

THE
AMERICAN LAW REGISTER.

FEBRUARY 1886.

LEGISLATION IMPAIRING THE OBLIGATION OF
CONTRACTS.

THE tenth section of the first article of the Constitution of the United States prohibits the several states from passing any law impairing the obligation of contracts. Like most of the clauses of that instrument this limitation has had a cogent influence in the decision of a long array of reported cases, and its operation has been found to determine the validity of many different species of legislation. It is the purpose of this article to examine in detail the more important applications of the prohibition, in the light of the authorities where its effect has been called in question and decided.

I. *Charters of Private Corporations.*—Since the decision in the great case of *Dartmouth College v. Woodward*, 4 Wheat. 518, it has scarcely ever been doubted that a charter of a private corporation is a contract, within the meaning of the constitutional limitation, between the state and the corporators, and that any act of legislation which impairs it, whether by enlarging the power of the state over the body corporate, or by abridging its franchises, or otherwise altering it in a material point, is invalid. The case cited held that the charter granted by George III., to the trustees of Dartmouth College in 1769 was a contract, and not subject to alteration at the hands of the New Hampshire legislature. And the same principle was upheld in the equally celebrated case

of *Fletcher v. Peck*, 6 Cranch 87. And see *Commercial Bank v. State*, 6 Sm. & M. 599; *Attorney-General v. Bank of Charlotte*, 4 Jones Eq. 287; per contra, *State v. Railroad*, 24 Texas 80; *Toledo Bank v. Bond*, 1 Ohio St. 622. As examples of legislative interference with corporate rights may be cited *Pingry v. Washburn*, 1 Aik. 264, where a statute authorizing certain persons to pass over a turnpike road without paying toll, who were not exempt by the act incorporating the turnpike company, was held unconstitutional; and the case of *Commonwealth v. New Bedford Bridge*, 2 Gray 339, where the charter of a bridge company authorized the erection of a bridge "with two suitable draws which shall be at least thirty feet wide," and it was held that a subsequent act requiring such draws to be of the width of sixty feet was invalid, as annexing new conditions. But a grant of a corporate franchise, like any other contract, must be accepted by the grantee, in order to raise any obligation. Hence a law declaring the repeal of all charters under which a *bona fide* organization has not taken place and business been entered upon within the time limited by the charter, or, if none be specified, within a reasonable time, is not in conflict with the constitution: *Chincoteague Lumber Co. v. Commonwealth*, 100 Penn. St. 438; *Gregory v. Shelby College*, 2 Met. (Ky.) 589; *Balto. & Susq. Rd. Co. v. Nesbit*, 10 How. 395. It is axiomatic that every contract must be founded upon a consideration, and the consideration in the case of a private charter is of course understood to be the advantage which the public expects to derive from it, whether of convenient transportation of persons and property, or increased facilities in the circulation of money, or reduced cost of manufactured articles, or what not. And even in the case of a mere grant by the legislature, based on no consideration at all, if the grant has become completely executed it is thereafter, like a gift between individuals, irrevocable: *Derby Turnpike Co. v. Parks*, 10 Conn. 522. Equally within the prohibition are the rights and powers incidental to the corporation and proper and necessary to carry into effect the authorities granted by its charter: *Planters' Bank v. Sharp*, 6 How. 301. At the same time, this constitutional immunity cannot be carried so far as to exempt the corporation from the proper and reasonable control of the state in cases where its privileges have been perverted or abused or the rights of third persons are in danger of being compromised through its actions. This position is very vigorously maintained by Mr.

Justice HARLAN, in a case decided by the United States Supreme Court in March 1885 (*Chicago Life Insurance Co. v. Needles*, 111 U. S. 574). The learned judge says: "The right of the plaintiff in error to exist as a corporation and its authority in that capacity to conduct the particular business for which it was created, were granted subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they may be withdrawn or reclaimed by the state in such way and by such modes of procedure as are consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence:" *Bank of the Republic v. Hamilton*, 21 Ill. 53; *Mobile, &c., Rd. v. State*, 29 Ala. 573; *Louisville, &c., Co. v. Ballard*, 2 Met. (Ky.) 165. So a law which gives a workman, employed by a sub-contractor on a railroad, the right to recover against the corporation, applies to existing companies and is not unconstitutional: *Grannahan v. Railroad*, 30 Mo. 546.

