in pursuance of an order of the said orphans' court, and without receiving any evidence that the said slaves were not sold, or that they remain still in possession of the said defendant, is erroneous, and that the decree of the circuit court, affirming the same, is also erroneous ; and that the said decree of affirmance ought to be reversed and annulled, and the cause remanded to the said circuit court, with directions to reverse the said decree of the said orphans' court, and to remand the cause to the said court, that further proceedings may be had therein, according to law. All which is ordered and decreed accordingly.

UNITED STATES *v.* BRYAN and WOODCOCK, Garnishees of HENDRICKSON. (*a*)

Priority of the United States.

The 5th section of the act of the 3d of March 1797, giving a priority of payment to the United States out of the effects of their debtors, did not apply to a debt due before the passing of that act, although the balance was not adjusted at the treasury, until after the act was passed.

ERROR to the Circuit Court for the district of Delaware. This was an attachment of the effects of Hendrickson, a bankrupt, in the hands of his assignees, Bryan and Woodcock. Hendrickson was surety for George Bush, late collector of the customs, at Wilmington, in an official bond, dated in 1791. Bush died on the 2d of February 1797. By an adjustment of his accounts at the treasury, in 1801, it appeared, that the balance against him was $3453.06.

In the court below, it was agreed, that the case should depend on the question, "Whether, under the 5th section of the act of congress of March the 3d, 1797, the United States are entitled to satisfaction of their demand *out of the effects of the bankrupt Hendrickson, in the hands of the garnishees, as assignees of the bankrupt, prior to the claims, or any part of them, of other creditors of the said bankrupt being satisfied?" The judgment in the court below was against the United States, and they brought their writ of error. [*375

Wells, for the defendants in error. — In respect to the priority supposed to be established by this act, if it be considered as applying to this case, it will be a priority set up, if not by an "*ex post facto* law," by a retrospective law.

Two questions here present themselves for consideration : 1. Was congress competent to enact such a retrospective law? 2. Has such a law been enacted? is the act of the 3d of March 1797, retrospective?

I. Was congress competent to enact such a retrospective law? It has never yet been contended, that these priorities rest, for support, upon any ancient and royal ground of prerogative. Our constitution is a government of definite, delegated authority : and the powers not given, belong to the people, not only by clear and unavoidable inference, but by positive and express reservation. No attempt has yet been made in any of the courts of the United States, to set up this claim, upon the ground of prerogative. Congress have considered it as not resting upon that ground ; or they would have deemed it unnecessary to make statutory provisions upon the subject.

(*a*) March 10th, 1815. Absent, TODD, Justice.

It has been decided, that they have the power to establish a fair priority, in behalf of the government. They have the power to impose and collect taxes; and it is certainly their duty to provide for their faithful collection and payment into the public treasury. A fair priority has been considered, if not absolutely "necessary," at least, "conducive" to this end; and the power
*376] *to establish it, consequently, given expressly, by the clause in the constitution, emphatically termed the "sweeping clause."

Had the constitution omitted this clause, still, it would seem, for the fair and legitimate execution of the powers expressly delegated, that there would be, from necessity, conferred the right to exercise any means, for that purpose, that were "proper and necessary." To give body and substance to this abstract right; to bring this latent power into light, and to demonstrate its existence, as well as its proper form and proportion; to show it, in the constitution, to the eye, what it is in perfect reason, it is declared, that congress shall have power "to make all laws," not that they, in their good pleasure, with a discretion that acknowledges neither guide nor restraint, not to make any and every sort of law they may choose, in furtherance of any special power, but only those "which shall be *necessary* and *proper* for carrying into execution the foregoing powers, vested, by this constitution, in the government of the United States, or in any department, or officer thereof."

An act which cannot be traced up to any original, nor yet to this secondary power, in the constitution, proceeds not from it, and of course, partakes not of the character of law. An act declaring itself to have proceeded from the secondary power, which shall be manifestly improper and unnecessary, or either, cannot have emanated from that power; and is both a stranger and an enemy to the constitution.

The limitation upon the secondary power was, originally, of a more striking and imposing character than it now appears, since the adoption of the amendments to the constitution. Most, if not all, of the high and important privileges, fenced about by those amendments, owed their security and protection, previous to the adoption of these amendments, to these two talismanic words, if I may use the term. Without some restraint imposed upon this secondary power, most probably, the means to effect a lawful purpose would have been what congress pleased to make them. An unlimited power over the means of accomplishing a proper end, would have been as
*377] terribly pernicious in politics as in morals. *It would have been not even a new mode of despotism. Nothing in the constitution could have stayed its monstrous course. It might, and probably would, have crushed beneath it, in its destructive progress, every atom of civil and religious liberty.

