*Jane Watson and others, Plaintiffs in error, *v.* John Mercer and Margaret Mercer.

Constitutional law.—Obligation of contracts.

In 1785, M. and wife executed a deed conveying certain lands of the wife to T., who immediately reconveyed them to M.; the object of the conveyance was, to vest the lands of the wife in the husband. The deed of M. and wife to T. was not acknowledged according to the forms established by the law of Pennsylvania of 20th February 1770, to pass the estates of *femes covert;* and after the death of the wife of M., the land was recovered in an ejectment from the heirs of M., in a suit instituted against him by the heirs of the wife of M. In 1826, after the recovery in ejectment, the legislature of Pennsylvania passed an act, the object of which was to cure all defective acknowledgments of this sort, and to give them the same efficacy as if they had been originally taken in the proper form. The plaintiffs in the ejectment claimed title to the premises, under James Mercer, the husband; and the defendants, as heirs-at-law of his wife, who died without issue; this ejectment was brought after the passage of the act of 1826.

The authority of this court to examine the constitutionality of the act of 1826, extends no further than to ascertain, whether it violates the constitution of the United States; the question, whether it violates the constitution of Pennsylvania, is, upon the present writ of error, not before the court.

This court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that if divests antecedent vested rights of property; the constitution of the United States does not prohibit the states from passing retrospective laws generally; but only *ex post facto* laws. It has been solemnly settled by this court, that the phrase, *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws; which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the manner prescribed; *ex post facto* laws relate to penal and criminal proceedings which impose punishments or forfeitures; and not to civil proceedings which affect private rights retrospectively.

The act of 1826 does not violate the obligation of any contract, either in its terms or its principles; it does not even affect to touch any title acquired by a patent or any other grant; it supposes the titles of the *femes covert* to be good, however acquired; and even provides that deeds of conveyance made by them shall not be void, because there is a defective acknowledgment of the deeds, by which they have sought to transfer their title. So far, then, as it has any legal operation, it goes to confirm and not to impair the contract of the *femes covert;* it gives the very effect to their acts and contracts which the intended to give; and which, from mistake or accident, has not been effected.[1] The cases of Calder *v.* Bull, 3 Dall. 386; Fletcher *v.* Peck, 5 Cranch 138; Ogden *v.* Saunders, 12 Wheat. 266; and Satterlee *v.* Matthewson, 2 Pet. 380, fully recognise this doctrine.

Mercer *v.* Watson, 1 Watts 330, affirmed.

*89] *Error to the Supreme Court of the state of Pennsylvania. In 1826, the defendants in error, John Mercer and Margaret Mercer, instituted an action of ejectment in the district court of the city and county of Lancaster, against Jane Watson and others, the plaintiffs in error, for the recovery of a tract of land in Lancaster county, and a verdict and judgment, under the charge of the court in favor of the plaintiffs, were rendered in their favor. The plaintiffs prosecuted a writ of error to the supreme court of Pennsylvania, and in 1832, that court affirmed the judgment of the district court.

The land in controversy was part of a tract held under a patent granted by the proprietaries of Pennsylvania to Samuel Patterson, on the 19th October 1743; and by regular descent, became vested in Margaret Patterson, the daughter of the patentee, who afterwards intermarried with James Mercer; who had five children by a former wife, now represented by the

[1] Randall *v.* Kreiger, 23 Wall. 137.

defendants in error. For the purpose of vesting the land in controversy in her husband in fee-simple, Margaret Mercer, on the 30th May 1785, together with her husband, James Mercer, executed a conveyance thereof to a certain Nathan Thompson, who, on the same day, reconveyed the said land to James Mercer in fee. This deed was not acknowledged by Margaret Mercer, according to the forms prescribed by the act of assembly of Pennsylvania, of 1770, enacted for the purpose of making the conveyances of real estate by femes covert valid.

After the death of Margaret Mercer, in 1805, David Watson, in right of his wife, the heir-at-law of Margaret Mercer, to whom, if the conveyance of 30th May 1785 was invalid, the land in controversy had descended, iustituted an ejectment for the same, alleging that the acknowledgment of the deed being defective, the same was absolutely void. In this suit, Watson and wife recovered the premises, and went into possession thereof. Afterwards, John and Margaret Mercer instituted an ejectment against Watson, then in possession of the premises, and in 1823, that suit was decided in the supreme court of Pennsylvania, in favor of the defendants in the ejectment; thus affirming the decision in the first case.

*On the 3d day of April 1826, the legislature of Pennsylvania made the following law. [*90

"A supplement to an act entitled 'an act for the better confirmation of the estates of persons holding or claiming under *feme coverts*, and for establishing a mode in which husband and wife may hereafter convey their estates.'

"Whereas, by the act of assembly, to which this is a supplement, it is enacted, that the estate of *feme coverts* may be transferred by deed executed by the husband and wife, and by them acknowledged before certain officers: And whereas, under this act, estates of great value have been *bonâ fide* sold by husband and wife, for a legal and sufficient consideration, and the deeds therefor have been by them acknowledged before the proper officer; but in many cases, the mode of making such acknowledgment hath been imperfectly set forth in the certificate: And it hath been held by the supreme court, that deeds transferring the rights and interests of *feme coverts* are invalid and void, unless certain requisites of the acknowledgment of such deeds provided by the said act, shall appear upon the face of the certificate of such acknowledgment to have been pursued; and in all such cases, it is but just and reasonable, that persons who hold such estates, should not, in any case, be disturbed in the enjoyment of them, thus equitably acquired, nor divested thereof under any pretence whatsoever: Now, for the purpose of carrying into effect the real intent of the parties, and of quieting and securing the estates so transferred:—