Whenever a right to repeal, alter, or amend a charter is reserved to the state in the act of incorporation itself, its exercise will not impair the obligation of the contract: *Commonwealth v. Fayette Co. Rd.*, 55 Penn. St. 452; *Miners' Bank v. U. S.*, 1 Greene (Iowa) 553; *Perrin v. Oliver*, 1 Minn. 202; *In re Oliver Lee & Co.'s Bank*, 21 N. Y. 9. And where several charters are contained in one act, it is enough if the power of repeal be reserved in any part of the same act, provided the language of the clause is sufficient to embrace the whole act: *Ferguson v. Bank*, 3 Sneed 609. Or the power of revocation may be reserved in the state constitution, and, in that event, need not be repeated in the charter: *Delaware Rd. Co. v. Tharp*, 5 Harr. (Del.) 454. Of course the legislature is not prohibited from altering a charter, even in its most essential features, if the changes are accepted and agreed to by the corporation: *Ehrenzeller v. Union Canal Co.*, 1 Rawle 190; and the assent of a corporation to legislative changes in its charter may be inferred from such circumstances as would raise a similar presumption in the case of a natural person: *Commonwealth v. Cullen*, 13 Penn. St. 133.

II. *Municipal Corporations*.—The foregoing remarks are to be applied solely to such corporations as are essentially private in their nature. With regard to municipal bodies the rule is different.

Their charters are not contracts; and they are not exempt, by the constitution, from the control of the legislature, except in so far as private property rights are involved. In the language of the Pennsylvania court: "There can be no doubt that the legislature possesses the power to alter the charters of such public bodies as concern the welfare and wholesomeness of the body politic; such as concern the administration of government, and are emphatically public. Such are the corporations of cities and boroughs, when no private right of property is involved, except incidentally, and such as can be easily reserved and compensated:" *Brown v. Hummel*, 6 Penn. St. 86; *Terrett v. Taylor*, 9 Cranch 52; *Bruffett v. Railroad*, 25 Ill. 353; *Layton v. New Orleans*, 12 La. Ann. 515. The distinction is thus stated by a learned judge in Maine; "The distinction between public and private corporations has reference to their powers and the purposes of their creation. They are public, when created for public purposes only, connected with the administration of the government, and where the 'whole interests and franchises are the exclusive property and domain of the government itself.' * * * All corporations invested with subordinate powers, for public purposes, fall within this class, and are subject to legislative control:" *Yarmouth v. North Yarmouth*, 34 Me. 417. But it was held, in the same case, that where the charter of a town grants to its trustees a fund for the use of its schools, the trustees constitute, for that purpose, a *private* corporation, and a subsequent statute, appropriating a part of that fund to the uses of another town, is therefore unconstitutional. And indeed it is well settled that when the state enters into an actual contract with a municipal corporation, the subordinate relation ceases and gives place to the equality subsisting between all contracting parties: *Grogan v. San Francisco*, 18 Cal. 590.

III. *Grants of Exclusive Privileges.*—Notwithstanding some difference of opinion it may now be regarded as established law that it is within the power of the legislature to grant to a corporation exclusive rights and privileges which no future legislature can revoke or impair. The principal case on this point is that of *The Binghamton Bridge*, 3 Wall. 51, where it was held that a charter to a bridge company to erect a bridge and take tolls, enacting that thereafter it shall not be lawful for any person or persons to erect any other bridge across the same stream within a distance of two miles above or below the proposed bridge, constitutes a contract

between the state and the corporation which is inviolable within the constitutional prohibition ; and that it means not only that no person shall erect such bridge without legislative authority, but that the legislature will not *make it lawful* for any person to do so. And see same point in *Bridge Co. v. Hoboken Land, &c., Co.*, 2 Beasley (N. J.) 81 ; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35 ; *Collins v. Sherman*, 3f Miss. 679 ; *Trustees v. Aberdeen*, 13 Sm. & Mar. 645. But if the privileges granted to the corporation are not made exclusive by the clear and unmistakable language of the act, the obligation of the contract is not considered as impaired by a subsequent grant, by the legislature, of a similar franchise to another corporation, notwithstanding the use of the latter may damage or even destroy the value of the first franchise or rival and diminish its profits : *Charles River Bridge v. Warren Bridge*, 11 Pet. 420 ; *Turnpike Co. v. State*, 3 Wall. 210 ; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44 ; *Matter of Hamilton Ave.*, 14 Barb. 405. In other words, in a simple act of incorporation, not conferring exclusive privileges, the legislature does not contract to preserve the *value* of the franchise, but only that the franchise itself shall not be taken away or materially altered. The rule of construction in such cases is, that the charter is to be construed strictly against the grantee, and nothing is to be taken by implication ; and therefore the state will not be held to have fettered its hands, in regard to granting rival franchises, unless such limitation is expressed in the grant itself in plain and explicit terms : *Charles River Bridge v. Warren Bridge*, *supra* ; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210 ; 2 Washburn on Real Property, 296.