And further, it cannot escape our observation, that the people, in their provident care of themselves, have established certain criterions, by which the *propriety* and *necessity* of measures shall be tested. I refer to the preamble of the constitution, where the moving causes—the great motives of establishing this government, are set out; and placed, as it were, for guards and sentinels, at its very threshold.

As there was, originally, no express provision in the constitution, destined to protect the privileges which are now so sedulously guarded by the amendments, so is there still none to be found to forbid the enactment, by con-

gress, of laws impairing the obligation of contracts, or those that are retrospective. To pass the former, would not be "proper," because it would be to travel a path of error, which the people have positively forbidden their own state governments to use. It would not be "proper," because it would overturn, instead of "establishing justice:" it would be to frustrate, in place of promoting, one of the first great objects of the people in forming this government.

As to retrospective laws, we learn, in our reports, from an authority which has always been, and I trust will long continue to be, respected in this court and in this country, that an earnest, but unsuccessful attempt was made in the convention to prohibit, expressly, to congress, the exercise of the power to pass retrospective laws, as well as *ex post facto* laws. We are not, however, to conclude, from the failure of the attempt to expressly inhibit the exercise of this power, that it was delegated to congress by letter or implication. The convention evidently departed, with reluctance, from the great and noble theory of government which they kept so steadily before them. The whole stock of power, they knew, was in the hands of the people; it all belonged to them. Their business was not to specify what they kept for themselves, but to particularize what *they surrender, in trust, for their benefit, to the government. It is true, they sometimes departed [*378 from this rule; as they did, when they prohibited the enactment, by congress, of *ex post facto* laws. They stepped out of the course which, with such wisdom, they prescribed to themselves, not so much to guard against the exercise of a power which they then expressly (as they would without it, have almost as clearly) withheld, as to obviate, upon a point of the highest interest and feeling, the misconceptions of ignorance; and to quiet the apprehensions and suspicions of fear and jealousy.

The power to pass retrospective laws, then, is neither expressly given, nor expressly withheld. When such acts are, therefore, passed by congress, they must derive their authority from being "proper and necessary" means to the exercise of some other power expressly given. Some such laws, in given cases, it is not denied, may be comprised by this definition; and be fairly regarded as entirely constitutional. It is, notwithstanding, contended, that these must always be considered as cases of exception, proving the general rule, that retrospective acts are not "necessary and proper" means to give due effect to the powers vested "in the government, or in any department or officer thereof." If congress, thus clothed with every power that ought to be desired, with abundant means for a wise and provident government, should fall into the mistakes of short-sighted man, they must, like him, pay the forfeit of error, and the price of experience. It cannot be "necessary and proper," nor will it "establish justice," to transfer to others the consequences of their own improvidence.

Such, the defendants in this case contend, would virtually be the effect of retrospective liens and priorities, in favor of the government, and at the expense of the citizen. The exercise of such a power would overturn all the rules by which men are governed, in calculating the chances of safety, and in estimating the risks of danger, when they give credit to each other. To set up such liens and priorities, would not be "proper," because it would impair the obligation of contracts between citizen and citizen, by rendering unavailing the means of insuring their execution. It would not be "proper,"

because it would be lessening the security for private "property," if not taking it away by undue "process" of law. It is true, that the creditor, who does
*379] not obtain security for the *payment of his debt, cannot escape the lawful consequence of a subsequent act of his debtor. His dependence for safety, in this respect, is placed upon his knowledge of the character of his debtor, and upon his own vigilance. But, most assuredly, he ought to have full reason to rely that the character of any concern in which his debtor has been already engaged, will not be changed by matter of subsequent enactment, so as to enhance his risk of danger beyond what it was when the debt was contracted. Such a mode of legislation, I repeat, would violate and not "establish justice:" by enfeebling confidence between man and man, it would retard instead of "promoting the general welfare:" it would "impair the obligation of contracts:" it would be virtually taking away private "property," without "due process of law." An act, then, producing any of these effects could not have been "necessary and proper;" and is not warranted by the constitution: and of course, the plaintiffs in this case are not "entitled" (to use the expression in the stated case) to the satisfaction they claim under it.

II. The defendants are next to inquire, whether such a law has been passed? whether the 5th section of the act of the 3d of March 1797, is retrospective? If there be any doubt, whether it was the intention of congress to give to this act a retrospective effect, every objection which can be fairly urged against its constitutionality, will incline the court to such a construction as will rescue it from that imputation. The defendants insist, that it was not intended to have this effect.

