v. *Storey*, Paine, 79; *Campbell et al.* v. *Claudius*, Pet. C. C., 484; 4 Wash. C. C., 424.

Without feeling justified on this occasion in going more at large into these questions, and some others of an interesting character connected with them, I may be permitted to add, that these rules seem to me to have in their favor over some others at least this merit. They give full effect to State powers and State rights over this important matter, when not regulated by Congress. They produce uniformity among the State and the United States courts. They conform to the practice in other countries, and are easily understood and easily enforced.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

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*THE PRESIDENT, DIRECTORS, AND COMPANY OF THE COMMERCIAL BANK OF CINCINNATI, PLAINTIFFS IN ERROR, *v.* EUNICE BUCKINGHAM'S EXECUTORS, DEFENDANTS IN ERROR. [*317

To bring a case to this court from the highest court of a State, under the twenty-fifth section of the Judiciary Act, it must appear on the face of the record,—1st. That some of the questions stated in that section did arise in the State court; and, 2d. That the question was decided in the State court, as required in the section.[1]

It is not enough that the record shows that the plaintiff in error contended and claimed that the judgment of the court impaired the obligation of a contract, and violated the provisions of the constitution of the United States, and that this claim was overruled by the court, but it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment.[2]

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[1] CITED. *Messenger* v. *Mason*, 10 Wall., 510.

[2] FOLLOWED. *Williams* v. *Oliver*, 12 How., 124. CITED. *Planters' Bank* v. *Sharp*, 6 How., 327; *Brown* v. *Atwell*, 2 Otto, 329.

It must appear from the record that the Act of Congress or the constitutionality of the State law was drawn in question. *Miller* v. *Nicholls*, 4 Wheat., 311; *Davis* v. *Packard*, 6 Pet., 41; *Crowell* v. *Randell*, 10 Id., 368; *McKinney* v. *Carroll*, 12 Id., 66; *Armstrong* v. *Treasurer of Athens Co.*, 16 Id., 281; *Crawford* v. *Branch Bank*, 7 How., 279; *Wolf* v. *Stix*, 6 Otto, 541; *Brown* v. *Atwell*, 2 Id., 327; *Moore* v. *Mississippi*, 21 Wall., 636.

Hence, where the legislature of Ohio, in the year 1824, passed a general law relating to banks, and afterwards, in 1829, chartered another bank; and the question before the State court was, whether or not some of the provisions of the act of 1824 applied to the bank subsequently chartered, the question was one of construction of the State statutes, and not of their validity.[3]
This court has no jurisdiction over such a case.

THIS case was brought up, by a writ of error issued under the twenty-fifth section of the Judiciary Act, from the Supreme Court of the State of Ohio.

The Reporter finds the following statement of the case prepared by Mr. Justice Grier, and prefixed to the opinion of the court, as pronounced by him.

Eunice Buckingham, the plaintiff below, brought an action of assumpsit against the plaintiffs in error in the Court of Common Pleas of Hamilton county, and filed her declaration claiming to recover twenty thousand dollars for bills or bank-notes of the Commercial Bank, of which she was owner, and of which demand had been made of the officers of the bank and payment refused, and claiming interest thereon at six per cent. from the suspension of specie payments, and also twelve per cent. additional damages from the time of demand and refusal. The cause was afterwards removed to the Supreme Court of Ohio, who gave judgment in her favor; and thereupon the defendant removed the case by writ of error to the Supreme Court in bank, by whom the judgment was affirmed, and the plaintiffs in error afterwards sued out a writ of error to this court.

The Supreme Court entered on their record the following

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If title to land is claimed under a statute, it must affirmatively appear from the record that such was the case. *Williams* v. *Norris*, 12 Wheat., 117; it must be set up by way of plea. *Montgomery* v. *Hernandez*, 12 Wheat., 120.

When the jurisdiction depends upon a decision in favor of the constitutionality of a statute, it must be stated in terms, upon the record, that the statute was drawn in question. *Wilson* v. *Marsh*, 2 Pet., 245; but the force of this decision is much weakened by *Satterlee* v. *Matthewson*, 2 Pet., 380, where it is held that although the record should not in terms state a misconstruction of the constitution of the United States, or that the repugnancy of the statute of a State to any part of that Constitution was drawn into question, yet the jurisdiction would be entertained. It is sufficient if, from the facts stated, such a question must have arisen, and the judgment of the State court would not have been what it is if there had not been a misconstruction of some Act of Congress, or a decision against the validity of the right, title, privilege, or exemption set up under it. *Harris* v. *Dennie*, 3 Pet., 292; *Craig* v. *Missouri*, 4 Id., 410; *Worcester* v. *Georgia*, 6 Id., 515; *Coom* v. *Gallager*, 15 Id., 18; *Kerth* v. *Clark*, 7 Otto, 454. The court will not resort to forced inferences and conjectural reasonings to sustain its jurisdiction. *Ocean Ins. Co.* v. *Polleys*, 13 Pet., 157.