IV. *Exemption from Taxation.*—It is also within the power of the legislature to exempt the property of a corporation from all future taxation, or from all assessment beyond a certain amount, and such an engagement, if express and positive, constitutes an irrevocable and inviolable contract under the federal constitution. The leading case on the subject is that of *The State of New Jersey v. Wilson*, 7 Cranch 164. It appeared that in 1758 the legislature of New Jersey passed an act to give effect to an agreement made by certain commissioners with the Delaware Indians, which agreement included the relinquishment by the Indians of their claim to all lands within the colony, in consideration of the purchase for them of a tract of land on which they might reside, and the act

provided that such tract so purchased should not thereafter be subject to any tax. In 1801 the Indians sold the tract, with the consent of the legislature, and removed from the state. In 1804 the legislature repealed that section of the act of 1758 which exempted the lands from taxation, assessed the lands, and demanded the tax from the purchasers; whereupon this controversy arose. The Supreme Court held that the proceedings between the colony and the Indians constituted a contract, of which the exempting clause was an integral part, and that therefore the repeal of that clause violated the obligation of the contract, and was unconstitutional. And see *Gordon v. Appeal Tax Court*, 3 How. 133; *State Bank of Ohio v. Knoop*, 16 Id. 39; *Hardy v. Waltham*, 7 Pick. 110; *People v. Roper*, 35 N. Y. 633. Though this doctrine is generally agreed to, another line of cases introduces a limitation upon it, viz.: that there must be a special consideration for the grant of an extraordinary privilege, like that of exemption from taxation; that if no bonus is paid by the corporation, no right surrendered to the public, no service or duty or additional obligation imposed upon the corporators as a consideration for it, it is a mere spontaneous concession on the part of the legislature, and not properly a part of the contract: *Washington University v. Rowse*, 42 Mo. 308; *People v. Comm'rs of Taxes*, 47 N. Y. 501; *Hospital v. Philadelphia County*, 24 Penn. St. 229. Thus it is said in a New York case: "It is never to be assumed, however, that the state has, even to this extent, fettered its power in the future, except upon clear and irresistible evidence that the engagement was in the nature of a private contract, as distinguished from a mere act of general legislation, and that such, in the particular instance, was the actual and deliberate intention of the state authorities:" *People v. Roper*, 35 N. Y. 633. And where the act of incorporation prescribes that no other liabilities or obligations shall be imposed on the corporation than those contained in its charter, still the legislature does not divest itself of the right to make further enactments as to the mode, the time when, and the courts where, those liabilities and obligations shall be enforced: *Gowen v. Railroad*, 44 Me. 140.

V. *Eminent Domain*.—These questions concerning grants to corporations are often complicated with the peculiar rights of the state, growing out of the power of eminent domain. Whether the legislature *can*, in any particular instance, by contract, divest the people of the right of eminent domain, is a question propounded

but not decided in the case of *Brewster v. Hough*, 10 N. H. 138; but the court intimates a very strong opinion that this "power is inherent in the people, under a republican government, and so far inalienable that no legislature can make a contract by which it shall be surrendered without express authority for that purpose in the constitution, or in some other way directly from the people themselves." But this case, even if it were a positive authority for the position there indicated, is in direct conflict with the preponderance of judicial opinion. The authorities cited in the preceding section conclusively establish that the right of taxation, at least, may be waived by the legislature, provided the intention to do so is manifested in unequivocal terms; and it is apprehended that, under the coercive force of those rulings, the doctrine would be extended to any similar questions which might arise. But here, also, the grant is to be strictly construed against the corporators, and in favor of the public, and "nothing passes but what has been granted in clear and explicit terms, and neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken:" *Jefferson Bank v. Skelly*, 1 Black (U. S.) 436. And it is important to be noted that the power of eminent domain, so far as concerns the right to take private property for public uses, is never waived. The very franchise itself is only a species of property (and not more sacred than any other kind), and hence may be taken or destroyed by the state in the exercise of its sovereign powers, as well as any other property of the citizen; and when compensation is provided for its infringement, its obligation is not impaired, but recognised: *In re Twenty-Second Street*, 102 Penn. St. 108; *Backus v. Lebanon*, 11 N. H. 19; *Central Bridge v. Lowell*, 4 Gray 474; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35.