"§ 1. Be it enacted, that no grant, bargain, sale, feoffment, deed of conveyance, lease, release, or other assurance of any lands, tenements and hereditaments whatsoever, heretofore *bonâ fide* made and executed by husband and wife, and acknowledged by them before some judge, justice of the peace, or other officer authorized by law within this state, or an officer in one of the United States, to take such acknowledgment, or which may be so made, executed and acknowledged as aforesaid, before the 1st day of September next, shall be deemed, held or adjudged invalid, or defective or insufficient in law, or avoided or prejudiced, by reason of any informality

or omission in *setting forth the particulars of the acknowledgment made before such officers as aforesaid, in the certificate thereof, but all and every such grant, bargain and sale, feoffment, deed of conveyance, lease, release, or other assurance so made, executed and acknowledged as aforesaid, shall be as good, valid and effectual in law, for transferring, passing and conveying the estate, right, title and interest of such husband and wife, of, in and to the lands, tenements and hereditaments mentioned in the same, as if all the requisites and particulars of such acknowledgment mentioned in the act to which this is supplementary, were particularly set forth in the certificate thereof, or appeared upon the face of the same."

In 1829, the defendants in error, John and Margaret Mercer, instituted another ejectment for the land, claiming, that the deed of 20th of May 1785 had been made valid by the act of assembly of 1826, and a verdict for the plaintiff was rendered in the district court of the city and county of Lancaster, the judgment of which court upon the verdict was affirmed in the supreme court of Pennsylvania. From that judgment of the supreme court the case came before this court by writ of error.

The case was presented to the court on printed arguments, by *Hopkins* and *Montgomery*, for the plaintiffs in error; and by *Rogers*, for the defendants. As the court decided no other points but those in which the constitutionality of the act of 1826, was presented, the arguments upon the other questions raised in the case are omitted.

The counsel for the plaintiffs in error contended. 1. That, under the laws and constitution of Pennsylvania, and the constitution of the United States, the title and possession of the plaintiffs in error to the land in dispute was sacred, and could be disturbed or violated by no judicial proceedings known to the said laws and constitution; and *à fortiori*, by no legislative enactment. 2. That the act of 3d April 1826, as applied to this case, was unconstitutional and void; divesting the vested rights of the plaintiffs in error to the property in dispute, and impairing the obligation of the contracts under which they recovered and held the same; transcending the
*92] power of the legislative branch *of government; and subverting all the protection guarantied to property and contracts by the constitution of the United States, as well as of the state of Pennsylvania.

For the plaintiffs in error, it was argued by *Montgomery*, that the legislature of Pennsylvania could not, by the act of April 3d, 1806, divest the property of the Watsons, and vest it in the Mercers. For if this act be construed to be applied to this case, and be considered as a constitutional exercise of legislative power, this will be the inevitable result.

The grant of the proprietaries to Samuel Patterson, on the 19th October 1753, was recognised by the legislature on the 27th November 1779, and the act of that date (1 Sm. Laws 479–81) confirming the title of the grantees, amounted to a new grant and a contract, that Samuel Patterson should hold the land thus acquired to him, his heirs and assigns; and the obligation of this contract was, as he had fully paid for the estate, that he should hold it according to the laws of the land, and not be divested of it, except by due course of law. The legislature would have had no right to resume it, or grant it to another. *Terrett* v. *Taylor*, 9 Cranch 43, 292; *Pawlet* v. *Clark*,

Ibid. 333 ; *Fletcher* v. *Peck*, 6 Ibid. 87 ; *New Jersey* v. *Wilson*, 7 Ibid. 164 And surely, what they cannot do directly, they will not be permitted to accomplish by indirect means. Sarah Watson recovered, in the suits of 1805, by virtue of the obligation of this contract, as contained in the grant. The land was withheld from her; she applied for redress to the judicial power, whose duty it was to expound, administer and enforce the law, *Ogden* v. *Blackledge*, 2 Cranch 272 ; and she recovered her estate. Why ? Because she had a vested right to it. A vested right is defined to be "the power to do certain actions, or possess certain things, according to the laws of the land." 1 N. H. 203; 12 S. & R. 360. Immediately upon the death of her sister, the right descended to her, and it became, *eo instante*, vested in her. Whence was it derived ? From the patent, and from its confirmation by the act of the legislature, in 1779. This was a contract executed ; and it is respectfully urged, that in Pennsylvania, there can be no vested right to land, that is not derived from contract. The whole system of land titles in Pennsylvania rests on this basis, and there is no trace of any title *in that state, which did not originate in a grant, 12 S. & R. 371–3, 380 ; or was perfected by patent, after having incepted by improvement. [*93 And no vested right can be taken away or interfered with, except by impairing the obligation of the contract on which it is based, and whence it springs.

Can it be doubted, that this was a vested right ? Why, the very terms of the definition embrace it, even to the letter. In the action of ejectment, the plaintiff must show a right of entry. Sarah Watson proved she had "the power to do this thing." But the plaintiff must prove that he has a right to the possession. Sarah Watson proved, that she had a right "to possess this land, according to the laws of the land." Can any case come more completely within the very letter of the definition. The act of the 3d April 1826, surely, cannot be retrospectively construed, so as to embrace this case ; for such a construction would make the law odious and void : 2 Dall. 310 ; 3 Ibid. 388 ; 7 Johns. 477 ; 1 Kent's Com. 455 ; 12 S. & R. 360 ; 4 Ibid. 401 ; 13 Ibid. 256 ; 15 Ibid. 72 ; 2 Show. 17, 2 ; 1 Vent. 330 ; 4 Burr. 2460 ; 1 Wash. 132 ; 3 Call 218 ; 2 Cranch 272 ; 1 Hen. & Munf. 205 ; 1 Binn. 607 ; 2 Gallis. 150 ; 3 Keble 543 ; 2 Inst. 292, 474 ; 2 Ch. Rep. 302 ; Price's Ch. 77 ; 2 Atk. 87 ; 4 Wheat. 207 ; 12 Ibid. 267, 271, 295, 301, 327 ; 8 Ibid. 12 ; 8 Mass. 423, 430.

