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THE RIGHT OF A LEGISLATURE (WITHOUT REFERENCE TO THE LAW OF EMINENT DOMAIN) TO CHANGE THE LEGAL CHARACTER OF ESTATES, OR THE TITLE TO PROPERTY, BY GENERAL OR SPECIAL ENACTMENTS.

This subject presents to our view two varieties of rights. One is the right of an organized body of men, termed a Legislature, to prescribe laws for a community: the other, is the right to property of each individual of that community. The one is a conventional, delegated right; for, however natural and necessary government and laws may be, there is no inherent right in any particular body of men to administer that government and make those laws. The other is a natural, original right; for we conceive of property as something capable of existing before society. It is immaterial whether the "state of nature" is a fabulous or a real era—whether, chronologically, society and government were coeval with the origin of mankind and the origin of property, or not. Logically, and in reason, the idea of property precedes that of government. Life and property, are synchronous with each other in their origin, and the primary objects with which government has to deal. In reason, the object, cause or occasion of a thing must exist before

the thing itself. It is on this account that, in reason, we call the individual right to property, a natural, original right. Reason may also teach us that government is natural and necessary. But it has taken centuries of experience and of reasoning to develope the idea, which is the basis of our institutions, that the governing power, considered as a right, exists only in the totality of those individuals whose single, particular rights, are the occasion and object of government. From this idea arises our doctrine of the sovereignty of the people as the governing power, and hence the idea that our legislators, or law-making men, exercise a delegated, and not an original power or right.

Although our subject, by its terms, limits us to a consideration of particular relations which these two rights, viz: the right of the Legislature to enact laws, and the right of the individual to his property—bear to one another, it will be useful to glance hastily at the general relations of property to the State, and of the State to property, under our system of government. In labyrinths of unsettled questions and conflicting opinions, axiomatic truths and general principles are always valuable guides to lead us to the light. Let us, at the outset, gather around us a few of these guides, reserving for after consideration the method of their use.

As was before hinted, the genius of our institutions recognizes the people as the source of government, recognizes individual life, liberty and property as existing together as rights prior to government. It also recognizes the protection of these as the sole object of government.[1] The State therefore rises before us in the important character of protector of property. But a protector belies his name, if he have not the sinews and muscles of strength with which to support his character. The State must have powers; else it is a mere name, without ability to act. The body politic itself must, therefore, in a certain sense, have life. It must also have a certain degree of liberty and property, in order to protect its members in their individual life, liberty and property. Individual liberty must be restrained, that the liberty of the whole may be

[1] Works of Franklin, Adams, Jefferson and Hamilton; The Federalist; Bills of Rights of several State Constitutions, &c.

practicable. And property itself must contribute of its fullness for its own protection. Hamilton, in arguing the necessity of the power of taxation, in The Federalist, remarks, that money is the vital principle of the body politic, essential for the performance of its functions. And we may extend the sense of the remark to all those other powers or rights with which government must be endowed in order to perform its office, and which, from the nature of things, must be derived by abridging those natural powers and rights which it is to protect. As Blackstone in effect says, a man's civil rights are what is left of his natural rights, after he has given up to the State what it absolutely requires. While the State, therefore bears the relation of protector to property—property bears the relation of a support or prop to the State.

If, in connection with this relation between property and the State, we keep in mind the idea previously considered, viz: that, logically, property existed before the State, and, so far as the two are concerned, was not made for the State, but the State for it, the right of the individual being an original right, while that of the Legislature is delegated, we shall arrive at the true general principle that embraces all the others, to wit: that the individual right to property is strictly sacred from all interference on the part of the State, through its agent, the Legislature, save when the protection of life, liberty, or of property itself, requires its exercise.

