Wend. 65; *Shaw* vs. *Dennis*, 5 Gilman, 405; *Reple* vs. *Brooklyn*, 4 Comstock, 419. But none of these cases are in point as to the means by which the measure is proposed to be effectuated here; and in my opinion, they do not involve the essential principle of the present causes.

It is otherwise, however, in the cases of *Bridgeport* vs. *Housatonic R. R. Co.*, 15 Conn. 475; *Nichol* vs. *Nashville*, 9 Hump. 252; *Talbot* vs. *Dent*, 9 B. Monroe, 526; and *Cincinnati, W. & Z. R. R. Co.*, vs. *Clinton Co.*, lately decided by the Supreme Court of Ohio.

I take the last case as a fair sample of them all.—The aim of the learned Court, so far as it is important to notice it here, is to show that the work was of such a local character as to justify local taxation by the Legislature, either directly or through the local authorities, and having done so, (as is supposed,) the inference is drawn—"if" "either might do the whole (work) is it not too obvious for doubt," "as a question of power, that each may be authorized to do a part?" Certainly it is. But I most respectfully think that this does not exhaust the argument. Nor do I presume that the learned Court regarded it as so doing; for, in another place, they say that the object being proper, it "might be done by any means, not prohibited, adapted to the end in view, and subscription of stock to a company incorporated for that purpose is not objectionable." Here is the very question of the cause; and without admitting the correctness of the views expressed as to the absoluteness of the legislature's power of local taxation for improvements which they may call local, I cannot help thinking that this question of the means has not been fully considered. Are not the means prohibited by the Constitution?

When we notice the character of municipal corporations, it seems somewhat strange that they should be allowed to borrow money for any purpose, except as a mere temporary expedient. Our municipal corporations have none of the sacredness that belonged to the chartered municipalties of England. Theirs were grants of franchises and privileges, generally purchased and paid for, and guarantied by Magna Charta, and were part of the very means and process of the development of individual rights, for which Englishmen were continually and earnestly contending. Ours are mere instruments of government, having essentially no higher value than other local offices, being instituted as these are, for the purpose of devising and executing certain local regulations which it would be inconvenient and almost impracticable for the Legislature to do by direct legislation. Their functions are different from the local offices of counties and townships, chiefly because of a more dense population, and not at all because of any constitutional necessity. Properly speaking, they have no faith to pledge; because they have no place in the Constitution, and no guaranty that their existence will be continued even for a year; because their jurisdiction, limits and taxing power, may be expanded, contracted and subdivided at the pleasure of the Legislature; because usually their taxing power is limited to the mere necessities of their corporate duties, leaving them little or nothing to answer other demands upon their plighted faith; and because the legislative power over them for alteration, extension and annihilation, cannot be taken away, and ought not to be impeded by their act of incurring debts—their power ought to be carefully limited, for the experience of all municipalities, ancient and modern, shows that there is always a tendency in corporations to sacrifice individual rights to the interest of the corporate body. A watchful observer of the acts of our own cities and towns can point out many instances of this. But it stands written in every age, in almost every year of the history of the Grecian and Italian cities, democratic, oligarchic, or monarchic, and this disregard of individual rights, was more than anything else, the cause of their decay.

The corporation to be aided by the investment, is a rail-road company. That such is a private corporation has very often been decided and is not disputed. It is essentially so, for it is not an instrument of government, and no Legislative declaration can alter this fact. In it the right of voting is regulated on principles totally different from the elective franchise of the constitution. It is private and not public, for its province is regulated, not by the constitution and general laws of the land, but by its charter, which stands as the contract terms of its existence, at least among its members. It is private, because it is not a law imposed upon any one by legislative authority; but a plan of union, accepted as such by persons, voluntarily and each for himself, associating themselves according to its terms. He that becomes a member of such a corporation voluntarily gives up so much of his property as he invests in it; he converts his money or other property into corporation stock. Besides this, his whole estate may be in some measure subject to the control of the corporation; for all private corporations may be so constituted that the members may be made personally liable for the corporation debts. And this is not all, for if this may be imposed upon a municipal corporation, it may be imposed upon any township or ward, or half or tenth part of a township or ward; for the legislature can subdivide any of them at pleasure. Nay, they may on the same principle be forced to become members of any private partnership formed for similar purposes, called public.

What, then, is the substance of the proposed measure; It is to make a municipal corporation, and therefore all its citizens, and to some extent, all persons owning property within its limits, members of a private corporation by an act of government. It is to take the property of the citizen, by an act of government, and invest it for him in the stock of a private partnership. It is to take his credit or his property out of the protection of the State Constitution, and place it under a charter which must thereafter be its only law. It is to place it where neither his power as an individual can control it, nor his vote as a citizen affect it. Under the constitution, he stood as the equal of all men, in the choice of the officers

who might affect any of his interests. (Bill of Rights, S. 5.) Under the charter now proposed to be forced upon him, his voice is not heard at all, or if at all, most indistinctly and indirectly; for neither the citizens nor their municipal representatives may have any voice in choosing the majority of the rail-road directors, and the votes which they do give bear no adequate proportion either to their numbers or their interest. Force upon them this new relation, and as to so much of their interests, you take away all their rights as individuals, and as citizens; and they are all, some with and some without their consent, made carriers of goods and of passengers, and liable, in some degree, to the duties and the risks of that relation.

Now here is the very question of the cause, and I proceed to its more direct consideration. May government force any portion of the citizens into such a relation? May a municipal corporation embark the interests of its citizens in the speculations of a private corporation or partnership? I think it cannot.

May not government authorize municipal corporations to engage in any sort of trade or business for the public benefit, on the faith of the taxes it has raised or has power to raise? Yes, it can, if that is proper govermental business; but it is not. And, of course, if the business be not govermental, government can levy no tax to carry it on. Is the stress laid upon the idea of the public benefit of the business? Then what line of business is there that is not regarded by those engaged in it, as being for the public benefit? Can proper public business be defined according to this standard? Generally, perhaps, it may; and then such business as this is declared to be the indefeasible right of man, as an individual, when it is declared that the right of acquiring and possessing property is indefeasible and inherent in man, and that it is excepted out of the general powers of government. (S. 1.) This declaration means nothing if government may convert itself, or part of itself, into a trading corporation or socialist commune, and pledge the credit and property of the citizens to sustain its schemes of trade. If it may, then all the guaranties of private property contained in the declaration of rights are but cob-web restraints upon the power of govern-

ment; for it may pledge all the property of the citizens, by engaging in some trading speculation.