VI. *Contracts of the State with Individuals.*—Passing from corporations and their privileges to natural persons, there can be no doubt that states may contract with individual citizens, and that such engagements, if authorized by law, are equally protected under the ægis of the constitution, so that rights acquired under them cannot be arbitrarily withdrawn or divested by subsequent legislation: *Woodruff v. State*, 3 Pike 285. Thus a contract by the state to convey lands on the performance of a condition precedent by the grantee, creates an obligation to parties accepting and partly per-

forming the condition which the legislature cannot evade by a repeal of the granting act: *Montgomery v. Kasson*, 16 Cal. 189; *Stanmire v. Taylor*, 3 Jones (N. C.) 207. So also, a statute providing for the funding of the floating debt of a city, amounts to a trust agreement, upon valuable consideration, and is therefore substantially beyond the control of the legislature: *People v. Bond*, 10 Cal. 563. So where a state chartered a bank, of which it was to be the sole stockholder, and provided that the bills of such bank should be receivable in payment of all debts due the state, it was held (though by a divided court), that this constituted a contract with the holders of such bills to receive the same in payment of state dues, and that consequently that clause could not be repealed as to existing holders: *Woodruff v. Trapnall*, 10 How. 190. And in a recent and highly important series of cases, (“*The Virginia Coupon Cases*”), it has been held by the supreme federal tribunal that when the State of Virginia, in funding the public debt in 1871, agreed that the coupons attached to the new bonds should be receivable in payment of all debts, taxes, and other demands due the state, this raised a contract between the state and the coupon-holders, the obligation of which could not be impaired by subsequent legislation declaring that such coupons should not be taken in payment of state taxes: *Hartman v. Greenhow*, 102 U. S. 672; *Antoni v. Greenhow*, 107 Id. 769; *Poindexter v. Greenhow*, 9 Va. Law Journal 331. But in respect to executory contracts, the state stands upon the same footing as an individual. That is, while the grant or contract remains unexecuted, while it still requires some further act to its completion, and while no consideration in fact or presumed exists, it may be revoked or repudiated in the same way that a mere naked promise between individuals may be recalled: *Trustees v. Rider*, 13 Conn. 87. And further, in the language of ANDREWS, J.: “The state may at any time abandon an enterprise which it has undertaken, and refuse to allow the contractor to proceed, * * * or enter into a new contract for its performance by other persons, without reference to the contract previously made, and although there has been no default on the part of the contractor. The state, in the case supposed, would violate the contract, but the obligation of the contract would not be impaired by the refusal of the state to perform it. The original party would have a just claim against the state for any damage sustained by him from the breach of the contract: *Lord v. Thomas*, 64 N. Y. 107. Finally, a law giving permission

to bring suits against the state is not a contract: *Beers v. Arkansas*, 20 How. 527.

VII. *Tenure of Public Office and Compensation.*—The constitutional limitation does not apply to the appointment or continuance in office, nor to the compensation, of the public officers of the state or municipality, unless provided for in the constitution of the state. Such engagements are not considered as contracts. Their compensation may be increased or diminished, or their terms of office closed, at the will of the legislature, subject only to the state constitution: *Butler v. Pennsylvania*, 10 How. 402; *Benford v. Gibson*, 15 Ala. 521; *State v. Smedes*, 26 Miss. 47; *Commonwealth v. Bacon*, 6 S. & R. 322; *People v. Devlin*, 33 N. Y. 273; *Barker v. Pittsburgh*, 4 Penn. St. 49. Thus it is said, in *Barker v. Pittsburgh*, “that there is no contract, express or implied, for the permanence of a salary, is shown by the constitutional provision for the permanence of the salaries of the governor and judges as exceptions.” And even where an office is created by the constitution and defined as to the term and salary, still the people may, by the adoption of a new constitution, terminate both without regard to the interests or expectations of the incumbent: *Conner v. New York*, 2 Sandf. 355; *Coffin v. State*, 7 Ind. 157.