But how is this general principle derived from political ethics to assist us? Primâ facie our subject is not proposed as a question of civil polity or political ethics, but as a question of law. We are to consider the limits of legislative power. These limits as determined by the true principles of the science of government, or by the maxims of morality and justice, form one question, while as defined by law, they form another and a different question. Law is the actual rule of civil conduct prescribed by the government, while the science of government and of political ethics prescribed theoretically what *ought* to be the rules of civil conduct. As patriotic citizens and lovers of our country, we cannot but hope that under our system of government, constructed as it was by the light of the past experience of the world, the two are identical; just as the true

lawyer will always desire to find law and justice synonymous. Yet we should note carefully the distinction. We have at the outset derived from the acknowledged theory of our government a certain general principle. But the law under which we live, and under which our subject arises, is not a body of general principles only, but a definite collection of rules, actually prescribed by the sovereign power or its agent, for the civil conduct of the members of the State. We have, therefore, to look first at the actual law. Under our form of government, there is a definite body of law prescribed for the regulation of the government itself. The actual theory, objects and principles of our government, are to be found embodied, in their leading outlines, in our several State Constitutions and the paramount Federal Constitution. These together make up the organic, fundamental law under which we live. Thus it happens that legislative power, unlike parliamentary authority in England, or the corresponding department in any other country, is subject to the provisions of written constitutions. So that, under Blackstone's general term "municipal law," there are comprised in this country not only common law and statute law, but also a third peculiar department, that of constitutional law. And since legislative power is determined in its general outlines by the provisions of the State Constitutions and the Federal Constitution, a question respecting its limits becomes a constitutional question. And since the interpretation and application of constitutional law is a function belonging to the judiciary, such a question is a judicial question. So well settled at the present time, and so frequently exercised, is this function of the judiciary, that it is unnecessary to trace the rise of the power from its first feeble exercise[1] in the early cases to its present mature and universally acknowledged completeness. Our subject, therefore, since it is primarily a question of law, and has to do with legislative right, is a constitutional question. It is, consequently, a judicial question—one for judicial cognizance. It is a question for legal, and not political consideration.

[1] In 1792, in 2 Dallas, 409, the Court, with great tremor, pronounced a law unconstitutional. But the question was settled forever by Marshall, C. J., in 1 Cranch, 127.

But while it is such, it has also the politico-ethical phase before noticed. What is the relation between these two aspects of the subject? Are we, inasmuch as the question is one of constitutional law, to stop short with the constitutional provisions, and look no further? Are we to avoid all consideration of general principles derived from political ethics or the laws of morality and justice? It is evident, that with a written constitution before us, as the fundamental law, we cannot have recourse to anything extraneous to the instrument, to any general principles whatsoever, to contradict or vary the constitution.

But can we resort to general principles when there is no repugnance between them and constitutional provisions, to determine the rights of the legislature?

It is plain to every one that we not only can, but must, to a certain extent. For some of the most important and usual powers of the legislature cannot always be derived from a grant in the constitution; and when so derived it is generally by implication only. All those powers, which are called the "sovereign powers" of the State, such as eminent domain, the power of taxation, and of police regulation, are considered as having their origin in general principles rather than in any distinct grant of the constitution. If a constitution were perfectly silent as to these powers, they would be deduced from the necessary character of a government. It is impossible for a written instrument to enumerate all the powers to be granted; and many of them must be inferred from the general nature of government, or from very general terms in the constitution. A constitution is intended as a check and limitation, not as a description of all the functions and powers of government.

"This is true as to a constitution generally like those of the States. The federal constitution is of a peculiar character. Since the federal government was formed by the surrender of certain powers of the several States, its constitution confers only such powers as are expressly given. But under the State constitutions all the power of the people is delegated to the government, except such as is specifically reserved."[1]

[1] C. J. Gibson, in *Kirby* vs. *Shaw*, 7 Harris, (Penna.,) 258.

We must conclude, therefore, that general principles of government and of political ethics may at least *confer* powers or rights upon a legislature, when there is no conflicting constitutional provision, and that many powers thus derived are recognized by the courts as legitimate powers. As a general conclusion, we might perhaps say that each department of government, so far as itself alone is concerned, can draw its powers from general principles, if they are not repugnant to constitutional provisions.

But can any department make use of these principles to *restrain* another department? Can the judiciary employ them to restrain the legislature?