I state an extreme case, not that I have any fear that it will happen, but merely that the principle may stand out with more prominence. The constitution means that there is a real distinction between the pursuits of the individual, and the province of the government; and it marks that distinction as clearly as general terms will admit. When it declares that the right of the individual man to "acquire, possess and protect his own property, and procure his own happiness, is inherent and indefeasible," and excludes it from the province of government; it means that this right shall not be invaded, and that government shall not undertake to control the individual in the exercise of it, either by directing his enterprises, investing his funds, or choosing his associates. If government can do this at all, in the manner here proposed, there is no limit to its power, and the whole form of our institutions may be changed by act of Assembly.

There may, no doubt, be many cases wherein it is difficult to mark the boundary between the province of the government and that of the individual citizen; but here there is none, for the line is distinctly marked by the fact that this particular business has been entrusted by law to private hands, and is subjected to the law that governs private relations. Can the citizens be compelled to enter into such a relation?

The attempt is forbidden by the Constitutional declaration that the right of the people "to alter, reform or abolish their government," that is, all govermental institutions, is "unalienable and indefeasible." (S. 2.) Admit the solecism that government may force any portion of its citizens into membership in an institution in which contract is the essential bond; then either this relation stands without its proper contract consequences, and you abolish the essential and constitutional distinction between contract relations and legal ones, including the inviolability of the former, which is impossible; or government has power to establish institutional relations among the citizens, which neither it nor they can "alter, reform or abolish." That is, government can establish social rela-

tions among the citizens—contract, and yet governmental—which neither it nor the people can change; because our Constitution forbids the government, and the Constitution of the United States forbids both government and people from "impairing the obligations of contracts."

Such interference with private rights, is excluded by the Constitutional rule, in favor of the inviolability of contracts. (S. 17.) This rule involves the idea, that those individual rights, which are the proper subject of contract, and in so far as they are so, may be placed beyond the jurisdiction of governmental rules, by the mere will of individuals expressed in a contract. This shows that contract relations are higher in degree than those established by law, and that rules of law are intended to define the relations between individuals, only when they have not themselves fully defined them by an agreement. Thus the common law maxim, *conventio vincit legem*, acquires new authority from the Constitution, and it may be, its province is enlarged. Contract relations being thus placed above legal ones, it necessarily follows that the law cannot force them upon any one. If, then, this is to be regarded as a contract relation in its character and consequences, it is one that the law making power cannot institute in any form. If it is not a contract relation, then it is a governmental one, and may be dissolved by the power that created it. The obligation, being imposed by law, may be discharged in the same way. Its contract form does not alter the case, for its legal character depends upon its essence, and not upon its form; otherwise power could make its own forms the means of justifying the most palpable usurpation.

The incongruity of the proceeding, presents itself in strong light, if we take into consideration the rule which has been so often affirmed, that the charter of a private corporation is placed by the Constitution of the United States entirely beyond the reach of all state power. It is said that over sixty millions of dollars are invested and proposed to be invested in this way, in several states under various acts of Assembly. This amount is equal to the assessed valuation of the property in about half of the counties and half the territory of this state, taking the more thinly populated parts. The

amount may be over-estimated, but that is not important. What then is the proposition? It is to place all this amount of property under the control of private chartered corporations. Not by the individual will of each property holder acting for himself, but by the will of the government. That is, government interferes with private property in order to place it beyond the control both of the individual and of the government. It exercises power in order to abdicate power, or rather to transfer it to private hands. The property whose relations were subject to the rules of the law and the Constitution, is outlawed—banished its relations—and sent into the desolate exile of a private corporation, where it can claim only an exile's rights, and where the voice of the law and of the constitution is unheard, and the equal ballot of the independent freeman is disregarded. Here is *diminutio capitis* and no *jus postliminii*.

To my mind, it seems very plain that this measure is in violation of the whole spirit of the declaration of rights. It violates especially the first section, by undertaking to control the citizen in the investment of his funds and the choice of his business. It violates the second, by imposing upon him an institution which neither the government nor the people can alter or abolish. It violates the fifth, by imposing an institution, wherein the elective franchise is taken away. It violates the ninth, by taking the property of the citizen by a special act, and without trial. It violates the seventeenth, by making the citizen a member of a private partnership without his consent. The eleventh would be violated, if we should shut the doors of this Court against him, and refuse him a prompt and full remedy. And the very nature of government is violated by government erecting over its citizens an institution which it cannot control.

I have now finished my direct argument of the point which strikes me as the pivot of the case; but I cannot avoid the belief, that a glance at the history of the development of private rights, which resulted in producing the ideas embodied in our declaration of rights, will tend to show that I have not misunderstood those ideas.

Perhaps all the internal political contests that the world has ever witnessed have been, consciously or unconsciously, contests for the

natural rights of individuals. Superficially regarded, they seem to have been mere contests for power. But it is far otherwise, in them, all the sentiment is, that the individual has been wronged by the government; and the contest therefore, is for individual right, rather than for power. Power over others is a means of advancing the individual; and for this purpose, the selfish and overbearing will seek an undue share of it; but the mass of the people will never seek it for its own sake; but because they believe that their natural and individual rights will be more respected, the more their influence in the government is felt.

It is doubtless true, that the right of the individual as against government, did not develope itself in the consciousness of the Grecian and Roman antiquity; for a state of almost constant external war is peculiarly unfavorable to its development. When martial law is the normal state of a people's institutions, man is useful only as an element and instrument of society; and individual rights are merged in the sodality of the state. With them, power was the means by which the burdens of war were cast in such a manner as to weigh least heavily on those that ruled. With them the nation's glory was measured by the nation's extent, and by its power over other nations, and not by the intelligence and virtue and liberty of its citizens. The highest aim of society was boundless dominion, and the highest aim of the individual was the chief seat in the kingdom. Equality of rights was unknown to them except as the portion of the ruling caste, who arrogated to themselves all power. That individuals had rights independent of law, was a principle which they never comprehended. With them power was absolute, and the highest merit was martial skill, and hence might and law, valor and virtue, were identical terms.