Until this law was passed, there was no other in force, securing to the United States priority of payment, except in cases of custom-house bonds for duties. The first act giving this priority was passed on the 31st of July 1789 (1 U. S. Stat. 42), and is confined to the case of custom-house bonds. The 21st section of that act provides, that, "in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States *on any such bond* (*i. e.*, for the payment of duties) shall be
*380] first satisfied." *The next law, giving priority to the United States, is that of the 4th of August 1790 (1 U. S. Stat. 169). The 45th section is in these words: "That where any bond for the payment of duties shall not be satisfied, on the day it became due, the collector shall forthwith cause a prosecution to be commenced for the recovery of the money thereon, by action or suit at law, in the proper court having cognisance thereof; and in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States, *on any such bond*" (*i. e.*, for the payment of duties), "shall be first satisfied."

Nor does the act of the 2d of May 1792 (1 U. S. Stat. 263) create this priority. The 18th section refers to bonds given "for duties on goods, wares and merchandise imported." It transfers the priority of the United States to the surety, or his representatives, upon payment of the debt on such bond. The extension, by this section, of the cases of insolvency mentioned in the 45th section of the act of 4th of August 1790, applies only to the subject-matter of that section, which were bonds for duties. The same

was the subject-matter of this section. If, upon any other bonds than custom-house bonds, a priority had been secured to the United States, why was not a transfer of that priority provided for, in behalf of the surety, or his representatives, who paid the bond, as well as in the case of bonds for duties?

After the law of 3d of March 1797, establishing a general priority in cases of subsequently-contracted debts, the provisions on this head, in subsequent acts, assume a corresponding character. Thus, in the act of the 2d of March 1799, § 65 (1 U. S. Stat. 676), the provisions are co-extensive with the then established priority. The first member of this section continues the priority in respect to bonds for duties. It re-enacts, in the same words, the 45th section of the act of 1790 (Ibid. 169) giving that priority. The next member of this section is general, and declares the liability of the representatives of a debtor, if they pay any debt, in preference "to the debt or debts due to the United States." *Here are no words like those used [*381
in the acts of 1789 and 1790, above referred to, to limit and restrain the meaning to any particular "bond" or debts. Their liability commences upon the payment of *any* debt, in preference "to the debt or debts due to the United States." The first proviso of this section respects bail. The second proviso makes a general regulation in behalf of sureties, or their representatives, who pay the debt due to the United States upon any bond "for duties on goods, wares or merchandise imported, or other penalty;" and the cases of insolvency, in this act mentioned, are declared to extend to the cases of assignment, attachment and bankruptcy. That there was not given to the United States the priority, except in cases of custom-house bonds, until the act of 1797 was passed, was conceded by their counsel in the case of *Fisher* v. *Blight* (2 Cranch 362).

The 5th section of the act of the 3d of March 1797, referred to by the agreement of the parties in this suit, as before mentioned, is in the following words: "That where any revenue-officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

The defendants insist, that there is error in the punctuation of this section; and that it ought to be read with a comma at the end of the second line (of the printed section) between the words "person" and "hereafter." It would then read "that when any revenue-officer or other person, hereafter becoming indebted," &c. The section thus pointed will establish for the United States a priority in case of subsequently-created debts, where: [*382
1. The debtor is insolvent: 2. Where he makes *a voluntary assignment of his effects, not having sufficient to pay all his debts: 3. Where an attachment shall issue against the effects of an absent, absconding or concealed debtor: 4. Where the debtor shall commit an act of legal bankruptcy: 5. Where his effects, in the hands of executors or administrators,

shall not be sufficient for the payment of all his debts. Without this latter provision, it has always been apprehended, that the declared priority in cases of insolvency would not bind executors and administrators : and it has uniformly been introduced, to create, in that case, not a greater, but only an equal priority. There can be no reason for supposing (notwithstanding the general words of this member of the section, respecting executors and administrators), that it was intended to extend the priority in this case to debts previously, as well as subsequently, created. The subject-matter of the section, with the punctuation we contend for, must be considered a provision for debts subsequently contracted. To understand its subject-matter, other than is here insisted upon, is to suppose the establishment of different priorities, without any reasonable motive or inducement for discrimination. In such case, the general (retrospective, as well as prospective) priority would apply to the case of a revenue-officer, to the case of a deceased debtor, and to the cases of voluntary assignment, attachment and bankruptcy. The limited (or prospective) priority would extend only to cases of persons (other than revenue-officers) becoming insolvent. Why this distinction between the insolvent and the other debtors? And in this view of the subject, what meaning is to be attached to these words, "and the priority hereby established, shall be deemed to extend," &c. ? According to the construction which we oppose, the priority established by the previous part of the section was general, as it respects revenue-officers, and executors and administrators ; and limited as it respects other persons. If it had been the intention of the legislature, to establish different priorities, they would have negatived, by their expressions, the individuality of the priority : most probably, they would have said, in place of the words they have used, "and the priorities hereby respectively established." Then, if a "revenue-officer" assigned, if his effects were attached as those of "an absent, concealed or absconding debtor," or if he committed "a legal act of bankruptcy," *383] *general priority would attach. If any "other person" came within this description, a limited priority would attach.