Can it add to its right of applying constitutional restrictions, the power of applying general principles of government, or of morality and justice, as *restraints?*

This is a question which is of great importance in this essay, and which will warrant a rather extended consideration. Any investigation is in a great measure accomplished, when its nature and limits are settled.

Our subject, as we have seen, involves, primarily, a legal or judicial question. Consequently, if we should determine that the judicial power embraced that of restraining the other departments by general principles, our judicial or legal question would extend over the wide field of universal justice and the science of government, and become to a great degree political as well as legal. But if we should conclude that the judicial power, as a restraint on the legislature, is confined to the application of constitutional provisions solely, we should then have a much narrower, and a purely judicial course to traverse.

The question, therefore, which must be determined before we can advance further in our essay, is:

Whether legislative right or power is subject to any other restrictions, which the judicial power can enforce, than are to be found in constitutional provisions?

It is to be noticed that we speak only of such restrictions outside of the constitutions, as the courts can apply. There is a fundamental ever-existing limitation upon legislative power arising from

the sovereignty of the people. The whole frame of government, and the constitution itself, may be changed at any time by the people. With this ever-abiding sovereign power of restraint, the judiciary have nothing to do; it is itself subject to it. The establishment and recognition of a particular form of government, is a political question, to be settled by political action, and does not afford a basis for judicial cognizance.[1]

We are considering only those restrictions which one agent of the people, the judiciary, can enforce against another agent, the legislature, under an existing constitution endowing them with their respective powers.

We should also notice beforehand, that there may be implied as well as express restrictions. Implied restrictions are deduced by interpretation. And there is a distinction between the use of general principles for the interpretation of a constitution, and their use as sources of new powers or restraints. Interpretation or construction is an acknowledged function of the judiciary. There may be cases of interpretation in which the courts, by enforcing implied restrictions, may appear to be applying restraints derived outside of constitutional provisions. In performing its duty of construction, the judiciary may be obliged to call to its aid general principles of government or maxims of the common law; and in this way legislative power may be indirectly restricted by principles outside of the express letter of the constitution. But this species of restriction must properly and strictly be considered as an element inhering in the expressed constitution itself; though the effect of it, when the courts exercise their right of interpretation with much latitude, is almost the same as endowing the constitution with new provisions. Correctly, however, interpretation only develops powers and principles already inhering, does not add to or enlarge a constitution. Hence, the common law and the fundamental principles of government are an unexpressed implied part of our constitutions as an element of interpretation. They form, as it were, the atmosphere in which our constitutions were born, and which, therefore, necessarily determine some of the conditions of their being.

[1] 7 Howard, (U. S.) 1.

So far then as general principles interpret, they may be used by the courts as a part of constitutional law. And under our present subject the principle deduced from our theory of government at the commencement of this essay may be employed to this extent at least.

But, beyond their use in interpretation, can the general principles of government, or those of "magna charta," or the fundamental principles of natural justice and morality, be employed by the courts to invalidate legislative enactments?

How is this question to be determined? What defines the respective powers of the judiciary? Evidently the constitutions—so far as they are defined by written law. But the constitutions do little more than separate the government into three departments, the executive, the judicial, and the legislative, leaving these terms to explain themselves. Usage and judicial decisions under these very constitutions must determine, where the written provisions are indefinite. The general writers on governments and natural law, such as Domat, Grotius, Burlamaqui, Puffendorf, Locke, Hooker, &c., &c., can afford us little help. At least their theories are of less authority than usage and the adjudications of cases, or opinions of judges under the very constitutions containing the indefinite phrase that is to be construed. Such a right in the judiciary, if included in the term "judicial power" must grow up by usage on the part of the courts themselves, if at all—just as the right to apply actual constitutional provisions grew up under this general phrase. By this latter power the judiciary became more nearly a co-ordinate branch of the government than ever before. If it has the former power also, it is something more than co-ordinate. Indeed, the question resolves itself into one between the claims of the two departments for supremacy. Independently of the express letter of the constitutions, and subject to the sovereignty of the people; is either sovereign as to the other? and if so, which of the two, the legislature or the judiciary?