All matters fell within the province of government. Religion, arts, trades, education, amusements, were the subjects of legislation. Not only the means, but the very form and essence of education and religion, were under the control of the state. Socrates was sacrificed for his efforts in the cause of education and progress, and Plato received a hint that some of the hemlock of his master's cup was left for him.

It was never so, but in an exceptional way, with the race of people from whom we derived our origin and our principles. As far back as history marks the progress of the Germanic tribes, liberty and independence was the motto on their banners. Personal independence was part of their governmental common law, and therefore part of their Constitution. It was the natural result of their national origin. Their's was the natural and spontaneous growth of a rural and homogeneous people, whose numbers were increased by the arts of peace, and by a virtuous regard for the family relation, and whose virtues and energies were developed by their conquests of the mountains and marshes, and forests and wild beasts of the earth, and under a government, free, unencroaching, and adapted to their circumstances. Roman development was from a city centre, by the arts of war, by the conquest and enslavement of their fellow men, always proceeding in disregard of individual rights, and, in order to maintain its position, requiring a government that disregarded them.

And when the German people invaded and conquered the Western Roman empire, war brought with it an analogous disregard of individuals rights, and fixed it among the institutions of government, by the establishment of the feudal system. But in England the idea was soon reclaimed as constitutional common law, and vindicated in Magna Charta; and since then the whole history of England is one continual protest against governmental invasions of private rights; and he reads history badly who regards it as a protest against merely royal power.

Definitions of the utmost boundaries of right and of authority, are not so common in England as here; because with them the system is in continual progress: and because general principles are not so much the means of a nation's growth, as inductions from its experience and history. In the revolution of 1789, France endeavored to invert this order and to set out by a course founded on philosophy and general principles. But it was a failure, because the people were not ready for it. A nation is not born in a day. The principles on which it acts and by which it advances, are the spontaneous accretions of its natural growth, becoming evolved as

needed, and adapted as evolved. David's sling seemed an insignificant weapon, but it suited him better than a sword, helmet and coat of mail. But the statesmen of the French National Assembly, properly defined the English and American idea of liberty, and presented a just generalization of the facts of history, when in 1780 they declared that "it consists in the ability to do any thing not injurious to others, and the natural rights of every man are only thus limited."

They understood the right of property, when they declared that it was "inviolable and sacred, and no one could be deprived of it, except when the public necessity, legally established, clearly required it; and then only on condition of just and previous compensation." They understood the province of government, when they declared that "the end of all association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, security, property and resistence to oppression." All this is involved in the personal liberty, personal security and private property guarantied as the natural and inherent rights of every Englishman, and especially of every Pennsylvanian, all being necessary as motives, encouragements, instruments and rewards of that personal virtue and energy, that are necessary to individual, and, therefore, to national development. It is all involved in the very religion which they profess, and which teaches that every man has his own conscience, his own duties, his own will, his own intelligence, his own future.

I say the general mind of France had not yet been trained to these high ideas of liberty, and they did not constitute part of the nations consciousness. Hence the days of Robespierre, when it was fancied that the laws of the fabulous or mythical Lycurgus were the true cure of all political ills. This was the very reverse of the enlightened political principles of National Assembly; for under those laws, individual liberty had no existence, Government directed all things.

Americans could commit no such error. They had been trained in the principles of English liberty, and had regularly and spontaneously outgrown them, their principles and institutions being de-

veloped together. Our whole provincial life was a struggle against govermental encroachments upon individual rights, and was the means of training us for a goverment of our own, by developing in us the principles embodied in our State Constitution, as "the general, great, and essential principles of liberty and free government."

Our whole declaration of rights stands as a monument of the regard which the people of the state have for the independence and protection of individual rights, and every line is marked with this principle. All our American Constitutions show that it is also an American principle, and it has been attempted to be introduced into the policy of most of the nations of Europe. The new clause, article 7, section 4, added in amending the Constitution, and providing that the Legislature shall not give any corporation or individual, the privilege of taking private property for public use, without compensation first paid or secured, is only a more adequate form of securing a well established principle, theretofore often invaded by the provision of a fruitless remedy. Under such a constitution, and within the prohibited limits, private rights are safe against the voice and act of even unanimous millions, unless they are willing to stand self branded as usurpers and tyrants: and I cannot doubt that the provisions of the bill of rights to which I have heretofore referred, do most expressly protect the citizen from the govermental invasion of his rights that is here intended.

Let us not be afraid of unduly reducing the province of government. The social principle is always strong enough to prevent this, and the tendency of events is always in the contrary direction. It is too common, the wish to cure all social ills, and advance all social projects, by the power of government. It is too common the wish to place the industry, enterprize and morality of the people, under the care of the state: though all history proves that they sicken and decay under the influence of large govermental powers, and that, in Christian lands, they revive and flourish under the spirit of individualism, which is natural to man, and which can be properly developed only where the pragmatism of the state is excluded. The state is no proper leader in any such matters. It

is delegated not to devise plans of acquiring wealth and securing happiness; but to protect individuals in the proper pursuit of their own lawful plans—not to guide enterprize into new channels and new undertakings; but to protect those already entered upon, and to keep open and improve their avenues. Man advances only by pursuing his own ideal of morality and enterprize; and this he pursues with an energy proportioned to the brightness of the rewards which his own eye discovers in it. When government interferes in such matters, it truly represents those only who suggest the plan; and they only will appreciate the ideal that it is intended to embody or realize; and they only, and not the people generally, can be relied on to give it effect. And so here, a small band of individual stockholders are likely to have the control of the millions of municipal subscriptions now proposed to be made in this and other cases, and the very proposition to make them, has prevented an incalculable amount of individual subscription, and set aside that much of the individual energy, forecast and watchfulness so necessary to the success of such enterprises. The laborer will not tax his own energies when Hercules undertakes his works, and he will be equally backward if Hercules attempt to control him. The vast majority of the people desire to be allowed to mind their own business in their own way, and it is this majority that ought to be regarded. And when the government undertakes to meddle with them, at the call of noisy speculators seeking public favors, no amount of official majorities can purge the deed of its tyrannical character.