But is it applicable to it at all ? The deed of 30th May 1785, had been judicially declared to be a void thing, utterly inoperative ; and, consequently, incapable of any confirmation. Co. Litt. 295 *b* ; Gilb. Ten. 75 ; 8 Cow. 544. 588 ; 16 Johns. 110 ; 20 Ibid. 301 ; Newland on Cont. 31 ; 3 Burr. 1805 ; 2 P. Wms. 144. It would never have been enforced against Margaret Mercer, in equity. 5 Day 492 ; 7 Conn. 224. The Mercers had failed in their ejectments, not from want of proof of the due execution of the deed of 30th May 1785, as it seems to be supposed by the chief justice, but because that deed was utterly and absolutely void ; and this will be found to have been the express decision in every case in which the point was mooted. The act of 24th February 1770, imposed a high judicial duty on the examining magistrate ; and where it was not performed by him, according to *the directions of the statute, the contract was held utterly void ; not because the "grantee had failed in proof of [*94

its execution," but because the grantor, the *feme covert*, was utterly incapable of making any contract, or doing any act, except in the mode directed by the statute. 1 Binn. 470 ; 2 Inst. 515 ; 2 Kent's Com. 168.

How can the act of 3d April 1826, operate upon it at all ? If by way of confirmation, then it forms a new rule for a past case, and transcends the legislative power. 2 Cranch 272. Nay, it does more ; for Margaret Mercer, if living, could by no act recreate this deed, so as to give it validity from its date. 16 Johns. 110 ; 20 Ibid. 301 ; 4 Binn. 1. It is called an explanatory act ; but if it be true, that it introduces a new rule of construction, then it is, *quoad hoc*, a repeal of the law of 1770 ; for it is an undeniable principle, that, where a subsequent statute makes a different provision on the same subject, it is not an explanatory act, but an implied repeal of the former, 7 Johns. 496–7 ; and if it be a repeal of the act of 1770, it can have no effect in divesting rights acquired under the former act. 8 Wheat. 493. So that, *quacunque via data*, this case ought not to be held to be embraced by it. It is, therefore, respectfully submitted, that these cases are not embraced by the act of 3d of April 1826 ; and that, by applying and making it the ground of their judgment, the supreme court of Pennsylvania have given it a construction which makes it void, so far as regards them ; for it is in direct opposition to the first article of the tenth section of the constitution of the United States, which prohibits any state from passing an "*ex post facto* law, or law impairing the obligation of contracts."

A law may be constitutional in its application to some cases, and void as to others ; 3 W. C. C. 318–19 ; 12 Wheat. 261, 262, 299, 302, 304, 327 ; and all the judges of this court, it is believed, have so held. Indeed, it seems to have been conceded by all, in the great case of *Ogden* v. *Saunders*, that retrospective legislation, operating upon past contracts, so as to impair their obligation, would be unconstitutional and void. It was so held in *Sturges* v. *Crowninshield*, 4 Wheat. 122 ; *McMillen* v. *McNeill*, Ibid. 209 ; *Smith* v. *Mechanics' Bank*, 6 Ibid. 131 ; *Dartmouth College Case*, 4 Ibid. 613.

*95] Now, the act of 3d April 1826, can embrace this case *only by a retrospective operation ; and the question then arises, does it not impair the obligation of a contract, within the meaning of the constitution of the United States ? The extent of the change made in the contract, or the evidence of it, does not vary the principle. 8 Wheat. 84, 75–6 ; 12 Ibid. 327. A change in the evidence, if it go to defeat a right already vested under the contract, would equally impair its obligation. It surely could not be contended, that a will of lands, not executed according to the statute, could, by a repeal of it, or a change so as to make it conformable to the very case supposed, be made valid and operative, so as to defeat the estate of the heir, acquired and vested by descent. Similar illustrations of the principle are given by all the learned judges who delivered opinions in the case of *Ogden* v. *Saunders ;* and a most apt one upon the statute of limitations, by the chief justice, in *Sturges* v. *Crowninshield.*

It has been attempted, and, with great confidence, it is submitted, with success, to prove that Sarah Watson could never have recovered this land, but by force of a vested right acquired by contract ; and that in the same way, her grandchildren successfully resisted the claim of the defendants, and obtained a final judgment against them, on 3d of June 1820. If this act be construed to apply to this case, the inevitable consequence is, that it

divests this right, thus vested under the contracts, impairs, nay, destroys, its obligation, and takes the property from them, to give it to the Mercers, whom the supreme court twice decided had no title, or even the shadow of claim. But it is said, the effect of this act is to affirm, and not destroy a contract, and that this circumstance brings the case fully within the principle of *Satterlee* v. *Matthewson*, decided by this court. 2 Pet. 380. Now, according to the distinction taken in *Ogden* v. *Saunders*, between a contract and its obligation, it is manifest, that the contract between Satterlee and Matthewson was valid as between themselves, although the municipal law gave it no obligation. Each party was competent to make a contract, for each was *sui juris;* and the contract in that case was between the very parties to the suit. In this case, Margaret Mercer was wholly incompetent to make any contract. She was not *sui juris*, but wholly *sub potestate viri;* and everything she did was merely void. 1 Bl. Com. 444; *Litt. [*96
§ 669, 670. She would not, and could not, have been affected by this deed, after her coverture ceased. 5 Day 492.

Bnt again, this is an attempt to set up a contract, not between the parties to this suit, but between strangers. What connection is there, or ever was there, between Sarah Watson and Nathan Thompson, from whom James Mercer derived title immediately; or between her and James Mercer, who conveyed to Thompson? They are strangers in blood and estate. So that there is, it is believed, no analogy between the cases whatever. But there is another all-powerful distinction between that case and this, which must wholly refute the argument drawn from this source. No final judgment ever was rendered in that case; a *venire de novo* was awarded, after the reversal of the judgment; and it would have been perfectly competent to the court to have corrected the error of the first decision: and so the act of assembly was not essential to the validity of the claim of Mrs. Matthewson. But here, if the Mercers recovered at all, it is by mere force of the act of 3d April 1826.