In England, in a few early cases, the doctrine was announced that there were certain principles of natural equity and of common

right, which would of themselves invalidate an act of Parliament.[1] But these cases are but exceptions to the doctrine laid down in Blackstone and universally prevalent in England, "that the power of Parliament is absolute and without control,"[2] and even announced by Coke (at great variance with his opinion as expressed in Bonham's case) in these words—"the power and jurisdiction of Parliament is so transcendent and absolute that it cannot be considered either for causes or persons within any bounds."[3]

The doctrine of these early and exceptional English cases has been announced in many of our American cases as applicable to the legislature. At a very early period, an act of the legislature of South Carolina was declared void as being against common right and reason;[4] and in another instance, as being against common right and the principles of "magna charta."[5] In *Rogers* vs. *Bradshaw*,[6] the Supreme Court of New York said that a law violating a great and fundamental principle of government should be deemed a nullity, as against natural right and reason. In *Benson* vs. *Mayor of New York*,[7] Justice Barculo said, that the rights of parties rest not merely on the constitution, but on the great principles of eternal justice, which lie at the foundation of all free governments. In *Goshen* vs. *Stodington*,[8] Justice Hosmer, of the Supreme Court of Connecticut, said, that if there should exist a case of direct infraction of vested rights too palpable to be questioned, and too unjust to admit of vindication, he should not avoid considering it a violation of the social compact and within the control of the judiciary. In *Hatch* vs. *Vermont Central R. R. Co.*,[9] it was said, that a certain act of special legislation would be void upon general principles of reason and justice. In *Calder* vs. *Bull*,[10] Justice Chase said, that there are certain vital principles in our republican governments which will determine and overrule an apparent and flagrant abuse of legislative power.

[1] Day *vs.* Savage, Hobart, 85; Dr. Bonham's case, Rep. part 8, p. 118; 12 Mod. 669.

[2] Bl. Comm. Bk. 1, ch. 2.

[3] 4 Inst. 36.

[4] 1 Bay. 98.

[5] 1 Bay. 252.

[6] 20 Johns. 735.

[7] 10 Barb. 223.

[8] 4 Conn. 209.

[9] 25 Vt. 49.

[10] 3 Dall. 386.

These cases are sufficient to show the tendency of some courts and some judges to hold that there are certain great principles of right justice or government, which it is the duty of the judiciary to apply as restraints on legislative action, independently of constitutional provisions.

But there are numerous and weighty authorities to the contrary. Chancellor Kent[1] in his commentaries, after praising the early, exceptional, English cases, and after stating that the principle of the English government, that Parliament is omnipotent, does not apply in this country, is, nevertheless, obliged to acknowledge that if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power under any other form of government.

. In *Bennet* vs. *Boggs*,[2] Justice Baldwin of the U. S. Supreme Court said, that we cannot declare a legislative act void because it conflicts with our opinions of policy, expediency or justice. "We are not" said he, "the guardians of the rights of the people of the State unless they are secured by some constitutional provisions which come within our judicial cognizance. The remedy for unwise and oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume this right."

In *Butler* vs. *Palmer*,[3] Cowen J. says that, after allowing the restrictions to be found in the Federal and State constitutions, it is not conceivable that any further bounds can be set to legislative power by the courts. And in *Cochrane* vs. *Van Surley*,[4] Verplanck, Senator, says, that it affords a safe rule of *construction* for courts in the *interpretation* of laws admitting of any doubtful construction to presume that the legislature could not have intended an unequal and unjust operation of its statutes. But if the words be positive and without ambiguity, no authority can be found for a court to vacate or repeal a statute on the ground of its injustice

[1] 1 Kent Com. 448, 5th edition.

[2] 1 Bald. 74.

[3] 1 Hill, 324. See also opinions of Selden & Johnson, in 2 Parker (C. C.) 490.

