The statute under which that judgment was recovered was not . . . a penal law, in the international sense. The faith and credit, force and effect, which that judgment had by law and usage in New York was to be conclusive evidence of a direct civil liability from the individual defendant to the individual plaintiff for a certain sum of money, and a debt of record, on which an action would lie, as on any other civil judgment *inter parties*. The court of appeals of Maryland, therefore, in deciding this case against the plaintiff, upon the ground that the judgment was not one which it was bound in any manner to enforce, denied to the judgment the full faith credit and effect to which it was entitled under the Constitution and laws of the United States."

LAMAR and SHIRAS, JJ., were not on the bench and took no part in the decision. FULLER, C. J., dissented, chiefly on the ground that "It was for the Maryland court to determine whether such enforcement would . . . involve the execution of the penal laws of another State, and although it might have mistaken in the conclusion arrived at, such error does not give this court jurisdiction to review its judgment." The learned Chief Justice thought that 'full faith and credit were accorded to the judgment as matter of evidence' and that 'no Federal question was involved.'

It might be interesting to speculate upon the future attitude of the State courts, under different circumstances, in view of this important decision; but this note has already exceeded the customary limit in the effort to present the situation fully and clearly and in the language of the different courts.

A. U. BANNARD.

EDITORIAL NOTES.

BY W. D. L.

CIVIL LIBERTY AS WRITTEN IN THE CONSTITUTION.

II.

How Far Civil Liberty was Thought, Prior to 1816, to be Secured in Written Constitutions.

IN our editorial notes for August we tried to point out that the great constitutional questions which would attract the attention of courts, bar and laity for a considerable time, were not those concerning the proper division of

State and Federal power, but questions concerning the civil liberty of the individual. That is to say, how far our written constitution marks out for the individual, or domain of individual freedom, and if so, by what principles shall we draw the boundaries of this domain. We also tried to point out that already there had appeared those whom we might call strict constructionalists, *i. e.*, those who would confine the domain of civil liberty to the express exemptions from the power of government in the written constitution, narrowly construed; while others would only give to a legislature created by a constitution such power as was expressly, or by necessary implication, granted, withholding all power that disregarded the fundamental principles of civil liberty as shadowed forth in such great documents of the English speaking race as Magna Charta and the Declaration of Independence.

To the former of these belongs Mr. McMURTRIE, whose articles in THE AMERICAN LAW REGISTER AND REVIEW [1] called forth these notes.

It is assumed, in these interesting and forcible articles, that the idea that a State constitution does not confer on a State legislature all power not expressly withheld, is "A Modern Canon of Constitutional Law." It is the correctness of this statement which we now desire to examine.

The best way to do this is to see if we can find any *opinions expressed previously to 1816, showing that the legislature could not pass laws contrary to the fundamental principles of natural justice, unless express warrant for the same was found in the constitution.*

It is most surprising, in view of the fact that later judges seem to have generally held the opposite view, that the opinion that a State legislature could not pass a law against what was called natural justice, unless expressly authorized by the constitution, was held, almost universally, during the last part of the eighteenth, and the beginning of the present century. The French Revolution, and its half-sublime, half-ridiculous ideas on the rights of

[1] *Supra*, January number, p. 1, and Comments in the June number.

man, and the prevalent twaddle concerning "social compacts," was partly responsible for this. Therefore, in reviewing opinions written at that time, we would caution the reader to remember, that in spite of bad logic, and essays concerning the "nature of the social compact," which fill the opinions of the courts, as it does all the writings of the wisest of the time, this, however distasteful, is no valid reason why the belief that a State constitution is a limited grant of power may not be sound.

In October, 1789, the case of Hain *v.* McClaws and wife,[1] came before the Superior Court of South Carolina. An act of the State, passed in 1789, provided that negroes could be brought into the State by actual settlers. In view of this act the defendants started from Havana for South Carolina with their negroes. While on their way an act was passed by the State legislature forfeiting all negroes hereafter brought into the State, not excepting those accompanying actual settlers. The question before the court was whether the negroes accompanying the plaintiff were forfeited. The Court decided that the legislature never meant to apply the law to such a case. But the attitude in which the three members of the court regarded the powers of the legislature is clearly shown in the following sentence:[2] "It is clear, that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, so far as they are calculated to operate against those principles. . . . We are bound to give such a construction to the Act of 1789 as will be consistent with justice, and the doctrine of natural reason, though contrary to the strict letter of the law."