Besides this, all history proves that the corruption of government increases with its powers, and that its purity, and therefore its performance, depend much upon the limitation of its jurisdiction. When its power is large, there are strong, and even ferocious, contests to get the use of its power. Even the power of passing private laws, authorizing private corporations, directing public improvements, and appropriating public money, has subjected government to the worst temptations, and given rise to intrigue, fawning and favoritism, and has annually attracted to our capitols swarms of voracious and unprincipled speculators, disgracing the public char-

acter, and causing more than one government to be publicly suspected and charged with corruption, and honest visitors there to be suspected of selfish and dishonest purposes. Every exertion of power that increases its patronage by enlarging its functions, should be watched with suspicion, for it increases the temptations to corruption, endangers the purity of those in power, casts a shade upon the character, and lowers the standard of public morality.

Our governmental stability depends much upon the absence of temptations to corruptions, and upon our reverence for the principle that the natural rights of the individual are sacred against the touch of government. Society was made for man, not man for society. Born to live in society, his virtue, intelligence and energy, are developed by it; and by the intercourse and competitions and efforts to which it naturally gives rise; and repressed and discouraged when attempted to be governed and forced by it. The natural disposition to appropriate is part of man's individualism. Upon it depends the very right of property, and without it, the positive gift of dominion over the earth would have been ineffectual. If it is unduly restrained or interfered with, the emulations which are at the bottom of all the energetic competitions upon which the propress of a people depends, will be most seriously affected. Men's energies are never so well expended and so fully exercised, as when left to the guidance of their own motives, tastes and intelligence. People will not and cannot work under the direction and compulsion of the state, with anything like the same effect as when their occupation and pursuits are chosen by themselves, and urged on by their own hopes and their own will.

It was, I believe, this experience and these reasons that called for our bill of rights, and they illustrate the propriety of the application which I desire to make of its principles. With most profound respect for those who differ from me, I must be allowed to say, that it is a long stride towards the very worst form of government, as applied to a nation—socialism. I think the injunction ought to be granted, for the reasons given above, and for the reasons given by my brother Lewis.

Louisville Chancery Court, Kentucky, July, 1853.

EX PARTE ALEXANDER.

1. The refusal of a writ of *habeas corpus* by one Court, is no bar to an application to another Court.
2. A Court can, on *habeas corpus*, deliver a party from imprisonment for a contempt of Court, where the Court committing the party has transcended its authority by excess of punishment, or by a punishment unknown to the law. But the question of contempt, if the Court had authority over it, will not be inquired into on *habeas corpus;* nor will a writ of error lie in such case; for every Court must be sole judge of the contempts against itself.
3. Cases of contempt were not cases for juries at common law, or under the Constitution; and the statute does not now require a jury to find the imprisonment beyond a day, where an order of the Court has been violated.
4. When we adopted the common law in this country, we did not adopt all the power exercised under it; but American principles regulate the power.
5. A commitment for contempt "*until the further order of the Court,*" is void.
6. The power to punish contempts is a power only of necessity—what ought to be done where a party cannot strictly comply with an order of Court.

The opinion of the Court was delivered by

PIRTLE, CHANCELLOR—James C. Alexander petitions this Court for a writ of *habeas corpus*, to be discharged from the jail of Jefferson county, to which he was committed by the order of the Jefferson Circuit Court. The record of the Circuit Court is referred to, and it is agreed that the Court shall grant, or refuse the writ, as the commitment shall be deemed valid, or invalid; and so the case has been heard on its merits, without waiting for a return of the jailor to a writ.

The Circuit Court made a decree for the sale of infants' real estate, and appointed Alexander a commissioner to make the sale, and ordered the "notes for the purchase money to be returned to Court subject to the order of Court." Alexander made the sale, and, instead of returning the notes to the Court, he collected the money on one of them, amounting to $711, and delivered the note to the purchaser. This fact appearing in his report, made in response to a rule against him, the Court ordered an attachment for a contempt "in failing to pay into Court" the sum of money.

When brought in on the attachment, he stated on oath that he was the administrator of one Cochran; that he was appointed the Commissioner to sell the lot of land belonging to the estate; and he was advised he had blended the duties of the two offices, and had been advised that it was his duty to collect the notes, which he had taken as commissioner; that he was not able to pay the money, and that he meant no contempt to the Court. The Court ordered him to be committed to the jail, "until the further order of the Court for a contempt offered in violating the decree of sale." This was on the 13th of June. It seems another order was made on the 16th of June, which I do not see in the transcript of the record. On the 22d of June, an order reads; "James C. Alexander, the Commissioner in this case having failed to pay into Court on this day, as he was required to do by an order of this Court, made herein on the 16th of June, the amount of money by him collected, in disobedience to, and in violation of the order of the Court in this case, and he appearing in Court, and failing and refusing to pay said amount, and he having violated the orders made heretofore herein, it is ordered that he be recommitted to jail until the further order of the Court, for the contempt offered by him in disobeying and violating said orders of this Court; and it is further ordered and decreed, that he pay the amount by him collected of Israel Hyman, the purchaser, into Court, for the use and benefit of said Hyman." In the same order, Hyman having insisted on his purchase, and declining to say whether he was willing to pay again the $711, the Court refused to confirm the sale, and ordered the property to be resold.

Afterwards, Alexander moved to be discharged from prison; among other things, "because it was impossible for him to return the note into Court, it being in possession of Hyman, the purchaser, and because the Court had no power to make the order requiring him to pay the money into Court for the use and benefit of said Hyman;" and he filed several affidavits showing his inability to raise money. The Court overruled his motion.

It appearing to the Court, on the suggestion of Hyman's counsel, on the same day, (23d June,) that Alexander was at large, an

attachment was ordered against him; and on the next day, when he was brought in, the Court considering that he had been illegally discharged, again ordered "that he stand committed for such contempt, until the further order of the Court." It seems he had been discharged by two justices of the peace, supposing they had power to do so, under the law, for the benefit of insolvent debtors.