[4] 20 Wend. 381.

alone.[1] So in *Sharpless* vs. *The Mayor*,[2] C. J. Black said, that he could not declare a law void because it violated the spirit of our institutions or impaired those rights which it is the object of a free government to protect, unless such laws are prohibited by the constitution. To do otherwise would be for the judiciary to assume the right of changing and enlarging the constitution.

The same doctrine has been upheld in the courts of Missouri,[3] Indiana,[4] Georgia,[5] and Michigan.[6]

The sovereignty of the Legislature, so far as the judiciary is concerned, independently of constitutional provisions, is recognized by Justice Iredell, in *Calder* vs. *Bull*,[7] by Justice Peterson in *Cooper* vs. *Telfair*,[8] and by Story, in his Commentaries on the Federal Constitution.[9]

It has been argued that the declarations of rights prefixed to the State Constitutions are themselves a proof of the indefinite, unlimited and absolute power which would reside in a constituted legislative body, unless restrained and limited by the instrument of its constitution. For what reason, it is asked, were the prohibitory articles introduced, if, by a general grant of legislative power, the legislature would not have had authority to do the acts thereby prohibited.[10] And if able to do the prohibited acts unless it were constitutionally restrained, much more is the legislature able to do those not prohibited, free from the control of the judiciary.

In deciding between these two classes of authorities, it is to be noticed that in many of the cases, in which the right is claimed, it is announced merely "*obiter*," and that in most of those in which the decision is apparently based on general principles, the cases are really decided on constitutional grounds, or if not, might have been. For what are sometimes so eloquently set forth as distinct classes of general principles underlying our institutions, and which, in these panegyrics, are treated as something distinct from the constitu-

[1] Same principle in 7 Harris (Penna.) 258.
[2] 21 Penn'a. 147—162. 2 Am. Law Reg., 27.
[3] 15 Missouri, 3.
[4] 8 Blackf. 10, 5 Id. 258.
[5] 5 Geo. 194.
[6] 1 Mann. 295.
[7] 3 Dall. 398.
[8] 4 Dall. 19.
[9] 3 Story Com. § 1367.
[10] 13 Am. Jurist, 75.

tions, can generally be reached through the constitutions themselves. For instance, the case of *Taylor* vs. *Porter*,[1] which is sometimes cited as sanctioning the idea of there being restraints to be found outside of the constitution, is based in reality on the express terms of the constitution.[2] And in other cases where the court professes to rest its decision on general principles, it will be found that the desired rule might by interpretation have been deduced from the constitution. In some of the cases, also, as in 1 Bay. 98–252, the laws declared void were passed before the existence of a constitution. There was, therefore, a good excuse for the court's resort to general principles during the formative period, as it were, of the constitution of the state—which would not make the cases authoritative guides for us.

Reason and authority seem to incline to that view which regards the legislature as sovereign, outside of constitutional provisions, the paramount sovereignty of the people excepted. Those who advocate the duty of the courts to restrict legislative action by the application of general principles, do so either on the ground that the laws of nature, &c., are a part of a body of universal law, which the courts, as courts of law, are to vindicate and enforce; or on the ground that it is the duty of the judiciary to prevent one branch of government becoming an arbitrary and despotic power. As to the first point, the very impracticability of a judicial tribunal's determining those general principles, about which no half a dozen writers are agreed, would be a sufficient answer. Principles of religion and morality, as understood by each individual, are binding upon his conscience. The science of government as understood by him, should control his opinions. The most fundamental and generally acknowledged of these principles are incorporated with our forms of government. Now the question is, after the body politic has not chosen to prescribe certain principles for the restraint of one of its agents, shall another agent arrogate to itself the right to prescribe them, when this right is not delegated to it? These principles may be such as are binding upon the consciences of the legislature itself,

[1] 4 Hill, 140.

[2] See Sedgwick on Constitutional Law, 155, note.

and such as should govern it in relation to its own acts. Yet if it chooses to violate them. shall the consciences of the judges of the courts be allowed to control the legislative conscience? The plea that there otherwise would be no remedy against oppression and tyranny on the part of the legislature, in some instances, is met by the fact of the sovereignty of the people, or offset by the counter plea that in this way there would be danger of the judiciary itself becoming despotic.