Before this MADISON had written in the *Federalist*,[3] concerning Bills of Attainder, *ex post facto* laws, and laws impairing the obligation of contract, that they are "contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are

[1] 1 Bay, 93.
[2] P. 98.
[3] No. 44, p. 212.

expressly prohibited by the declarations prefixed to some of the State constitutions, *and all of them are prohibited by the spirit and scope of these fundamental charters.* It is true that when this was written, the proposition contained in Malbury *v.* Madison,[1] that a Court could declare an act not warranted by the constitution void, was certainly not generally recognized, but it is easy to see that had he once recognized this principle, MADISON, as a judge, would have declared an *ex post facto* law void, because contrary to the spirit of a free government, though no express prohibition could be found in the Constitution of the United States or of the State.

In Pennsylvania, in 1795, Mr. Justice PATTERSON told the jury, in the case of Vanhorn's Lessee *v.* Dorrance,[2] that the act of the State commonly called the "regulating and conferring act," which attempted, without just compensation, to take the property of the plaintiff and give it to the defendant, was unconstitutional. From the usual general expressions of the bill of rights the judge draws the conclusion, "that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and unalienable rights." From the whole tenor of his address it is clear that his decision would have been the same had the bill of rights been entirely absent from the constitution of the State. Of the constitution he says: "It is the form of government delineated by the mighty hand of the people, in which certain fixed principles of fundamental laws are established." And he adds, "What are the legislatures? Creatures of the constitution. They owe their existence to the constitution; they derive their powers from the constitution. . . . The preservation of property is the primary object of the social compact, and by the late constitution of Pennsylvania was made a fundamental law. . . . The legislature, therefore, had no authority to make an act, divesting one citizen of his freehold and

[1] Cr., 137 (1803).

[2] Dal., 304.

vesting it in another, without just compensation . . . it is contrary to the letter and spirit of the constitution."

Turning to the Supreme Court of the United States, we find this subject first discussed in Calder *v.* Bull.[1] The State of Connecticut had passed a law granting a new hearing in the case of a suit involving the validity of a will. The decree of the Court had been made, but the property not actually in the possession of the successful parties at the time the act was passed. The Supreme Court held, that inasmuch as the property had not come into the possession of the successful parties in the first suit, at the time of the passage of the act, no rights vested had been divested, and the act was constitutional.

But Mr. Justice CHASE, in discussing the question whether a State legislature, not expressly restrained by the State constitution, can revise a decision of any of its courts of justice, says: "I cannot subscribe to the omnipotence of a State legislature . . . although its authority should not be expressly restrained by the constitution, or fundamental law of the State. The people of the United States erected their governments . . . to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. . . . There are acts which our federal or State legislatures cannot do without exceeding their authority. There are certain vital principles to our free Republican governments, which determine and overrule any apparent flagrant abuse of legislative power: as to authorize any manifest injustice by positive law; or to take away the right of personal liberty, or private property, for the protection whereof government was established . . . a law that punished a citizen for an innocent action, or, in other words, for an act which when done was in violation of no existing law, a law that destroys or impairs the lawful private contracts of citizens, a law that makes a man a judge in his own cause; or a law that takes property from A. and gives it to B. It is against reason and justice for a

[1] 3 Dall., 386 (1798).

people to entrust a legislature with such powers, and, therefore, they will not be presumed to have done it. The origin, the nature, the spirit, of our own State governments amount to a prohibition on such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, forbid, permit and punish; and may declare new crimes, and may establish rules of conduct for *all* its citizens in future cases; they may commend what is right, and prohibit what is wrong; they cannot change innocence into guilt, or punish innocence as a crime, or violate the right of antecedent lawful private contract; or the right of private property. To maintain that our federal or State legislatures possess such powers, if they *are not expressly* restrained would, in my opinion, be a political heresy, altogether indefensible in our free republican governments. . . . The prohibition against their (the States) making any *ex post facto* law was *introduced* for greater caution." [1]