On the 28th of June, Alexander's counsel presented his petition to the Circuit Court, praying a writ of *habeas corpus*, setting forth, substantially, the same complaint of illegal imprisonment which is contained in the petition to this Court. The Court refused the writ.

1. The refusal of that Court to grant the writ of *habeas corpus* is no bar to an application here. Even if the writ had been granted, and the case fully heard upon the return made to it, and a formal order made of record, refusing a discharge from imprisonment, the writ now applied for might be granted by this Court. Proceedings *refusing* the benefit of a *habeas corpus* will always be considered with deference and respect, when application is made to another tribunal; but they are not final—they do not stand as judgments, and do not bar, any more than the refusal of a *supersedeas* or an order for an injunction out of Court.

2. Can the *habeas corpus* be granted where the party is imprisoned for a contempt, by a Court having power to punish contempts?

This writ was the privilege of every Englishman at the common law, when he was imprisoned contrary to the law of the land. It was a privilege belonging to him, derived from his Saxon ancestors, which was not to be withheld in any instance, unless he was detained by a lawful power, lawfully exerted. His privilege was wide as that of a citizen of Rome, except that he had to apply in his own name, whereas every Roman citizen could apply to the prætor for himself, or any other Roman, for an Interdict, having substantially the effect of the *habeas corpus* of the common law.

The statutes of 16 Charles 1st and 31 Charles 2d, regulating proceedings on *habeas corpus*, are more in detail than our statute; and while they were intended to preserve the common law privilege, they made exceptions to the granting of the writ in some cases,

which have operated, in the opinion of some Courts, as restrictions on the privilege. But these are restrictions to the action of the judge who grants the writ in vacation. He has not the power to release "*persons convict*," or to discharge a person brought before him, if it appears that he is detained "*upon any legal process out of a Court having jurisdiction of criminal matters.*" This was the constant practice before the statute, even if a judge in vacation could issue the writ before the passage of the *Habeas Corpus* Act, 4 Johns, Rep. 358. But where *the Court* awarded the writ, the authority, and the whole of the authority, by which the party was detained, was examined. I do not mean the regularity or the clearness from error in its exercise, but the validity, the *lawfulness* of the authority.

I do not know an instance where the Courts of England, in modern times, have declined to look into the authority by which a man has been imprisoned. They have, (and always will do so, I have no doubt,) declined to examine the merits of the judgment on this writ; but where the judgment does not belong to the tribunal to give, they have not failed to say so. In the great and leading case of the *Lord Mayor of London*, 3 Wils. Rep. 198, Ch. Justice De Grey says, "The writ by which the Lord Mayor is now brought before us, is a *habeas corpus* at common law." "This is a writ by which the subject has the right to the remedy of being discharged out of custody, if he hath been committed, and is detained contrary to law; therefore the Court must consider, whether the authority committing is a legal authority; if the commitment is made by those who have authority to commit, this Court cannot discharge or bail the party committed." The Court in this case, looked upon the House of Commons as a Court having power to punish contempts; and because the Court of Common Pleas did not know, judicially, what was the law of contempts in that House, or what its punishment was—it decided that it was bound to remand the prisoner to the Tower. At page 200, *De Grey* says, "We do not know, certainly, the jurisdiction of the House of Commons; we cannot judge of the laws and privileges of the House, because we have no knowledge of those laws and privileges; we cannot judge

of the contempts thereof—we cannot judge of the punishment therefore." And at page 205, Mr. Justice *Blackstone* says, "it is our duty to presume the orders of *that* House and their execution, are according to law." Now, certainly, these expressions imply that if the Court could form a judgment with regard to the punishment inflicted by that Court, (the House of Commons,) and was not left to presume the orders of that Court and their execution were according to law, the Common Pleas would, if it had found the House had exceeded its authority, have discharged the Lord Mayor. Power is not to be considered lawful authority, barely because it is exercised by a Court. It *may* not be lawful. It is sometimes erroneously exercised, scarcely ever beyond the point of lawfulness; but it is possible to be so, even in the highest tribunals.

The *Habeas Corpus* Act in this State, as far as the cases to which the writ is applicable are concerned, is a mere re-enactment of the common law. After having stated what officers shall grant the writ, the 3d section provides—"The writ of *habeas corpus* shall be granted forthwith by any of the officers enumerated in the first section of this article, to any person who shall apply for the same by petition, showing by affidavit or other evidence, probable cause to believe he is detained *without lawful authority.*" The law standing so, this Court is bound to inquire into the lawfulness of the commitment, although it is a commitment by a high court, and for a contempt to that Court. This is a case in court, not in vacation, (if there could be any difference under our statute,) and this Court is bound to proceed as at common law.

The power to punish contempts is necessary to the administration of justice. It belongs to courts for the purpose of upholding the authority, respect and dignity, not of the judge, but of the law. Without this power, the law itself must, many times, fall in weakness, its solemn injunctions be the sound of mockery; and with the Courts, justice must sink into contempt. This power must, from the very nature of the cases that call for its exercise, be much left to discretion; sometimes as to when it shall be used; and sometimes as to the manner in which it shall be exerted. It is impossible for legislation to foresee and provide for all instances. To attempt to

do so, would lead to embarrassment and confusion, and it would often be to leave the redress of wrongs not to be found in the law. The power may be abused—so may other necessary power; but that has never been a sufficient reason for taking away power, or for not trusting it in any instance. We have, from the nature of society, to intrust men. No civil institutions are perfect, because they are made by men, and must be carried on by men who are fallible. This it is fruitless to regret or complain of, for it cannot find remedy. The dispatch, promptitude and command with which some of the action of Courts of Justice must be conducted, require some things to be left to the judge, looking to the responsibility of his own conscience as an elevated man; to the public sentiment as to hardness and cruelty, and to the law—for all are responsible to the law. This doctrine of the necessary power over contempts has existed ever since the law had any history. It would be useless to quote books to show that the experience of society proves what I say. To support this necessary power in a proper manner, the revised statutes, page 215, say, "That no writ of error, or appeal, shall lie 'from an order or judgment of any Court punishing a contempt.'" This was the common law. It has had the sanction of ages. In the case of *Johnson* vs. *Commonwealth*, 1 Bibb, 602, the Court of Appeals, says, "The great purposes for which Courts are instrusted with the power of punishing contempts, demands a speedy and summary proceeding, not consisting with delays consequent upon writs of error or appeals." After a few sentences, the Court goes on to express these important truths. "In fact, the rights, liberties and property of the whole community are immediately involved and interested in the support of the constituted authorities. What are laws without the means competent to enforce and secure a due obedience? To this end, a power in courts of justice to suppress contempts and disobedience to their authority, by immediate punishment, is essentially necessary, and results from the very first principles of judicial establishments. Laws are necessary to the good order of society; Courts are ordained by the laws, as necessary for their due administration; hence due respect for the courts is as essentially necessary as a regard for the laws themselves: for