This last point also answers the second ground of objection to the sovereignty of the legislature, viz.: that there should be no place open for the exercise of despotic power in a free state. Giving the desired power to the judiciary would be simply changing the despotism from the side of the law-makers to the side of those whose proper function it is to apply the law. The making of a law must precede its application. An enactment of the law-making power is to be presumed a law, unless there is some paramount law which declares it none. Were the judiciary to declare a professed law, emanating from the proper department, No *law*, aside from and without reference to any paramount law, it would become a law-making power, and no longer a proper judicial tribunal.

In determining, therefore, the right of the legislature to change the legal character of estates or the title to property, we must confine ourselves solely to constitutional provisions. Any enactment of the legislature, general or special, which does not violate these, is constitutional and valid. So far as we are concerned, in our character as lawyers, such acts are of binding force. However unjust may be any particular legislative act changing the legal relations or the title of property, however opposed, as we may think, to the principles of our free institutions, if it does not violate the State or the Federal Constitution, it is not for us, as lawyers, to pronounce it invalid. With such an act we must deal in our capacity as citizens, and as individual members of the sovereign people, should we desire its repeal or abrogation; but as lawyers or judges, we could not declare it void. The discussion and application of general principles of justice and civil polity we are to leave to statesmen and political writers, and to the legislators themselves,

except so far as they may be necessary for the interpretation of express constitutional provisions.

With the ground thus prepared—with the general principle that the individual right to the property is strictly sacred from all interference on the part of the legislature, save when the protection of life, liberty, or of property itself requires its exercise—with this general principle as an aid to interpretation in ambiguous cases—let us inquire

What, under constitutional law, is the right of the legislature, independently of eminent domain, to change the legal character of estates, or the title to property, by general or special enactments?

By the exception of "eminent domain" all questions are excluded connected with the right of the legislature to take property for public uses, or by way of taxation, or for purposes of police regulation. For "eminent domain" in its most general sense, includes all these powers. "Eminent domain" expresses that sovereign power of the State over the property of its subjects or citizens, which must exist in the State for the public good, and which is conceded as existing by all writers and under all systems of government, and which may exist in our own governments, and will be recognized by the courts, independently of any grant in the constitutions. There is a narrower sense in which the phrase is used, the same in which it is employed in the constitutional provisions, which forbid the taking of private property for public use without "compensation." And the courts have carefully distinguished such a taking of property as requires "compensation," from the powers of taxation and police regulation in which no "compensation" is necessary.[1] They have drawn a definite line between "eminent domain" in this restricted sense, and the taxing and police power. Still, "eminent domain," in its most general meaning (that which our subject has in view) includes all these sovereign powers of the State.

Excluding these, there are left to be considered those powers of the legislature which are generally conferred by a grant in the State constitutions of "legislative power."

[1] 7 Cush. 53–84. 4 Comst. 423.

The grant is made under this very general phrase. It is in some constitutions expressed in the simple declaration that the power of the government shall be divided into three departments—the legislative, the executive, and the judicial. In none, except that of New Hampshire, is an attempt made to define the "legislative power," and here with not much success. Careful provision is made for the separation and independence of the three departments, so that no person exercising the functions of one shall assume or discharge the duties of another—but without any explanation of what is to be understood by the "legislative power."

The legislature, therefore, by this grant has all the power over property that can be deduced from the meaning of the term "legislative power" in its widest sense, except so far as this term is restricted by other constitutional provisions.

What are the restrictions to be found in our constitutions?

First—In the Federal Constitution, the only provision affecting legislative right over property, within the sense of our subject, is that clause, among other restraints upon the States, which declares that "no State shall pass any law impairing the obligation of contracts."