But there is a still greater obstacle to remove, before the construction of the plaintiffs can prevail. It would make a distinction, without reason, between "revenue-officers" and custom-house officers ; and indeed, between "revenue-officers" and all other nominal agents of the governments, whether accountable by bond or otherwise. A general priority would attach in case of a "revenue-officer" only ; and a limited priority in case of other receivers of the public money. It cannot be said, that "revenue-officers" comprise custom-house officers. It is very true, that money arising from customs constitutes part of the public revenue. Nor is it intended to be denied, that, in strict propriety, the collectors of those customs might be termed "revenue-officers." But it is insisted that the terms used were not intended to have that meaning, but a limited, appropriate and technical meaning. It is believed, that in no other sense, have they ever been used in any act of congress. Had it been the design of the legislature to use this definition in its enlarged, and not its accustomed, sense, they would have taken care to have marked their departure from former observances, in a manner that would have admitted of no doubt ; in a way too, that would have denoted, with precision, as occasion might require, the generic and specific signification of the terms. And besides, the legislature, after passing this law, have,

themselves, clearly disaffirmed the construction to which we object, by resorting again to these expressions, and undeviatingly using them in their former, limited and specific sense.

If the defendants' interpretation of the words "revenue-officer" is correct, then the fifth section will not, whatever may be its proper punctuation, establish a retrospective priority, in the case of custom-house officers. For if the court adheres to the existing punctuation of the statute, then, custom-house officers will be embraced by that part of the section which refers to persons becoming indebted to the United States, after the passing of this law; and the extension of the priority, in the *cases mentioned in the latter part of the section, will adapt itself, necessarily, [*384 and even in the absence of the usual technical words of discrimination, to that which, as occasion serves, will become its proper subject-matter. Thus, if the extension is to apply to a revenue-officer, the priority will be general—retrospective, as well as prospective; but if the extension is to apply to "any other person" (and of course, including custom-house officers), the priority will only be prospective.

If either of the general views here taken of this subject be correct, the United States, in this case, are not "entitled, under the 5th section of the act of congress, passed the 3d of March 1797, to satisfaction of their demands, out of the effects of Isaac Hendrickson, the bankrupt, in the hands of the garnishees, as assignees of the bankrupt, prior to the claims, or any part of them, of other creditors of said bankrupt being satisfied;" because the debt due to the United States was created prior to the enactment of that law.

Rush, Attorney-General, for the United States.—The reasons in support of the claim of the United States do not rest upon the rights of prerogative, but upon the terms of the legislative grant. It must be admitted, that the legislature had power to grant the priority which is claimed in the case of public officers; and the judgment of this court, in opposition to all objections, however well stated, has recognised and established the legitimacy of the grant, in every case of a public debtor, whatever might be the origin or nature of the debt. The existence of the power is, therefore, no longer open to dispute, whatever speculative doubts may be cherished as to its propriety; or whatever controversy may arise upon the cases proper for its application.

But the legislative power is limited in its exercise by the positive provisions of the constitution, and it is provided, among other things, that congress shall not pass an *ex post facto* law. The act of the 3d of March 1797, having been passed subsequent to the death of the collector; and of course, subsequent to the period of the debt's being contracted, the question is made, whether the act would not assume the character of an *ex post *facto* law, if it were to be applied to the present case. The answer [*385 in the negative is maintained by the following general reasons.

1. In ascertaining the true import of the terms, *ex post facto*, this court has decided, that they only apply to criminal cases. The present is a case of debt.

2. Laws having a retrospective effect in civil cases, both as to rights and remedies, have never been, on that account alone, deemed unconstitutional.

Theoretically, retrospective laws may sometimes be condemned; but practically, they are common to every system of jurisprudence. A member of the convention who framed the constitution of the United States, "had an ardent desire to have extended the provision respecting *ex post facto* laws to retrospective laws in general;" but having failed in accomplishing that desire in the convention, when he became one of the ornaments of the bench of the supreme court of the United States, he concurred in the judgment, that congress possessed the power to pass retrospective acts, in relation to civil, though not *ex post facto* laws, in relation to criminal, cases. (See 3 Dall. 397.)