VIII. *Contracts between Individuals.*—The first and most obvious application of the clause we are considering is to contracts between private individuals; yet not many cases have arisen on this point, and those must be reviewed rather as examples of the general principle than as establishing broad rules of application. Thus, a law changing the rate of interest on existing debts, though not falling due till after its date, impairs the obligation of contracts and is unconstitutional: *Myrick v. Battle*, 5 Fla. 345; *Brewer v. Otoe*, 1 Nebr. 373; *Roberts v. Cocke*, 28 Gratt. 207. So where a law makes the *stock* of stockholders in a corporation liable for its debts, it cannot be repealed as to existing debts, for that would impair the contract of the creditors with the bank: *Hawthorne v. Calef*, 2 Wall. 10; but on the other hand, there being no privity of contract between creditors of corporations and the individual stockholders, the latter are *personally* liable (if at all) only by express statutory provisions, not by contract, and hence the repeal of a law declaring their individual liability does not impair the obligation of any contract: *Coffin v. Rich*, 45 Me. 507. So an enactment that indorsers in blank of promissory notes before

delivery, &c., shall be entitled to notice of non-payment the same as regular indorsers, cannot apply to existing notes, for it would materially alter the contract relations of the parties: *Cook v. Goo-gins*, 126 Mass. 410. But a law prohibiting the future making of contracts of a specified kind is not within the purview of the limitation: *Churchman v. Martin*, 54 Ind. 380; nor is a law which makes valid a void contract: *Welch v. Wadsworth*, 30 Conn. 150. Nor was the constitutional prohibition intended to interfere with the legislation of the states in regard to their internal police. Hence a law declaring a certain day to be a legal holiday cannot be regarded as impairing the obligation of the contract contained in a promissory note, already existing, although its effect is to make such note payable one day earlier than it would otherwise have been: *Barlow v. Gregory*, 31 Conn. 261. Nor can a law which is in force at the time a contract is made be deemed to have this effect; for the parties are legally consensant of it, the contract is made with reference to it, and it is embodied in their agreement: *Blanchard v. Russell*, 13 Mass. 16. Neither can the limitation be extended to judicial decisions which declare a contract void because it contravenes the constitution: *McClure v. Owen*, 26 Iowa 243. Finally, it is competent only for the party whose rights are invaded to plead the nullity of a law as impairing the obligation of contracts: *New Orleans Navigation Co. v. New Orleans*, 12 La. An. 364.

IX. *State Insolvent Laws.*—It is settled that a state insolvent law, allowing the absolution of the debtor, is not unconstitutional as impairing the obligation of contracts, provided that it is not extended to pre-existing debts, but only to such as were contracted after the law went into effect, and provided that it shall only apply to citizens of the state and to such others as voluntarily place themselves within its control and jurisdiction for that particular purpose: *Sturges v. Crowninshield*, 4 Wheat. 122; *Baldwin v. Hale*, 1 Wall. 223; 1 Kent's Com. *422. And whereas this principle was at one time made to rest upon the ground that parties contracted with reference to existing insolvent laws and so made them a part of their contract, that theory seems to be rejected by the more recent cases, and an entirely different basis established. In the language of Judge GARDINER: "The permission by these laws accorded to a debtor to absolve himself is an act of sovereignty, induced by considerations of public expediency. It is the exercise of a power not derived from or dependent upon contract, but beyond

and in hostility to it. The public good or the exigencies of a state may require the taking of private property without the consent of the owner, or the discharge of a debt without the consent of the creditor; but the idea that the justification in either case rests on contract or depends upon the assent of the holder, has scarcely the merit of plausibility :” *Donnelly v. Corbett*, 3 Seld. 505.