To show how universal was the opinion that a State legislature was bound by certain "*general and fundamental principles of all free* governments," in the case of Ogden *v.* Blackledge,[2] also in the Supreme Court of the United States, Mr. MARTIN was stopped by the Court, when he was about to argue that a retrogressive act, declaring what the law had been, was contrary to "the fundamental principles of all our governments," and therefore, unconstitutional, the Court saying: "It was unnecessary to argue on that point."[3] But, perhaps, one of the most brilliant arguments in favor of considering powers of legislation, withheld from a body called into being by a constitution, except where expressly conferred, is found in the speech of Mr. HAYWOOD, in the case of Trustees of University *v.* Foy, before the Court of Conference, in North Carolina.[4] There the State, by the Act of 1789, had vested in the University

[1] See a further discussion of this.

[2] Cr., 272 (1804).

[3] P. 277.

[4] Murphy (N. C.), 58 (1805).

Corporation all the lands which had, or would thereafter escheat to the State. In 1800 the legislature repealed this act, and declared that all land received by the University under the prior act, and not disposed of to *bona fide* purchasers, should revert to State. Mr. HAYWOOD, speaking of the inviolability of private property, and the powers of the legislature to violate it—and here he strikes the key-note of his position—said: "Upon what occasion was it that the people clothed them with a decision so fatal to their dearest interest?" "Is the act justified by anything in the constitution?" and then he points out that so far from being justified it is impliedly prohibited by the tenth section of the Bill of Rights. The point which we wish to illustrate is that he argued the case on the assumption that the legislature had to point to some clause in the constitution of the State, for any power which gave them the right to confiscate private property without compensation.[1]

Carrying out the same thought Judge PARKER, in Ellis *v.* Marshall,[2] a case where the question was whether the defendant could be made a member of a corporation by the State legislature against his will, says: "No apprehension exists that the legislature has such power."

One also has the great Chief Justice himself as his authority for this way of regarding the powers granted by constitutions to legislatures. If we turn to his opinion in Fletcher *v.* Peck.[3] we find that in discussing the question whether a State legislature can annul its grants; he divides the argument into two parts: First, that a State legisla-

[1] The opinion of the Court in this case is most unsatisfactory. They decided the controversy in favor of the University on the ground that the constitution having directed the legislature to create a University, its creation was the creation of the constitution, and, therefore, the land could not be taken away. Where Judge LOCK found a basis for the conclusion in the premises it is hard to say. HALL, J., with much more reason, argues that, as a result of this article in the constitution, the University corporation was public, and its officers, the officers of the State, and, therefore, the State could take away its funds as much as it pleased.

[2] Mass., 269 (1807).

[3] Cr., 87 (1810).

ture cannot do this even if it was not expressly restrained by the Constitution of the United States or of the States. Secondly, a State is expressly restrained by the clause forbidding any impairment of the obligations of contracts. The first part of the argument is that which is at present interesting to us. He points out that the power of taking property already vested is not a legislative power, and then he adds: "If the legislature of Georgia . . . might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded. . . . The principle (contended for) is this: That a legislature may, by its own act, divest the vested estate of any man whatsoever, for reasons which shall by itself be deemed sufficient." A proposition for which the Judge has little sympathy. He says: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? . . . The validity of this rescinding act may well be doubted were Georgia a single sovereign power."

It was not necessary for Chief Justice MARSHALL to rest his decision solely on the spirit of the constitution, and the "fundamental principles of a free government," but from these expressions one can have no doubt that, had he entertained the same idea as Mr. Justice JOHNSON concerning the scope of the prohibition on the States to impair the obligations of contracts, he would, as did that Judge, still have held the act of the State unconstitutional.

Speaking of Mr. Justice JOHNSON, his opinion is very pronounced. "I did not hesitate to declare," he says, "that a State does not possess the power of revoking its own grants; but I do so on a general principle, on the reason and nature of things; a principle which would impose laws even on the deity."