It is a perversion of terms, to say that Satterlee acquired a vested right by the decision made in 1825; for no final judgment was rendered in the case at all. But how different the cause now under consideration. Here, the heir recovered by virtue of her vested right under the contract, and was put in possession of the land; the mesne profits were adjudged her as a compensation for her loss, and she was remitted to her original estate, so as to make her title, by operation of law and lapse of time, valid against the whole world. Her grandchildren had defeated the very persons now suing, and by obtaining the judgment on 3d of June 1820, acquired an additional protection from the statutory provisions of the act of the 13th April 1807.

But further, the effect of the judgment in Satterlee's case was not to impair the patent to Wharton, under which he claimed; it was left in full force, so as to afford him every remedy to which, at law, he was entitled. All that the decision of the act of assembly did, was to prevent a particular defence that affected merely the right of possession to the land in that action, without touching the titles of the respective parties at all. How different is this case. Here are no conflicting patents; if these judgments be affirmed, the consequence inevitably is, that the estate goes from the blood of Samuel Patterson and passes to strangers. *What boots it, if the patent be [*97
available against the state, if they have the power to take the land

from the heirs of the original grantee, who paid for it, and give it to strangers? Of what avail is it, that courts may recognise, and protect and enforce contract, and the rights that spring from them, if the legislature may, at pleasure, thus impair them? The act in question may be a perfectly proper and legitimate exertion of legislative power, if construed so as to protect the rights intended to be secured by it. But if the construction put upon it by the supreme court of Pennsylvania be sustained, then it is an act of legislative power, far transcending even the boasted omnipotence of the British parliament. It breaks down all the security of property derived from contract, and resolves every man's title into a tenure at legislative will; it overturns solemn decisions of the courts of the last resort, by which even these courts themselves were so bound that they could not fail to obey them; and it leaves everything relating to personal rights or private property, not under the protection of the constitution, where the people placed it, to be expounded by the judiciary, but in the variable and ever-changing mind of the popular branch of the government.

The repeal of laws, the abrogation of treaties, even the disruption of empires, have hitherto been held not to affect private rights previously acquired and vested; but if the doctrine advanced in *Mercer* v. *Watson* be sustained, all these solemnly settled principles are overturned, and a simple legislative enactment is enabled to do that which the most violent revolutions have hitherto been unable to effect; and rights heretofore considered as sacred as justice herself, are all consigned to popular will and popular excitements.

It is, therefore, respectfully submitted, that the judgments of the supreme court of Pennsylvania must be reversed, because they give to the act of the 3d of April 1826, a construction which, so far as regards this case, makes it manifestly unconstitutional and void: for it divests vested rights acquired by contract; destroys the obligation of the contracts under which the Watsons held, and gives their estate to the Mercers in a way that even Margaret Mercer herself could not do—for she could never have re-created this deed so as to make it operate from its date; subverts the judicial power; makes
*98] it subservient *to the legislative will, and directly contravenes the tenth section of the first article of the constitution of the United States; which, according to the construction given to it by this court, shields and protects all contracts, executed and executory, real and personal, from the influence of state legislation that impairs their obligation.

Rogers, for the defendants in error, argued: 1. That the act of 3d of April is not an *ex post facto* law, nor law impairing the obligation of a contract, either express or implied; and in this particular, it has nothing to do with the constitution of the United States. 2. That the act in question is an explanatory law, altering a rule of evidence merely; it does not divest titles, nor divest vested rights; and it is not unconstitutional, if it did. The consideration of these two propositions will meet the argument of the plaintiffs in error, before the supreme court of Pennsylvania, and, it is presumed, will equally answer that purpose here.

The act of the 3d of April 1826, is retrospective in its operation and so designed by its framers. It is not, for this cause, unconstitutional. The power of a legislature to pass retrospective laws, is nowhere taken away,

nor prohibited by the constitution of the United States. It is true, a state cannot pass an *ex post facto* law which is a retrospective criminal law, but it can a retrospective civil law. *Expressum facit cessare tacitum*, says a maxim of the law. This power of passing retrospective laws by a state has been repeatedly decided to be constitutional in Pennsylvania. See *Underwood* v. *Lilly*, 10 S. & R. 97; *Bambaugh* v. *Bambaugh*, 11 Ibid. 190. So also, in the supreme court of the United States, in *Satterlee* v. *Matthewson*, 2 Pet. 380. The same principle was decided in Pennsylvania, and is reported in 15 S. & R. 72; which, in the supreme court of the United States, was quoted as authority, in the case of *Livingston* v. *Moore*, 7 Pet. 469.

The act in question is constitutional, unless it is an *ex post facto* law, or law impairing the obligation of a contract. *Satterlee* v. *Matthewson*, 2 Pet. 580. It is not an *ex post facto* law, because such a law relates to criminal matters alone. **Calder* v. *Bull*, 3 Dall. 386, 396; *Fletcher* v. *Peck*, 6 Cranch 138; *Commonwealth* v. *Lewis*, 6 Binn. 271. [*99

Then, does the act violate a contract? What is a contract? It is an agreement between two or more parties to do or not to do certain acts. The contracts embraced by the clause in the constitution referred to, the first clause of tenth article, include those which are executed, such as grants, and such as are executory, and this, whether between individuals only, or between a state and individuals. This position is abundantly decided in *Fletcher* v. *Peck*, 6 Cranch 136; *Green* v. *Biddle*, 8 Wheat. 1, 92; *Providence Bank* v. *Billings*, 4 Pet. 514. The clause embraces no other contracts except those for property, or some object of value. See case of *Dartmouth College*, 4 Wheat. 637, 644. It did not embrace any other contracts than express. Implied contracts are excluded; except, perhaps, indeed, such as are implied from the nature or terms of a prior agreement. This distinction is expressly taken by the supreme court in the case of *Jackson* v. *Lamphire*, 3 Pet. 280. Judge BALDWIN says, "where there is no express contract, courts will not create a contract by implication."