[3] DISTINGUISHED. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 144 (but see Id., 154). FOLLOWED. *Lawler* v. *Walker*, 14 How., 149, 152. CITED. *Planters' Bank* v. *Sharp*, 6 How., 330.

certificate, which contains a sufficient statement of the points arising in the case:—

"And upon the application of said plaintiffs in error, it is certified by the court here, that the said plaintiffs in error, on the trial and hearing of this case in said Supreme Court for Hamilton county, and also in this court, set up and relied upon the charter granted to them by the General Assembly of the State of Ohio, on the 11th day of February, A. D., 1829; which charter contains the following *provision:—the fourth section provides, 'that said bank shall not at [*318 any time suspend or refuse payment, in gold or silver, of any of its notes, bills, or other obligations, due and payable, or of any moneys received on deposit; and in case the officers of the same, in the usual banking hours, at the office of discount and deposit, shall refuse or delay payment in gold or silver of any note or bill of said bank there presented for payment, or the payment of any money previously deposited therein, and there demanded by any person or persons entitled to receive the same, said bank shall be liable to pay as additional damages at the rate of twelve per centum per annum on the amount thereof for the time during which such payment shall be refused or delayed,' and insisted, that, by the provisions above set forth, the said plaintiffs in error ought not to be held liable to pay for interest or damages in case of suspension of specie payments, or upon demand and refusal of payment of their notes or bills, at a greater rate than at the rate of twelve per centum per annum, and the court here overruled the defence so set up, and held, that under and by virtue of the act of the General Assembly of the State of Ohio, passed January 28th, 1824, and of the said charter of the plaintiffs in error, the defendants in error were entitled to the interest and additional damages allowed to the defendants in error by the Supreme Court for Hamilton county, as stated in the bill of exceptions. The first section of the said act of the General Assembly of the State of Ohio, of January 28th, 1824, is as follows:—'That in all actions brought against any bank or banker, whether of a public or private character, to recover money due from such bank or banker, upon notes or bills by him or them issued, the plaintiff may file his declaration for money had and received generally, and upon trial may give in evidence to support the action any notes or bills of such bank or banker which said plaintiff may hold at the time of trial, and may recover the amount thereof, with interest from the time the same shall have been presented for payment, and payment thereof refused, or from the time that such bank or banker shall have ceased or refused to redeem

his notes with good and lawful money of the United States.' And the eleventh section of which is as follows:—'That when any bank or banker shall commence and continue to redeem their notes or bills with lawful money, the interest on their notes or bills shall cease from the commencement of such redemption, by their giving six weeks' previous notice, in some newspaper having a general circulation in the county where such bank or banker transacts banking business, of the time they intend to redeem their notes or bills with lawful money.' It was contended and claimed in this court, by said plaintiffs in error, that the said act of the General Assembly of Ohio, of January 28th, 1824, as applied to the said provisions of this charter, impaired the obligation thereof, and violated the provisions of the constitution of the United States; which
*319] claim so set up was *overruled by the court. And it is further certified by the court here, that on the trial and hearing of this case in this court, the validity of the said act of the legislature before mentioned was drawn in question, on the ground that the same, as applied to the charter of the plaintiffs in error, impaired the obligations thereof, and was repugnant to the constitution of the United States, and that the decision of this court was in favor of the validity of the said act of the legislature as so applied."

The cause was argued by *Mr. Stanberry* (Attorney-General of Ohio) and *Mr. Gilpin*, for the plaintiffs in error, and *Mr. Charles C. Convers*, for the defendants in error.

As the case went off upon the question of jurisdiction, only so much of the arguments of the counsel is given as relates to that point.

*Mr. Stanberry*, for plaintiffs in error.

The first question which presents itself is as to the jurisdiction of this court. It is claimed for the plaintiffs in error, that the jurisdiction arises upon that clause of the Judiciary Act of 1789, which provides for the case where the validity of a statute of a State is drawn in question, as repugnant to the constitution of the United States, and the decision of the State court is in favor of its validity.

It appears very clearly in the record, that the validity of a statute of Ohio was drawn in question in the State court, on the ground that the same, as applied to the charter of the plaintiffs in error, impaired the obligation thereof, and that the decision was in favor of the validity of the statute.

The defendants in error are understood to claim, that, inasmuch as this statute was in existence at, and prior to, the

granting of the charter, it cannot be held to impair the obligation of the charter; in other words, that this prohibition in the constitution is to be confined to *retrospective* legislation.