Second—In our several State constitutions are to be found, in the preambles and bills of rights, declarations of certain general principles to government, such as the equality of man and the abstract right of life, liberty, property, and the pursuit of happiness. While these serve as aids in interpretation, there is to be found in the constitutions themselves the express provision that no citizen shall be deprived of his rights, or of life, liberty or property, except by the law of the land or by due course of law.

This provision, with the restriction implied in the separation of the legislative from the judicial department, or expressed in the prohibition of one department exercising the functions of the other, make up the limitations upon legislative power over property, independently of "eminent domain" which are common to the several State constitutions.

It will be necessary to examine more particularly the purport of these restrictions upon legislative power and guaranties of private

rights, that we may see how they are to be applied in the present case. Let us examine the construction which the courts have put upon them—

First—as to the provision of the Federal Constitution, let us glance at

I. The meaning of the term "contract" as used in that instrument.

II. The meaning of the phrase "impairing their obligation."

1. What is a "contract" under the constitution of the United States, in this connection?

The Supreme Court says[1] that the term applies to contracts by which perfect rights, certain definite, fixed, private rights of property are vested, and not to rights growing out of measures or engagements, adopted or undertaken by the body politic or State government for the benefit of all, which, from the necessity of the case and according to universal understanding, are to be varied or discontinued as the public good shall require. There is no "contract" on the part of the State that prospective possible rights shall not be abridged or revoked by future legislation.[2] A contract includes executed as well as executory agreements, so that a legislative grant is a contract.[3] Charters of private corporations are contracts. Marriage is held a contract within the purview of the Federal Constitution in some cases,[5] and in others[6] as not a contract.

Of the incidents of marriage, such as are existing, vested rights, are held contracts.[7] Dower is held an inchoate right, not the result of a contract, but a positive institution of the State.[8]

We see, therefore, that "contracts," in this provision of the Federal Constitution, embrace private agreements between indi-

[1] 10 How. 416.
[2] 18 Barb. 159; 17 Barb. 660; 5 Barb. 474; 4 Sandf. 461.
[3] 6 Cranch, 87; Fletcher *v.* Peck.
[4] 4 Wheaton, 519; Dart. Coll. *v.* Woodward.
[5] 4 Wheat. 518, (obiter); 4 Mo. 120; 8 Conn. 548.
[6] 16 Me. 479; 7 Dana, 184; See 1 Kent, 417.
[7] 4 Barb. 296.
[8] 4 Selden, 110; 4 Sandf. 461.

viduals, by which definite rights are vested, and public agreements between an individual, or a body of individuals, and the State, and that under the latter are not included the general laws passed by the Legislature for the good of the community.

II. What acts "impair the obligation of contracts?"

The peculiar distinction made by C. J. Marshall, in *Sturges* vs. *Crowninshield*,[1] between the obligation of a contract and its remedy, has been followed in the cases since his time. C. J. Taney, in *Bronson* vs. *Kinzie*,[2] illustrates and maintains the doctrine. According to this distinction, all State laws, doing nothing more than changing a remedy or altering it so as to abridge it, are constitutional. It is acknowledged, in some of the cases, that the remedy may be altered or abridged to such an extent as to impair the obligation of the contract, and make the law unconstitutional.[3]

But so long as we can trace the legislative act as affecting the remedy alone, and not the essence of the contract, it is held valid. In this way it is held that the time under statutes of limitation may be shortened, new rules of evidence prescribed, modes of proceedings altered with respect to past contracts, new laws passed requiring further legal sanction to make a title perfect, as registry, and laws passed making valid previous invalid acts.[4]

Second, as to the provisions of the various State constitutions:

I. As to the distinct provision insuring to property the protection of the "law of the land," or "the due course of law."

The definition of Mr. Webster, given in his argument in the Dartmouth College case, is often quoted as one of the best explanations of the term "law of the land."

"By the 'law of the land' is most clearly intended the general law which hears before it condemns, which proceeds upon inquiry,

[1] 4 Wheat. 200.

[2] 1 How. 315. See also 2 How. 608; 8 Blackf. 455.

[3] 1 How. 315.