But where is the contract impaired by this act of the legislature of Pennsylvania? It is contended, there is none, either express or implied. If so, where is it? How does it arise, and who are the parties to it? The inquiry is important, because the party complaining must show it. It is not sufficient, to allege that the constitution has been violated. Courts will not declare laws unconstitutional for light or trivial causes. "This power," says Chief Justice TILGHMAN, 3 S. & R. 73, "is a power of high responsibility, and not to be exercised but in cases free from doubt."

But the inquiry is important, in another sense; because, if the act of the legislature of Pennsylvania divests rights which are vested by law in an individual, if it does not violate a contract, it has nothing to do with the constitution of the United States. 2 Pet. 380. The error assigned in substance says, "the contract commenced with the patent, in 1743, by the proprietors to Samuel Patterson; descended, by the laws of intestacy, from generation *to generation, and was finally confirmed by the decision of the supreme court." [*100

1st. It is contended, that the patent is impaired by this law? Did the the state attempt to resume the grant, as in *Fletcher* v. *Peck?* Does the question arise between the state, and Patterson or his alienee? Did he sell?

The land on the contrary is derived under the patent, by both parties, and not in contradiction to it. It operates upon a state of things long subsequent to Patterson's death; upon a contest between the children. See 3 Pet. 280.

2d. Did the common law, or the statutes of descent, as the gentlemen call them, create, a contract between the *feme* and her heir-at-law, that if she died intestate, the heir should have the property? Does the common law, where a *feme covert* attempted, though imperfectly, to transfer her property, and a legislature made the attempt valid, declare, that this legislative act violated a contract between the heir and *feme* heir-in-law? Was such a contract contemplated by the clause in the constitution? Is such a contract express or implied?

3d. Did the act of 20th February 1770, create any contract which is violated by the legislative act of 1826? This is not even pretended.

4th. Then, did the supreme court, in 1809 (*Watson* v. *Bailey*), when, as the plaintiffs in error say, they declared the deed of the 30th of May 1785, void, create a contract which is violated by this act? According to this argument, the court, in this case, first destroy one contract, and then make another between different parties.

But admit, for one moment, that the deed was void, and as such declared by the court. This act of 1826 did not impair it. The legislature, say they, make a void deed a valid one: that is, set up a new contract between the parties. Did they violate the contract? There is a difference between making a new contract between parties, and impairing one. 2 Pet. 412–13.

But was the deed declared void by the court? This position is the basis of all the argument of the plaintiffs in error, and if you remove the foundation, the superstructure must fall also. The supreme court, in 1809, did not say so. 1 Binn. 480. Judge YEATES concludes by saying, "I am, there-
*101] fore, of opinion, *that this deed had no legal effect against the heir-at-law, after the death of the wife." Here, it is admitted, that the deed was good, during the life of the wife—not void *ab initio*. It failed of legal effect, says the court; and how did it fail? Because the deed was not sufficiently proven—not that it was void. The court held the certificate of the judge to be conclusive; and as, on its examination, it did not appear that the contents were made known, and the act of signing to have been her voluntary act, the deed was not received as evidence of title. And parol declarations of the wife, repeatedly made, were rejected as evidence, to supply the necessary proof of the acknowledgment.

There is another view of this case peculiarly applicable in this stage of the argument. This deed of the 30th of May 1783, was a good and valid deed at common law, that is, the common law of Pennsylvania. See *Davey* v. *Turner*, 1 Dall. 11; and *Lloyd* v. *Taylor*, Ibid. 17. These cases decide, on the principle of *communis error facit jus*, that a deed signed by husband and wife, whether she was examined separate and apart, or whether the deed was even acknowledged at all, yet it conveyed the interest of the parties. These cases furnish, if nothing more, ample corroboration of the truth and correctness of the view taken by the chief justice of Pennsylvania, in this cause, in which he considers the act of 1826, not as a law impairing a contract, but as carrying a contract into effect. Thus, validating the deed of the 30th of

May 1785, by the substitution of the intention, and carrying it into operation.

Upon the second proposition of the defendants in error, Mr. Rogers contended, that the law of 1826 is an explanatory law, altering a rule of evidence. This is the first part of the proposition which is primarily to be examined. The act of the 24th of February 1770, for which see 1 Dallas' Laws 535, and 1 Smith Laws 307, points out the mode of the acknowledgment, &c. The court, in putting a construction upon this act, construed it strictly. Deciding that the evidence, and only evidence of the acknowledgment, being in accordance with the act, was the certificate of the judge. 1 Binn. 470. So that it mattered *not how honest the intention to convey, and fair the transaction between the parties; nor whether the [*102
judge conformed to the requisitions of the act in point of fact; yet if he did not certify all the particulars, the deed could not be received. Thus violating the *maxim omnia presumuntur rite esse acta.* The act of the 3d of April 1826, which in its title is supplementary to the act of the 24th of February 1770, altered the rule thus estabilised by the court; by making the intention of the parties the legitimate subject of inquiry before courts of justice. The question then was, was the deed *bonâ fide* made and executed by the husband and wife, and acknowledged before some judge, &c. If so, then, if the acknowledgment were informal, in not setting forth all the particulars, it was not for this cause invalid, but was cured by the act.

The deed thus acknowledged, bore on its face, when exhibited in a court of justice, *primâ facie* evidence of the good faith of the parties; that is, furnished a legal presumption in favor of the deed. But the question is still left open for the opposite party to show fraud or want of good faith Fraud was not alleged, nor even pretended; but the opposite was shown by the reasons for a new trial in 1809, brought forward by the Watsons themselves. The jury found in favor of the deed, a second time, as already stated; thus furnishing a decision in point of fact and of law, in favor of Mercer.