when once such respect is lost among the people, the authority of the Court is at an end." The Court proceeds to say, "One Court cannot judge of a contempt committed against another. In fine it seems necessary to the very existence of a court in the healthy exercise of its powers, that it should have exclusive jurisdiction to judge of contempts to its authority,"

"But it may, perhaps, be asked, if each Court is suffered to exercise the power of punishing contempts, where is the security of the citizen against the arbitary oppression of the judge, by a wilful infraction of the law. It is answered that the citizen finds security in his own correct demeanor, in the great lenity and unwillingness which has generally been remarked in courts, to resort to this exercise of their powers, but above all, in that responsibility which the judge owes to the assembled representation of the country, for any corrupt or wilful and arbitary abuse of his powers."

"Government cannot be administered without committing powers in trust and confidence."

There are countless other powers than that in regard to contempts, of great importance, daily exercised, and which *must* be exercised in the sound judgment of the Court. And yet, in the nature of things much wrong, and in some instances, much oppression *might* be done. What could be more oppressive than to refuse bail where it should be granted? or worse than to demand excessive bail, so that it operates with the same hardship? yet these must be left, and have always been left in the discretion of the judge.

This Court cannot deliver any person lawfully committed by the Circuit Court for contempt. It cannot, on *habeas corpus*, inquire into the question of contempt. But if there should be a commitment in an instance where there *could* be no contempt, as where a Court should adjudge a man guilty of contempt, who was not, in any sense, before the Court, as, for instance, (and the supposition is very remote,) where a man should be ordered to pay a debt, who was not an officer of the Court, in any sense, and against whom there was no suit or proceeding, and he should be imprisoned for disobedience of the order, the proceeding then would be *coram non judice*, and the order merely void. So if the Court has jurisdiction

regularly, and in the commitment exceeds the power of the law; as if a man should be committed for life for disobedience of a lawful order; or should be committed to the pillory instead of the jail, then he should be released by *habeas corpus*. These are very extravagant instances, but they serve to illustrate.

The doctrine that one Court cannot relieve against the lawful commitment of another Court, is clearly stated in many cases; but I need not cite more than the case of the Lord Mayor before referred to, and the case of *J. V. N. Yates*, 4 Johns. Rep. 315. I know this case was reversed by the Senate of New York, but I have no sufficient evidence that it was on this point; and if it were, I should regard the opinions of Kent and Thompson, and Van Ness, more than the vote of the Senate. The learned Counsel for the petitioner, in his able argument, seemed to think that Ch. J. Kent had approved a decision of the King's Bench, in the time of Charles 1st, which refused to discharge a prisoner lawlessly committed by the Star Chamber. But this is a mistake. *Chambers' Case*, Cro. Car. 168, quoted by Kent, was a case of contempt in open Court by insulting language; and the King's Bench barely decided that it could not deliver a man from a lawful commitment; for although the Star Chamber had much odious and tyrannical power given it in time of Henry 7th, and Henry 8th, yet it was one of the ancient Courts of the realm, and had a portion of legitimate power; and that exercised was of such character. The severity of the punishment, however, in that case, would now be deemed beyond the power of any Court for such an offence.

3. Had the Court jurisdiction to commit in the case? I think it had. The failure to return the note, and the receiving and using the money, were a high contempt of the authority of the law, calculated to degrade the administration of justice, to destroy confidence in the Courts of Kentucky, and they actually did defeat justice in its own course. Such instances call for the immediate action of the Court.

But it is contended that, as the note had been put out of the power of Alexander, the imprisonment could not produce it, and thus the order taken could not operate a remedy for the infants,

but was merely punitory, and must come within the 1st section of Article 24, of the Revised Statutes, which, in general language, does not allow imprisonment for contempt exceeding one day without the intervention of a jury, page 273. And it is also contended that if this section applies, then the commitment, being void for this, should be deemed void as to the money too; and the party should be discharged. I do not see the force of the last position. Why should it be void *in toto*, because the party is committed for two things, "until further order?" If he should have been committed for one thing, he ought not to be let out, because he ought not to have been committed for another. If a man were committed on a charge of felony, until, &c., and also for something out of the power of the law, he should not be discharged of the commitment for that which demanded his imprisonment.

There is some difference in the language of the 10th section of the Article just referred to, and the 3rd section of the Act of 1793; but I think the same construction should be given to the new law, which was given to the old. After making the same provision in substance, about calling a jury, the act of 1793 says: "This act is not intended nor shall be construed to affect cases where a party served with process from any Court, judge or justice, shall refuse to answer according to law, or to perform any decree, judgment or order of the same." Until this law was passed, requiring a jury in certain cases, there was no certain fixed time, beyond which a man might not be imprisoned for any contempt of Court, without calling a jury; contempts were not jury cases at common law, or under the constitution; and when the legislature restricted the power of the Court without a jury, to one day's imprisonment by the 1st section of the act of 1793, it was careful in the 3rd section to leave the power of the Court in such cases as this of Alexander's, to the common law. And such was the universal judgment of the Courts of Kentucky. Whether the Court punished the contempt done in violating its lawful order or decree, for the purpose of vindicating the law and its authority in the administration of justice; or whether the punishment was to operate also as a remedy for a party litigant, there was no difference at common law, and none

after the passage of that statute. But surely where the Court is called on to imprison a man merely to vindicate the law and its authority in the Courts, and the process of its Courts, it should be, as our Courts have always been, very careful not to inflict any punishment not imperiously demanded by this important object. Any thing of hardness or cruelty would defeat the purpose aimed at, and bring the Court into odium. If a jury were called in cases provided for by the statute, and excessive fine or imprisonment were found, such as the Court did not approve, it would be the duty of the judge to inflict less than the verdict called for; and he would not be so far bound by the verdict as in a case of an indictment for a misdemeanor.