If, therefore, congress has passed an act which must have a retrospective effect, the court will not, merely for that cause, declare it unconstitutional and inoperative. Before the act of the 3d of March 1797, was passed, congress had provided, in favor of the United States, for a priority as to the payment of debts upon bonds for duties. But no similar priority was made applicable to the cases of revenue-officers; of accountable agents; of debts on bonds, other than bonds for duties; or on contracts. These presumed defects in the law produced the act of the 3d of March 1797, and it must be expounded most liberally, to remove the defects, and advance the remedy in contemplation. With respect to revenue-officers, it was the policy, and must be taken to be the meaning of the law, that when they prove insolvent, the priority shall attach in favor of the United States, with a full retrospective effect. But when a debtor, not a revenue-officer, proves insolvent, he must have become indebted to the United States, after the passing of the act, in order to establish the claim of priority. *Such I have been informed, (*a*) has been the construction in the supreme court of Pennsylvania, in a case of the *Commonwealth, for the use of the United States*, v. *Lewis*, the surety of the administrators of Delany, who was collector for the port of Philadelphia, and died indebted to the United States, before the act of the 3d of March 1797 was passed.[1] The provision of the 5th section of the act respecting the priority of payment, and of the estate of a deceased debtor in the hands of executors or administrators, was considered, in the same case, as a substantive provision, analogous to the provisions, in most codes, by which, upon the decease of a debtor, the law undertakes to class his debts, and prescribe the order of payment; as, for instance, specialties before simple-contract debts, and debts due to the state, before those due to individuals.

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It has been suggested, however, that a collector of the customs is not a revenue-officer, within the meaning of the act of the 3d of March 1797. But the fact is, that the collector has, peculiarly, been deemed such an officer, as well by practical experience, as under the terms of the act itself. If the court should decide otherwise, it is to be feared, that the security given would be far short of the intention and policy of the act of 1797. The government had, obviously, more at risk upon the fidelity of the collectors of the customs, than upon any other class of revenue-officers. That they are embraced under the designation of revenue-officers in the act, it is believed, has been

(*a*) Mr. Dallas, who argued the case, has been kind enough to favor me with the information.

[1] Since reported in 6 Binn. 266.

taken for granted, in the different district and circuit courts of the United States.

March 11th, 1815. (Absent, Todd, J.) Livingston, J., delivered the opinion of the court, as follows :—The United States claim a priority in payment out of the estate of Hendrickson, in the hands of the defendants Hendrickson, it appears, was one of the sureties of George Bush, late collector at Wilmington, who died on the 2d of February 1797, in debt to the United *States, as appears by a subsequent adjustment of his accounts [*387
at the treasury, in the sum of $3453.06. By the 5th section of the act of the 3d of March 1797, under which this priority is claimed, it is declared, that where any revenue-officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, &c., the debt due to the United States shall be first satisfied.

The court is of opinion, that Hendrickson was indebted to the United States, before this act passed, that is, at the time of the death of the collector, although the accounts of the latter were not settled, until after its passage ; and that, therefore, the law which secures a priority against the estates of persons who shall thereafter become indebted, does not apply to this case. The judgment of the circuit court is affirmed.

Judgment affirmed.

The Brig Concord, Taylor, Master. (*a*)

Duties on captured goods.

If captured goods, claimed by a neutral owner, be, by consent, sold, under an order of the court, and afterwards, by the final sentence of the court, the proceeds are ordered to be restored to such owner, the amount of the duties due to the United States upon the importation of the goods, must be paid.

This was an appeal from the sentence of the Circuit Court, affirming that of the district court, which restored to the claimants, neutral Spanish merchants, at Teneriffe, twenty pipes of wine, part of the cargo of the British brig Concord, captured by the American privateer Marengo, in August 1812, without payment of duties ; although the same had been, by consent of the proctors for the parties, sold, under an order of the court. The cause being submitted, without argument—

Story, J., delivered the opinion of the court, as follows :—This is the case of a shipment made by a neutral house, on board of a British ship, which was captured, on a voyage from Teneriffe to London, by the private armed ship Marengo, and brought into the port of New *York for [*388
adjudication. Pending the prize proceedings, the goods were sold by an interlocutory order of the district court, and the proceeds brought into the registry. Upon the hearing, the property was decreed to be restored to the claimants, without payment of duties ; and this decree was afterwards affirmed in the circuit court. The cause has been brought, by appeal, to this court, for a final decision.

We are all of opinion, that the proprietary interest of the claimants is

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(*a*) March 11th, 1815. Absent, Todd, Justice.