The remaining part of the second proposition of the defendant in error, relates to the power of a state, by a legislative act, to divest rights vested by law in an individual. And here, it is contended by the plaintiff in error, that the legislature of Pennsylvania, by the passage of the act of 3d April 1826, infringed their vested rights to the land in dispute, which were guarantied by the constitution of Pennsylvania and that of the United States.

The question, whether a state law, repugnant to a state constitution, is constitutional or not, is not cognisable by the supreme court of the United States; it is exclusively confined to the state courts. *Jackson* v. *Lamphire*, 3 Pet. 280. As to the power under the constitution of the United States, of a state to take away from an individual his vested rights to property, whatever doubt there may have been before; since the case of *Satterlee* v. *Matthewson*, 2 Pet. 380, the question *has been put at rest. Such a [*103
law, if it does not impair a contract, has nothing to do with the constitution of the United States.

But the exercise of such a power, so far as it is applicable to this case,

is denied. The legislature did not divest the vested rights of the Watsons.

Hopkins, for the plaintiffs in error, contended, that the act of April 3d, 1826, was *ex post facto* in its operation, and therefore, void. The rights of the appellants were derived under the patent from the proprietaries of Pennsylvania to their ancestor; had been established by two verdicts in ejectment, and by the force of the 13th section of an act of assembly of 1807; and the ejectment in this case was conclusively barred. The section enacts, "whenever two verdicts shall, in any writ of ejectment between the same parties, be given in succession for the plaintiff or defendant, and judgment be rendered thereon, no new ejectment shall be brought, but when there may be verdict against verdict between the same parties, and judgment thereon, a third ejectment, in such case, and verdict and judgment thereon, shall be final and conclusive, and bar the right; and the plea in ejectment shall be not guilty. All these rights are, by the constitution of Pennsylvania, in its ninth article, excepted out of the general powers of government "that the general, great and essential principles of liberty and free government may be recognised and unalterably established." The first section declares, that all men have certain inherent and indefeasible rights, amongst which are those of enjoying life and liberty, of acquiring, possessing and protecting property. The ninth section declares, that no one can be deprived of life, liberty or property, unless by the judgment of his peers, or the law of the land. The sixth section provides for the due administration of justice; and the seventeenth section declares, no *ex post facto* law, nor any law impairing contracts shall be made. And § 15 and 18 protect personal security. And § 26 declares, that everything in this article is excepted out of the general powers of government, and shall for ever remain inviolate.

*104] *Absolute rights to property, are placed under the safeguard of the constitution, as completely and effectually as life and liberty, and with equal justice; as life and liberty would be dreary things to man, if he could not be secure in the enjoyment of his property, acquired by his honest industry, to make life comfortable, and liberty worth preserving. The arrangement of personal security and private property is much expanded, and differently cast, in the constitution of Pennsylvania, from that which exists in the constitution of the United States. The 15th, 16th, 17th and 18th sections, are widely different in their arrangement, and designedly so, to afford to each their fullest operation, to the whole extent of the expressions used. The imputations of crime and punishment, are wisely and studiously separated from those which expressly relate to civil rights, except when the protection to the latter would, in its generality, equally embrace the former. The 17th section associates *ex post facto* laws and laws impairing contracts, and makes them, as to their objects, on eand indivisible; as it would be all but useless, to preserve civil rights from being impaired in the least degree, when the contract itself would be destroyed by legislative enactment, by creating something to assail it, which did not exist before, or by prescribing a rule of evidence which would recreate that which had been condemned in judgment of law.

Our constitution is formed by the people, out of their original inherent

and elementary power enjoyed as a free people, seeking their security and happiness, against that despotism which sometimes springs up in the turbulence and listlessness of the best of governments. The words and phrases used are taken in their most comprehensive sense; adapted to the common understanding, excluding all technicality which would be unintelligible to ninety-nine out of a hundred of those who had the deepest interest in the protection intended and given by it. Hence the expression, *ex post facto* law, is used in its original and general sense, to prevent all retrospective legislation, and to make an act, which, when done, was innocent, criminal; or a right, which when acquiree was legal and just, illegal and unjust. The other clause of the sentence in which these expressions are found, necessarily imposes on this, from *its connection, the protection of civil rights. *Noscitur à sociis*, is a very just and rational rule of exposition of the different clauses of the same sentence, which, from the affiliation of its parts, must be intended to embrace the subject-matter of the sentence, which was the protection of property and person, otherwise, they would not be so united. A complete absolute inviolability was designed for both, which forbids restricting the terms used from their general meaning. [*105

Our courts, in conformity to this injunction and interdiction of the people, have uniformly construed acts of the legislature prospectively, even when their language would have borne a different construction. The late venerable Chief Justice TILGHMAN, who united all the virtues of a judge to an enlightened and profound knowledge of his profession, declares, "the rule has been, that where civil rights are affected, the act shall be confined to a prospective operation." The same doctrine was uniformly sustained before, and formed an impregnable barrier against unconstitutional power, invading the constitutional rights of the people. 4 S. & R. 401; 12 Ibid. 330; 1 Binn. 601; 3 S. & R. 169, 590; 2 Dall. 312. And even this very act of the 3d of April 1826, has been adjudged, by the unanimous opinion of the supreme court, to operate prospectively only, where civil rights are affected. This uninterrupted series of decisions, sustaining the constitutional rights of Pennsylvania, had grown with her growth and strengthened with her strength, from the first foundation of the province, resting on the benign principles of the common law.