Nothing can be more firmly established, however, than that a discharge of the debtor under the insolvent laws of his own state has no effect whatever upon contracts made with citizens of other states, or upon contracts not made within the state : *Ogden v. Saunders*, 12 Wheat. 213; *Baldwin v. Hale*, 1 Wall. 223; *Felch v. Bugbee*, 48 Me. 9; *Guernsey v. Wood*, 130 Mass. 503; *Whitney v. Whiting*, 35 N. H. 467; *Pratt v. Chase*, 44 N. Y. 597; Story on Conf. Laws, § 341. And in *Guernsey v. Wood*, *supra*, this principle was held to apply though the contract was made and to be performed in the state of the defendant, and even though made by the defendant with plaintiff’s agent who was also a resident of that state and whom defendant supposed to be the principal, the fact of agency not being disclosed. These decisions proceed upon two well known and analogous rules of law; (1) that state laws have no extra-territorial force, (2) that the courts of a state have, generally, no jurisdiction over non-residents. It is therefore entirely in accordance with this principle to hold that foreign creditors may put themselves on a footing with citizens, and be equally bound by the debtor’s discharge, by becoming parties to the proceedings, by proving their debts under the commission of insolvency, by accepting dividends, or by any other act which clearly shows their submission to the jurisdiction : *Whitney v. Whiting*, 35 N. H. 467; *Pratt v. Chase*, 44 N. Y. 597. But if the contract is made between citizens of the same state, the power to grant a discharge is not impaired by a subsequent removal of the creditor to another state : *Stoddard v. Harrington*, 100 Mass. 87.

X. *Marriage not a Contract.*—The constitutionality of legislative divorces has involved the question how far and to what purposes marriage may be considered a contract. A few sporadic cases have held that it is purely and simply a contract, and therefore within the constitutional limitation now under consideration; *Ponder v. Graham*, 4 Fla. 23; *Bryson v. Bryson*, 44 Mo. 232. But the overwhelming weight of authority is to the effect that, while certain contractual elements do indeed enter into the marriage rela-

tion, it is more properly to be regarded as a *status*; and therefore an act of the legislature destroying the marital status of two persons is not a "law impairing the obligation of contracts:" *Maguire v. Maguire*, 7 Dana 183; *Adams v. Palmer*, 51 Me. 481; *Cronise v. Cronise*, 54 Penn. St. 255; *Carson v. Carson*, 40 Miss. 349; *Noel v. Ewing*, 9 Ind. 37; Story on Confl. Laws, § 108 and note; 2 Whart. on Cont. § 1069; 1 Bishop Mar. & Div. §§ 667, 669.

XI. *Not Applicable to Actions on Torts*.—It seems to be well settled that a claim founded upon a tort, whether it has passed into judgment or not, cannot be considered a contract under this clause of the federal constitution; because in either case, it lacks one of the vital elements of a contract, the assent of the parties; *McAfee v. Covington* (Sup. Ct. of Ga., 1884), 17 Reporter 552; *Garrison v. New York*, 21 Wall. 196; 2 Wharton on Cont. § 1070, and case cited.

XII. *Distinction between Obligation and Remedy*.—Of all the complications which have arisen under the general topic, and presented themselves for solution, there is perhaps none which has been productive of greater embarrassment and confusion than the distinction between the obligation of the contract and the remedy for its enforcement. We propose first to review the authorities which have taken this troublesome question in hand, and then to see what deductions can be drawn from them. In the first place, then, the obligation of a contract may be roughly defined as the duty of each of the contracting parties to perform his share of it, and the right (since right and duty are here correlative terms), of the party who keeps the agreement to exact specific performance, or compensation in damages, from the party who breaks it. The remedy is the means provided by the state for the enforcement of that right. Accordingly it was said at an early day, by Chief Justice MARSHALL: "The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct:" *Sturges v. Crowninshield*, 4 Wheat. 200. Then followed the case of *Bronson v. Kinzie*, 1 How. 311, where the court said: "And although a new remedy may be deemed less convenient than the old one, and may in some degree render the collection of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. What-