The great Chancellor, KENT, was also very far from

regarding (as his opinion in Dash *v.* Van Kleich,[1] very plainly shows) a State constitution as granting to the legislature every power that was not expressly retained. This case was one in which it was attempted to apply a statute, which construed a prior act differently than it had been construed by the Court, to a case arising before the explaining statute. The judges were evenly divided in opinion. Chancellor KENT took the view that the statute was not meant to apply to the cases arising before the statute, but he leaves no doubt on our mind that, irrespective of express constitutional restrictions, he would have declared such an act unconstitutional. "Our constitutions," we read, "do not admit the power assumed by the Roman Prince (*interlocutis principis*), and the principle we are considering (no retroactive laws) is now to be considered sacred. *It is not pretended that we have any express constitutional provisions on the subject;* nor have we any for numerous other rights dear alike to freedom and to justice." Mr. Justice STORY, in Society *v.* Wheeler,[2] a case which was argued on express prohibitions regarding retrogressive acts in the constitution of New Hampshire, speaking of this opinion of Chancellor KENT, says: "In a fit case depending upon elementary principles, I should be disposed to go a great way with the learned argument." That his own opinions were similar to those of the Chancellor we clearly see from the case of Terret *v.* Taylor,[3] in which he delivered the judgment of the Court. The point in that case was whether the State could, without compensation, divest the Episcopal Church of property vested in it as a corporation. The land happened to be at the time in the District of Columbia, and naturally this fact made the case of the State still more impossible, if that could be, than it would have been had the land been within Virginia. Mr. Justice STORY, in the course of his opinion, says: "We have no knowledge of any authority or principle which would support the doctrine that a legis-

[1] 7 Johns. (N. Y.), 477 (1811).
[2] Gals., 103, p. 139 (1814).
[3] 9 Cr., 45 (1815).

lative grant is revokable in its own nature, and held only *de bene placito.* Such a doctrine would uproot almost all land titles in Virginia, and is entirely inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired. . . . That the legislature can repeal statutes creating private corporations, or conferring on them property already acquired, and by such repeal vest the property of such corporations exclusively in the State . . . we cannot admit, and we think ourselves standing on principles of natural justice, upon the fundamental laws of every free government, and upon the spirit and letter of the Constitution of the United States." Except in this last sentence, not one word about any "*express*" prohibitions.

Of course, these opinions did not go unchallenged. Thus, the expressions and some of the arguments of HAYWOOD, in Trustees of University *v.* Foy,[1] are condemned in the dissent of Judge HALL, and in Dash *v.* Van Kleich,[2] the case in which Judge KENT delivers his opinion, we find Judge YATES coming to an opposite conclusion, on the ground that "There is nothing in the State constitution to prevent legislative interference in judicial construction," while Judge SPENSER is practically of the same opinion.

But undoubtedly the quantity and quality of judicial opinion, prior to the days of TANEY, is in favor of what Mr. MCMURTRIE has called a "New Canon of Constitutional Interpretation," viz.: "that a statute interfering with natural rights must be shown to be authorized, not that it must be shown to be prohibited."

Why, then, the contrary opinion of a few years back, which held undisputed sway—that an act of a legislature, no matter what, must be shown to be expressly prohibited before it can be declared void.

We believe that the opinions in the Dartmouth College case have much to do with this. Both MARSHALL and STORY base their opinions in that case on the express clause

[1] Murphy (N. C.), 58 (1805).

[2] 7 Johns, 477 (1811).

in the Constitution of the United States prohibiting the States from impairing the obligation of contracts. Those who read these opinions are impressed with the idea that if it were not for this clause the Court would have held that the States could trample on all civil rights arising out of contracts. They look, as we confess we ourselves first looked, on Webster's argument, that the acts of New Hampshire were void, irrespective of any one clause in the Constitution of the United States,[1] because "they are not the exercise of a power properly legislative," as merely used for the purposes of argument, and only meant half seriously. Few think that the identical expression was employed in a similar opinion by the Chief Justice himself only a few years before.

But though this way of regarding civil liberty, and the constitutions of the State and the United States is not new, its antiquity does not prove its correctness. In the next number, therefore, I shall do my best to deal with Mr. McMurtrie's very able arguments, going to show the folly of putting into the hands of the Court a determination of the question whether a legislative act conforms to natural justice, and the extreme improbability of the people, ever having intended such a construction to be put upon any constitution.

[1] 4 Wh. p. 558.