The 10th section of the article quoted, says: that "nothing in this article shall be construed to prevent any Court or judge thereof from proceeding against any person writing or publishing a libel, or slanderous words, of and concerning such Court or judge in relation to his judicial conduct in Court, by indictment or presentment, nor from prohibiting any Court or judicial tribunal from punishing any person guilty of a contempt in resisting or disobeying any judicial order or process issued by, or under the authority of such Court or judicial tribunal or officer." This is a section not very carefully written. But we cannot suppose it was intended that a grand jury should be called; or that there should be a punishment for the violation of the order of the Court, only by the verdict of a jury; for there is not one word in the article that could have been construed to prevent the punishment for violating an order, &c., if a jury was called. It must then have been intended, as was the 3rd section of the act of 1793, to reserve the power of the Court, without the verdict of a jury to vindicate the orders, &c., of the Court. Any other construction would require the Court to have the verdict of a jury every time an injunction should be violated, or an order disregarded to file books, deeds or other papers, or to pay money into Court by a receiver of the Court, or other officer, or even to file an answer. Such a course would stop the wheels of justice, and render the necessary orders of the Court merely nugatory. A great portion of the jurisdiction of this Court, so necessary

on these matters, in favor of boatmen in enforcing quick payment of their wages, would be practically lost.

The Court of Appeals in the case of *Bickley* vs. *The Commonwealth*, 2 J. J. Marsh, 572, decided, that although according to the case of *Johnston* vs. *The Commonwealth*, (which was approved) that Court had not jurisdiction to re-try the contempt, yet it had power on a writ of error to reverse so much of an order as exceeded the power of the Court below. In the case of *Patton* vs. *The Commonwealth*, at the present term, that Court had before it an order committing the plaintiff until certain sums of money were paid; yet, although the Court took jurisdiction as to the sums of money, they being too large, it said nothing of the excess of power without a jury, which could not have been disregarded if the 1st section aforesaid, applied to such cases; for then there would have been an excess of power, and the Court of Appeals had jurisdiction to correct the order, as decided in the case of *Bickley*.

4. But it is contended that the money was not collected by Alexander as a commissioner of the Court; that the Court set aside the sale because it could not be received by him; and having set aside the sale, the Court had no more jurisdiction as to the money; and Hyman must have his remedy by suitable action, as in other cases of indebtment. It does not seem to me so. He received the money on the note, which as commissioner he had taken, and which had been plainly ordered to be returned to the Court. The relation in which he stood when he received it, made it the duty of the Court to see that Hyman did not lose his money, or that the infants, whose lands were sold, should have it.

That his office of commissioner had terminated could make no difference in the duty of the Court. In the case of *Bagley*, vs. *Yates and Prentiss*, where a deputy marshal had received money due upon a judgment after he had returned the execution, the Court issued an attachment against him for not paying it over; 3 McLean's Rep. 465. But in that case it could not have been said that he received the money strictly as a deputy marshal; his principal would not have been liable; yet he stood in such a relation to the Court when he received it, that it was the duty of the judge to see

that he did not degrade the justice of the Court, whose minister he was.

5. But it is said the Court had no authority to sell the estate of infants; and therefore the whole proceeding was *coram non judice*, and void. I think the Court had the power. But whether it had the power to order a sale of the estate or not, the party stood in the same relation to the Court, as to this note and this sum of money; just as much under its supervision in the one instance as the other. And, if it were found out that the Court could not decree a good title to Hyman, it at once became, on that account, the duty of the Court to order back to him his money.

6. It is contended that Chap. 51 of the Revised Statutes, concerning insolvent debtors, authorized the justices of the peace to discharge the party from the jail. The 5th section says: "The provisions of this chapter shall apply to a person imprisoned by order of a Court of Chancery, to compel the payment of money under a decree or judgment of such Court." I do not think the statute applies even to such part of the order as has a reference to the non-payment of the money. It is not a commitment until he pay the money; but it is for the contempt in not having paid it, and "'till the further order of the Court." But, be this as it may, the act only applies to cases of a "decree or judgment." It could not have been intended to apply to cases where *orders*, not *decrees*, are made against the officers of a Court for abusing their authority, and failing to comply with the orders of the Court to restore the abuse. The distinction between decrees to pay money, and such orders, is well understood. The Court orders its receiver, its commissioner or its marshal, to pay money into Court. On this no execution issues; but the Court enforces compliance summarily, and keeps charge of the subject 'till it is ended; and if it should become necessary for the honor of the country's justice, to commit one of these officers, the two justices of the peace have nothing to do with the matter. It would be preposterous if they had. The *decree* is generally for the payment of money, on this an execution issues, as a matter of course; and it is not necessary to comply with the decree, that the money should be brought *into Court*. The

decree is always in favor of some person by name; and it is made in conformity to pleadings, such as bills, answers, cross-bills, petitions; the *order* is not frequently so, and may not be directed at all by them. It is frequently made to pay money into Court, when it is not yet known what party is to have it. The Revised Statutes, page 317, require a copy of the schedule of the insolvent's property he intends to surrender, to be furnished the plaintiff, or his attorney, ten days before he is allowed to take the oath. Now, in many cases, on an order to pay money in, it could not be known who should have notice; but in cases of decrees it is always known. It is true, the word "decree" is in the order in this instance, but that does not change the import. The money was to be paid *into Court.* Besides, this word is only in the last order, on which the party was not in custody for violation.

The order, distinct from the decree, is under the control of the Court, from day to day, and from term to term, and may be revoked or modified, as justice may demand; and, for this reason, it cannot be, that one committed under it can be discharged by the justices. This would frustrate the necessary power of the Court. A decree, such as spoken of in the statute, is final, and cannot be modified at a subsequent term.