ever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution." Soon after it was held that a certain law in regard to sales of property on execution so far *obstructed* the remedy as to impair the contract, and was therefore unconstitutional: *McCracken v. Hayward*, 2 How. 608. And see *Gunn v. Barry*, 15 Wall. 610; *Green v. Biddle*, 8 Wheat. 1; *Butz v. Muscatine*, 8 Wall. 575; *Planters Bank v. Sharp*, 6 How. 301. In the case of *Van Hoffman v. Quincy*, 4 Wall. 535, it was stated that if these doctrines were still open to discussion, the soundness of the distinction between obligation and remedy, might well be doubted. And a recent case (*Edwards v. Kearzey*, 96 U. S. 595), holds that the law of the remedy, as it exists at the making of the contract, enters into it and forms a part of its obligation, in so far that any subsequent change of remedy which tends to essentially lessen or impair the value of the contract, is unconstitutional. Turning now to the state reports we find a number of cases holding generally that whatever pertains to the remedy merely may be altered at the will of the legislature, provided a substantive remedy is left to the creditor, and no material rights are destroyed: *Rathbone v. Bradford*, 1 Ala. 312; *Paschal v. Perez*, 7 Texas 348; *Holland v. Dickerson*, 41 Iowa 367; *Cutts v. Hardee*, 38 Ga. 350. Again, it is held that a law changing the remedy and rendering it less speedy and convenient, is not invalid, if there be still a substantial remedy left: *James v. Stull*, 9 Barb. 482. But if the law imposes so many obstacles in the way of enforcing a class of contracts as to leave the right scarcely worth pursuing, it impairs their obligation: *Oatman v. Bond*, 15 Wis. 20; *Smith v. Morse*, 2 Cal. 524. And so a statute which takes away *all* remedy is clearly unconstitutional: *Bruce v. Schuyler*, 4 Gilm. 221; *State v. Bank of the State*, 1 S. C. 63. Another decision states that although the legislature cannot substitute a nugatory remedy for a good one, they can substitute another good one; parties have a vested right to some remedy substantially as good as the old one, but not to that particular one: *Lockett v. Usry*, 28 Ga. 345. Again, it is said that there is a distinction in favor of the constitutionality of an act which prolongs or revives a remedy, as compared with one which cuts off or takes

away the remedy: *Caperton v. Martin*, 4 West Va. 138. And whereas it is sometimes suggested that the contract is made with reference to all laws existing at the time, a Minnesota decision holds that only such laws become a part of the contract as would be enforced by courts of a foreign jurisdiction—such as have the full force of law wherever the contract is sought to be enforced—which of course excludes purely remedial legislation: *Heyward v. Judd*, 4 Minn. 483. And lastly, it is said that in determining whether a change in the remedy is reasonable and just, the courts must look behind the statute to the state of the country, and the causes which led to the enactment of the new remedy: *Baumbach v. Bade*, 9 Wis. 559.

It will have become apparent from the foregoing review that, notwithstanding some fluctuation of opinion, the United States courts (and, under their lead, the state courts,) have been led to the adoption of two positions not reconcilable without a compromise. First, that whatever pertains merely to the remedy is no part of the contract and may be modified at the will of the legislature. Second, that it is possible to alter the remedy in such a manner as to impair the obligation of the contract itself. As a resultant of these two positions, they have made the rule to rest on the *extent* to which the change in the law affects the remedy and, through it, the contract; holding that when the law destroys the remedy altogether, or renders it practically worthless, or invades it in a material point, or lessens the value of the contract, it is in contravention of the constitution. Although this has been repeatedly characterized as an “unhappy” distinction, it is, after all, the only possible means of escape from holding, on the one hand, that the remedy cannot be modified at all, or on the other hand, that it may be desiccated or destroyed. But that it opens up a very wide ground of debate will be sufficiently apparent from the following section.

Before proceeding further, however, it is important to be observed that if the parties to a contract include in it, in express terms, the remedy for its enforcement, subsequent legislation changing the remedial process which they have agreed upon is, as to them, inoperative. “If they do not prescribe the rule of remedy in their contract, the law-making power is free; but if they do, they become a law to themselves, and the legislature must let them alone:” *Billmeyer v. Evans*, 40 Penn. St. 324; *Taylor v. Stearns*, 18 Gratt.

244; *Duerson v. Alsop*, 27 Id. 230; 2 Daniel on Neg. Instr. § 970 a.