In England, where the liberty and security of the subject has no other basis to rest upon than the common law, retrospective legislation is uniformly rejected by her courts of justice. T. Jones 108; 2 Show. 27; 2 Mod. 310; 1 Ld. Raym. 1352; 4 Burr. 2460. So, in Virginia: 1 Wash. 139; 3 Call 168, 278; 1 Hen. & Munf. 204. So, in New York: 7 Johns. 477, 501; 19 Ibid. 58. It is an invariable rule in Massachusetts, never to construe a statute retrospectively, unless it be so positively expressed. 10 Mass. 437; 12 Ibid. 383. *The same rule has uniformly prevailed in the courts of the United States, where it has ever been held, that no law is to be construed, so as to impair rights previously vested. [*106

This interdiction, by judicial power, of retrospective legislation upon civil rights, on account of its tyrannous and despotic character, might be extensively shown in the judicial code of most, if not of all our sister states, wherever it has been attempted. But as the sovereign will of the people has excepted this power out of the grant of legislative power, and has

declared, that our bill of rights, contained in the ninth article of the constitution, shall for ever remain inviolate, its extinction in Pennsylvania will not occur, while the constitution is maintained by our courts of justice.

The act of the 3d of April 1826, does not embrace our case. This is a supplement to the act of 24th of February 1770, with which it must be construed, to discover its meaning. The original act is both confirmatory and declaratory. The mode of conveying by man and wife, had been according to certain customs and usages, by which "a very great number of *bonâ fide* purchasers for a valuable consideration, were become the just and equitable owners," and "to remove some doubts" about the validity of such conveyances, the act confirms the title of such purchasers. It stopped, upon protecting *bonâ fide* parchasers for valuable consideration, who had become the just and equitable owners; and left husbands, who used their situation to become the owners of their wives' property, where they were. To that extent, *communis error facit jus*, would probably have supported the custom, because, at the early period of the province, and until 1760, inchoate titles to land, such as warrants, locations, &c., not perfected by patents, were transferred by bill of sale, as chattels. The confirmatory part of the supplement, just goes the same length and no further. And that was going much further than the former, where common error made a strong case, with the custom, and the unimproved and uninformed state of the province, at that early period; whereas, the declaratory part of the original law prescribed a mode for the husband and wife to convey the estate, which would prevent injury to purchasers *bonâ fide* and for full value, who were not guilty of gross neglect. The legislature, in the supplement, set forth the object to be the same for its *enactment as was declared in the original act; that
*107] estates of great value have been *bonâ fide* sold by husband and wife for a legal and sufficient consideration, and that, in all such cases, the persons who hold, should not be disturbed in the enjoyment of them, thus equitably acquired. This specific declaration of the object and intent, could not, by any just rule of construction, be expanded, by the verbiage of the enactment, to embrace this case.

But if this act of the 3d of April 1826, upon its true construction, embraces this case, it is void by the constitution of the state and of the United States. The title of the plaintiff in error originates in the patent, granted by the late proprietaries of Pennsylvania, for full value, to Samuel Patterson, their great-grandfather, on the 19th of October 1743, and is the highest contract known to the laws of Pennsylvania, of title to real estate. The act of November 1779, which divested the proprietaries of their estate in the province, and vested it in the commonwealth, confirmed all the grants and contracts made by them to individuals. This title to the lands in dispute came by succession, through several courses of descent, to Margaret Patterson, who married James Mercer, and on her death, in his lifetime, without issue, came, by three successive descents, to the plaintiff in error, under the act directing the descent of intestates' real estate, passed the 19th of April 1794. The first of these descents was established by the judgment of the supreme court, in the ejectment brought by David Watson and Sarah his wife, the heir-at-law, against the executors of James Mercer, on the 31st of December 1808, against the deed of the 30th of May 1785, and the last two, by the judgment rendered on the 3d of June 1820, in the ejectment

brought by John and Margaret Mercer, against Samuel P. Watson, and on his death, continued against his heirs, plaintiffs in error, against the said deed.

Margaret Mercer died before the 1st of February 1802, and our recovery on the descent, on the 31st of December 1808, remitted to us the possession, according to our title, against the deed of the 20th of May 1785, and we continued in possession until the 3d of April 1826—twenty-four years, two months and three days. *By the act of the 26th of March 1785, twenty-one years is the limitation of actions for real estate in Pennsylvania. By the 20th section of the act of the 13th of April 1791, no writ of error can be brought to reverse any judgment, given in any action, real, personal or mixed, after seven years. By the 4th section of the act of the 13th of April 1807, after two verdicts and judgments in succession, no new ejectment shall be brought. Under this statement, the following points are submitted : [*108

1st. This is an *ex post facto* law, impairing the obligation of contracts ; destroying and impairing our vested rights under the grant contained in this patent, both by the constitution of Pennsylvania, and of the United States.

2d. It is an *ex post facto* act, impairing our vested rights, which descended under the intestate law of the 19th of April 1794, by virtue of the grant contained in the patent, and deprived the plaintiff in error of the protection of that law.

3d. The act is *ex post facto*, and impairs the vested right derived to us under our patent, and the three descents cast upon us, and confirmed by the two judgments of the supreme court, sustaining the said descents against the deed of the 30th of May 1785, and adjudicating it to be void, on points put to the court, involving its validity, which judgments are conclusive evidence of said deed being no deed—and of our rights acquired by the three descents being absolute vested rights.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the supreme court of the state of Pennsylvania, brought under the 25th section of the judiciary act of 1789, ch. 20. The original suit is an ejectment by the defendants in error, for certain lands in Lancaster county, in the state of Pennsylvania, upon which a final judgment was rendered in their favor. The facts, so far as they are material to the questions over which this court has jurisdiction, are these. On the 8th of May 1785, James Mercer and Margaret his wife executed a deed of the premises, then being the property of the wife, to Nathan Thompson, in fee, who afterwards, on the same day, reconveyed the same to James Mercer, the husband, in fee ; the object of the deeds being to vest the estate in the husband. *The certificate of the acknowledgment of the deed of Mercer and wife to Thompson, by the magistrate who took the same, does not set forth all the particulars, as were required by the law of Pennsylvania of the 24th of February 1770, respecting the acknowledgment of deeds of *femes covert*. The legislature of Pennsylvania, on the 26th of April 1826, passed an act, the object of which was, to cure all defective acknowledgments of this sort, and to give them the same efficacy as if they had been originally taken in the proper form. The plaintiffs in the ejectment claimed title to the premises under James Mercer, the husband ; and the defendants, as heirs-at-law [*109

of his wife, who died without issue. The ejectment was brought after the passage of the act of 1826.