7. It is contended that the order of commitment is void, because it is "until further order of the Court."

If the order transcends the power of the Court, in such an instance as this, it will be void, and the party must be discharged; for it is not like other commitments for want of bail, &c., where, if it appear that the party ought to be detained, he will not be absolutely discharged for a defect in the *mittimus.*

The power to imprison for contempts is derived merely and absolutely from the necessity of the case, no further punishment, therefore, can be lawfully inflicted than is necessary in the strictest sense; and if discretion must be given in this country, it must likewise be with-held where it is not impracticable to do so. It may have been the English practice to commit for contempts until further order. The statute of Westm. 2, 13 Edw. 1, provided that persons who resisted the process of the King's Courts or the Sheriff,

should be summarily imprisoned during the King's pleasure. All the commitments for contempt made by the House of Commons, have been, as far as I have seen, during the pleasure of the House. But because these kinds of commitments might be made in England, and might even consort with the genius of the old common law, I do not think they have been adopted by, or consort with, our free institutions, where no power exists but for the public good, and no one's pleasure is to be consulted or regarded. On such subjects we cannot, with safety, turn to the usage of the English Courts, or to the acts of Parliament, centuries ago, nor up to the time of our separation from that Empire. When we adopted the common law, it cannot be said that we adopted all the power exercised under it; nor did we engage society to stand still; but we have left much of its harshness far behind us. Indeed, our enlarged and advancing public sentiment has gone far beyond what is still left standing on our statute books as a memento of the rudeness of former days. If we open the old statutes of Kentucky, we shall find the ducking stool and the pillory; and we will find the abominable practice of the common law formally enacted by the statute of 1796, (and *forgotten* to be repealed by our Revisors,) that condemned a man to be executed for standing mute on his arraigment, or challenging a number of jurors beyond what the law allowed! 1 Morehead and Brown, 528. These barbarisms we trust are repealed by the new Constitution, as it has repeated the words of the old since they were enacted. They have been abrogated and forgotten in the march of society. They certainly would be "cruel and unusual." Yet I am old enough to have seen a pillory standing in the midst of a village, now one of the most refined towns in the State.

Contempt at the common law was likewise punished by the pillory; for with the Courts of England, the mode was measurably one of practice; with us it is a matter of law founded on American principles for the action of the Government on its citizens. Surely we have passed by that mode of punishment without a statute, because it is not *necessary*, and it is cruel in this age.

But I have not sufficient evidence that commitments during the pleasure of the Court, or until further order of the Court, would

have been good in England. What had been deferred to the King might not, if examined, have been deferred to the Courts. Precedents might frequently have been made by letting things pass without examination. Much of this may be inferred from what Mr. Justice Powys said in the case of *Regina* vs. *Paty*, 2 Lord Raym. 1108, "*If all commitments for contempts, even those by this Court,*" (the Queen's Bench,) "*should come to be scanned, they would not hold water.*" In a late case of a commitment for a contempt, the King's Bench discharged the party because the time was not fixed in the *mittimus*, 5 Barnw. and Ald. Rep. 394, *The King* vs. *James*.

A commitment during the pleasure of the House of Commons was deemed good. But the Courts held that it was not indefinite, but that the imprisonment must terminate with the adjournment of the House; and this is strictly true as to the termination of any commitment by a parliamentary body, as decided by the Supreme Court of the United States in the case of *Anderson* vs. *Dunn*, 6 Wheat. 204. The power of the House of Commons to commit for contempt, is stated by *De Grey* in the Lord Mayor's case, to be "*legal, because necessary.*"

Is it necessary that the Courts in this country should have power to commit until further order of the Court? I cannot find it. I can see no call for it. I can see danger in it; and the law should not make danger, where there is no necessity. A freeman should never, by the laws of freemen, be placed in such dreary uncertainty of imprisonment as that when he inquires of the "law of the land," it cannot tell him when it shall end.

No absolute power lives in this country. It cannot exist in a republic. See 2d section of the Bill of Rights.

Suppose the Court should adjourn without having made any further order, the consideration of his case is cut off at once and entirely until the next term. So he must be left without any authority of the judiciary even to meditate his case. And a person committed for contempt cannot be bailed.

The time should be fixed as to its maximum. Then the punishment is duly weighed at once. Then, too, the Executive may see

whether it may be proper to interpose his extraordinary power; a power scarcely ever exercised in America in cases of contempt, because of the leniency of our Courts; and because the governors have deemed the pardoning of contempts an interference with the necessary power of the judiciary.

When the time is fixed, beyond which the Court will not go, then the addition to the order, "or until the further order of the Court," would keep the whole matter in charge of the Court, so that on proper terms, the party might be released before the time arrived. So when there is a commitment for the purpose of enforcing the payment of money, or the delivery of property, the Court should provide in the order, that the party be discharged on giving surety for the money in some form, when he has not got it; and on paying the price of the property, if it shall turn out that the party cannot deliver it; and so of other cases, in order that nothing shall be inflicted but of necessity. This course corresponds with the case of *Patton* vs. *The Commonwealth.*

I know it was decided in 1810, by the Supreme Court of New York, that a commitment until further order of the Court, was valid. This case was reversed by the Senate, whether on this ground or not, I do not know; nor do I regard the opinion of the Senate, except for its argument. 4 Johns. Rep. 318, *The case of Yates;* 6 Johns. Rep. 337, *same case on Error.* In the syllabus made by the reporter to the case of *Yates* vs. *Lansing*, 9 Johns. Rep. 395, it is said, that what was decided by the Supreme Court in the first case, was affirmed in this; but this is not authorized by what was decided in the case, and the syllabus is wrong.

The judgment of the Supreme Court in New York is certainly a precedent that any of us, at first thought, might follow. But I do not think its doctrine can be derived from our institutions, nor do I think we can venture to transplant such from beyond the water; we cannot even say it was the common law. I know it would be a safe power in the hands of the enlightened and benevolent judge who made the order in question here; but my view of the law compels me to decide that the commitment was not valid.

Logan and *T. F. Marshall*, for the Petition.

Fry, against it.