[4] 3 Pet. 190; 2 How. 608; 28 Miss. 361; 8 Mass. 429; 5 Pick. 26; 22 Pick. 431; 8 Pet. 88; 18 Me. 112; 4 Greene, 154; 36 Me. 9; 1 Kernan, 281; 3 Kernan, 299.

and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of general rules that govern society. Everything that may pass under the form of an enactment is not the law of the land."[1]

The phrase, "law of the land," in the amendments to the Federal Constitution, though it applies solely to acts of Congress, and not to the States, is held to be equivalent to the same provision in the State constitutions. We may, therefore, properly consult the opinion of Justice Curtis, given under this clause in *Murray's Lessee* vs. *Hoboken Co.*[2] He says that to ascertain whether any proceeding is due process of law, the constitution itself is first to be examined, to see whether any of its provisions be disregarded, and if not, then we must look to the settled usages and modes of proceeding existing in the common and statute law of England at the time of the emigration of our ancestors. It seems, therefore, that if an act of the Legislature deprives a man of his property without affording him an opportunity to have his rights adjudicated under some general law, the act is unconstitutional, unless there are no constitutional provisions applicable to the case, and the proceeding by which the act is done existed as a part of the legislative power under the common law.

II. As to the separation of the legislative from the judicial department.

Closely allied to the position just considered is the division of the powers of government, and their prescribed independence.

The provision just considered is but an express prohibition of, or safeguard against, the consequences which would flow from a disregard of the independence and the inviolability of the judicial functions by the Legislature.

[1] Same general idea in 4 Hill, 180, J. Bronson's opinion. See also 3 Dev. 12; 10 Yerg. 59; 2 Greene's, (Iowa,) 122; 2 Texas, 251; 6 Barr, 87; 16 Penna. 256; 2 Henn. & M. 336; 4 McLean, 498; and opinions of the various judges in 3 Kernan, 378, Wynehawer *vs.* People.

[2] 18 How. 272.

It is very difficult to draw a definite line of demarcation between the two powers, from the difficulty of exactly defining either power. The cases enable us to catch a few general distinctions. It is said that the legislature is to confine itself to making laws, and is not to make decrees determining private controversies; that a legislative act, as distinguished from a judicial act, is one which determines what the law shall be for the government of all future cases, while the latter determines what the law is in relation to some particular thing already done or happened.[1]

An act, in its nature judicial, determining private controversies, directly or indirectly, is to be classed among objectionable laws.[2]

An act releasing a debtor from imprisonment for a limited time has not the characteristics of a law, and is void.[3] General or special acts, granting appeals after the time allowed by the law, are judicial, and void.[4] An act declaring a widow entitled to dower is judicial, and void.[5] So of an act authorizing the sale of land for the payment of debts.[6] So of acts dispensing with the law in particular cases,[7] and of acts granting new trials.[8] Numerous other cases declare acts of the legislature, in the nature of judicial decrees, void.[9] Legislature has no right to determine facts touching the rights of individuals, says the court in a New York case.[10] Nor has it the right to determine the rights of parties either by itself or by commissioners,[11] for this is judicial.

We have now cousidered in a general way what is left within the "legislative power," after the exclusion of the rights of eminent domain, and have considered, also, the constitutional restrictions that limit this remainder of power.

We are to discuss under our subject the relations of this restricted

[1] 2 Chip. (Vt.) 77.
[2] 7 Metc. 389.
[3] 1 Aik. 121; 2 Vt. 175, 517; 3 Vt. 361.
[4] 3 Vt. 507; 1 Aik. 315.
[5] 3 Scam. 465.
[6] 3 Scam. 238; 10 Yerger, 59.
[7] 11 Mass. 396; 5 Pick. 65.
[8] 15 Penna. 18; 3 Greenl. 326; 4 ib. 140; 4 Indiana, 301.
[9] 5 Yerger, 320; 1 Gill. & J. 463; 18 Penna. 111; 8 Gill 145; 5 Indiana, 348.
[10] 7 Hill. 77.
[11] 5 Cowen, 346.