In the case of the *Lessee of Watson and wife* v. *Bailey* (1 Binn. 470), the acknowledgment of this very deed from Mercer and wife to Thompson, was held to be fatally defective to pass her title. But the act of 1826 has been repeatedly held by the supreme court of Pennsylvania to be constitutional, and to give validity to such defective acknowledgments. It was so held in *Barnet* v. *Barnet* (15 S. & R. 72), and *Tate* v. *Stooltzfoos* (16 Ibid. 35); and again, upon solemn deliberation and argument, in the case now before this court. The object of the present writ of error is, to revise the opinions thus pronounced by the highest state court.

Our authority to examine into the constitutionality of the act of 1826, extends no further than to ascertain, whether it violates the constitution of the United States; for the question, whether it violates the constitution of Pennsylvania, is, upon the present writ of error, not before us.

The act of 1826 provides, "that no grant &c., deed of conveyance, &c., heretofore *bonâ fide* made and executed by husband and wife, and acknowledged by them before some judge, &c., authorised by law, &c., to take such acknowledgment as aforesaid, before the first day of September next, shall be deemed, held or adjudged, invalid or defective, or insufficient in law, or avoided or prejudiced, by reason of any informality or omission in setting forth the particulars of the acknowledgment made before such officer as aforesaid, in the certificate thereof; but all and every such grant, &c., deed of conveyance, &c., so made, executed and acknowledged as aforesaid, shall *110] be *as good, valid and effectual in law, for transferring, passing and conveying the estate, right, title and interest of such husband and wife of, in and to the lands, &c., mentioned in the same, as if all the requisites and particulars of such acknowledgment mentioned in the act, to which this is supplementary, were particularly set forth in the certificate thereof, or approved upon the face of the same."

The argument for the plaintiffs in error is, first, that the act violates the constitution of the United States, because it divests their vested right as heirs-at-law of the premises in question: and secondly, that it violates the obligations of a contract, that is, of the patent granted by the proprietaries of Pennsylvania to Samuel Patterson, the ancestor of the original defendants, from whom they trace their title to the premises, by descent through Margaret Mercer.

As to the first point, it is clear, that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The constitution of the United States does not prohibit the states from passing retrospective law, generally; but only *ex post facto* laws. Now, it has been solemnly settled by this court, that the phrase, *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws, which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the manner prescribed. In short, *ex post facto* laws relate to penal and criminal proceedings, which impose punishments or forfeitures, and not to civil proceedings, which affect private rights retrospectively. The cases of *Calder* v. *Bull*, 3 Dall. 386; *Fletcher* v. *Peck*,

5 Cranch 138; *Ogden* v. *Saunders*, 12 Wheat. 266; and *Satterlee* v. *Matthewson*, 2 Pet. 380, fully recognise this doctrine.

In the next place, does the act of 1826 violate the obligation of any contract? In our judgment, it certainly does not, either in its terms or its principles. It does not even affect to touch any title acquired by a patent or any other grant. It supposes the titles of the *femes covert* to be good, however acquired; and only provides that deeds of conveyance made by them shall not be void, because there is a defective acknowledgment *of the deeds by which they have sought to transfer their title. So far, then, as it [*111 has any legal operation, it goes to confirm, and not to impair, the contract of the *femes covert*. It gives the very effect to their acts and contracts which they intended to give; and which, from mistake or accident, has not been effected. This point is so fully settled by the case of *Satterlee* v. *Matthewson*, 2 Pet. 380, that it is wholly unnecessary to go over the reasoning upon which it is founded.

Upon the whole, it is the unanimous opinion of the court, there is no error in the judgment of the supreme court of Pennsylvania, so far as it is subject to the revision of this court, and therefore, it is affirmed with costs.

This cause came on to be heard, on the transcript of the record from the supreme court of the commonwealth of Pennsylvania, for the Lancaster district, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said supreme court in this cause be and the same is hereby affirmed, with costs.

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*James Brown, Plaintiff in error, *v.* Richard R. Keene. [*112

Averment of citizenship.

A petition filed in the district court of Louisiana, averred, that the plaintiff, Richard Raynal Keene, was a citizen of the state of Maryland, and that James Brown, the defendant, was a resident of the state of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles.

The decisions of this court require, that the averment of jurisdiction shall be positive; that the declaration shall state expressly the fact on which jurisdiction depends; it is not sufficient, that jurisdiction may be inferred, argumentatively, from its averments.

A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicil; but the petition does not aver that the plaintiff is a citizen of the United States.

The constitution extends the judicial power to "controversies between citizens of different states;" and the judiciary act gives jurisdiction, "in suits between a citizen of the state where the suit is brought, and a citizen of another state."

The cases of Bingham *v.* Cabot, 3 Dall. 382; Abercrombie *v.* Dupuis, 1 Cranch 343; Wood *v* Wagnon. 2 Ibid. 9; Capron *v.* Van Noorden, Ibid 126; cited.

Error to the District Court for the Eastern District of Louisiana. In the district court, the defendant in error, Richard R. Keene, filed a petition in which he stated himself to be a citizen of the state of Maryland, against James Brown, a citizen or resident of the state of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles, in the district aforesaid, claiming damages for an alleged non-performance of a contract relating to the conveyance of a lot of ground, part of the batture at New Orleans.