XIII. *Examples.*—Taking the conclusions arrived at in the last section, therefore, as correctly expositive of the present state of the law, we proceed to adduce some examples and illustrations, for the purpose of showing in what cases the courts have held changes in remedial legislation so material as to impair the obligation of the contracts affected by them, and where not. And in the first place, it is competent for the legislature to pass statutes of limitation, prescribing the time within which actions shall be brought on demands already accrued, provided the time is not so unreasonably shortened as to practically deprive parties of their remedy altogether: *Griffin v. McKenzie*, 7 Ga. 163; *Cox v. Berry*, 13 Id. 306; *Call v. Hagger*, 8 Mass. 430; *Holcombe v. Tracy*, 2 Minn. 241; *Maltby v. Cooper*, 1 Morris (Iowa) 59; *Pearce v. Patton*, 7 B. Mon. 162; *Billings v. Hall*, 7 Cal. 1. But where such a statute allows only thirty days for the commencement of suits on existing debts, it must be regarded as unconstitutional; because that time is unreasonably and oppressively short: *Berry v. Ransdall*, 4 Met. (Ky.) 292. And where property rights have been acquired by virtue of a limiting act, they cannot be divested by a subsequent statute enlarging the time for bringing suit: *Sprecker v. Wakeley*, 11 Wis. 432. So also it is allowable for the legislature to grant a stay of execution on judgments, or otherwise postpone the collection of debts, so it be for a limited and not unduly protracted period: *Farnsworth v. Vance*, 2 Cold. 108; *United States v. Conway*, 1 Hempst. 313; *Chadwick v. Moore*, 8 W. & S. 50; *Coxe's Ex'r v. Martin*, 44 Penn. St. 322; *Newkirk v. Chapron*, 17 Ill. 344. But where the provisions of the act are such that the stay taken under it may be indefinitely, even perpetually, extended, it touches the remedy in a vital point and is unconstitutional: *Bunn v. Gorgas*, 41 Penn. St. 441. As to whether exemption laws could apply to judgments entered before their passage, there has been some difference of opinion. It has been held that a law which prohibits a levy on a portion of the debtor's property which was previously subject to an existing judgment is unconstitutional: *Forsyth v. Marbury*, R. M. Charlt. 324; *Vedder v. Alkenbrack*, 6 Barb. 327; *Quackenbush v. Danks*, 1 Denio 128. The last named case was affirmed by the New York Court of Appeals in *Danks v. Quackenbush*, 1 Comst. 129; but as the opinion there was given by an equally divided court,

it was not considered as entitled to the weight of a precedent; and the same court, in a later case (*Morse v. Gould*, 11 N. Y. 281), arrived at an exactly opposite opinion, conceiving that although a law may be regarded as impairing the obligation of the contract when it so embarrasses the remedy as to substantially defeat the rights of the creditor, yet a statute exempting certain property would not be likely to have that effect in the large mass of instances, though isolated cases might occur where the exempted articles would constitute the debtor's whole property. And this decision may be regarded as sound law: *Coriell v. Ham*, 4 Greene (Iowa) 455; *Stephenson v. Osborne*, 41 Miss. 119; *Taylor v. Stockwell*, 66 Ind. 505. But see *Gunn v. Barry*, 15 Wall. 610. Again, it is universally held that laws abolishing imprisonment for debt do not touch the obligation of the contract: *Sturges v. Crowninshield*, 4 Wheat. 200; *Gray v. Munroe*, 1 McLean 528; *Newton v. Tibbatts*, 2 Eng. 150; *Bronson v. Newberry*, 2 Doug. 38; *Ware v. Miller*, 9 S. C. 13. Nor is there any constitutional objection to the repeal of an extraordinary remedy given to a particular class of creditors by a previous statute: *Stocking v. Hunt*, 3 Denio 274. So the legislature may change the remedies provided for the collection of rents, *e. g.*, by abolishing distress and substituting the action of ejectment in its stead: *Van Rensselear v. Snyder*, 13 N. Y. 299. So also of statutes regulating the joinder of parties in suits on negotiables: *McMillan v. Sprague*, 4 How. (Miss.) 647; *Augusta Bank v. Augusta*, 49 Me. 507. Nor can a right be said to be impaired by a statute which merely imposes an additional duty on the owner, as necessary to its preservation: *Tarpley v. Hamer*, 9 Sm. & Mar. 310; *Curtis v. Whitney*, 13 Wall. 68. Again, a law prescribing that no action shall be maintained on any special promise to pay a debt from which the debtor has been discharged under the bankrupt law or state insolvent law, unless such promise be in writing and signed by the debtor, has been held constitutional and valid as applied to pre-existing verbal promises, the court saying: "The act * * * simply gives a rule of evidence as to the proof of a new promise to revive the old debt: or, in other words, declares that the law will furnish no remedy to enforce such a promise, unless it is in writing. The law has relation to the remedy and not to the validity of the contract:" *Kingley v. Cousins*, 47 Me. 91. And generally, a law which establishes a rule of evidence as to certain past transactions, cannot be regarded as within the pro-