Authority for this distinction is supposed to be found in the opinions of the majority of the judges in *Ogden* v. *Saunders*, 12 Wheat., 213.

There is no question that, in *Ogden* v. *Saunders*, the majority of the court proceeded upon a distinction between a statute prior and one subsequent to the contract, holding that a statute in force when the contract is made cannot be said to impair the obligation of the contract, for the reason that such preëxisting statute being a part of the law of the land at the time of the contract, the parties are supposed to acquiesce in it, and in fact to make it part of their contract.

In the first place, it is to be observed of this case of *Ogden* v. *Saunders*, that the distinction it enforces is opposed to the reasoning of the court in *Sturges* v. *Crowninshield*, 4 Wheat., 122, and to the language of the court in *McMillan* v. *McNiell*, 4 Wheat., 209.

*As a general distinction, applicable to all laws, it certainly is not sound, for it would quite set aside this most important restraint upon State legislation. It can only have reference to such laws as provide for the manner of enforcing or discharging future contracts, and which may be said to be in the view of the parties when they afterwards enter into the class of contracts provided for in the previous legislation. [*320

In this view, *Ogden* v. *Saunders* perhaps settles a just distinction, as applicable to the sort of statute then before the court. The question there was as to the validity of a State bankrupt law, in reference to a subsequent contract. It might well be said, that the parties tacitly adopted and recognized this law, or this mode of discharging their contract, when it was entered into.

But in the case at bar, no such intendment can be made, and it is impossible to suppose that the statute of 1824 was adopted by the parties, or in any way entered into the contract or charter made in 1829. The charter was wholly independent of the statute.

Again; this charter was granted by the State. It does not stand on the footing of a contract between individuals, who are supposed to be bound by the existing laws as to contracts, and to adopt and acquiesce in them. Here the State is one of the contracting parties, and the contract itself is a law. If the charter granted in 1829 provides, as we claim it does, that

in case of refusal to pay its notes in gold and silver the rate of interest shall be twelve per cent., it surely cannot be intended that the parties submitted themselves to the prior law of 1824, so as to increase the rate of interest upon such refusal to eighteen per cent., or six per cent. in addition to the rate stipulated by the charter. In no sense can it be said that the law of 1824 entered into or became part of the charter. If the charter had been silent as to the rate of interest in the particular case of a refusal to redeem, the general law of 1824 would have settled it, and might well have been considered as entering into the charter and constituting one of its terms, for then there would have been no inconsistency or repugnancy between the general law and the charter stipulations.

It is obvious, then, that the charter is impaired by the law of 1824, when the court add to the twelve per cent. provided for by the charter the six per cent. provided for in that law.

Taking it as granted that a charter or contract is so impaired by a preëxisting law, the case is certainly within the mischief, if it be not within the meaning, of the constitutional prohibition.

A charter is granted by a State, explicitly defining what shall be the consequences of suspension of specie payments, and fixing a certain limit to the liability of the stockholders in that event. This is the contract made between the State and the stockholders. It has no reference to any prior laws, *but is a law in itself*, superior to all other laws upon the sub-
*321] ject-matter so provided for by its *stipulations. Upon a case made between the bank and a holder of its paper, a claim is made to recover eighteen per cent. for suspension of specie payments, instead of the twelve per cent. provided by the charter. This claim is founded upon a statute of the State passed five years before the date of the charter. The bank questions the validity of this statute, so applied to its charter, on the ground that it impairs the charter, in adding to the rate of interest fixed for suspension. The court decides in favor of the validity of the statute as so applied; the charter is no protection, and the liability of the bank is extended beyond the terms of the charter.

It may be said that all this is the act or error of the court, not of the legislature; that it is simply an error in the construction of the terms of the charter.

Undoubtedly, contracts are liable to be impaired by the errors of the judiciary. It is not for such errors that resort can be had to this court from State tribunals. If a contract be impaired by the application, on the part of the court, of some

legal principle, or by misconstruction of the terms of the contract, a case does not arise for the jurisdiction of this court; but if the contract is impaired by the application of a State law, then the jurisdiction does attach.

The prohibition in the constitution is in terms the most general:—"No State shall pass *any* law impairing the obligation of contracts." This is a clause which does not execute itself, nor is any mode pointed out in the constitution by which the prohibition is to be enforced. It is worked out by the Judiciary Act, by means of a case, and the decision of that case by the highest court of the State. That court must first decide upon the question as to the application of the State law; and the decision must affirm its validity. To bring the jurisdiction of the federal tribunal into exercise, to bring about the condition of things to which the constitutional prohibition applies, the law-making and law-expounding authorities of the State must concur. The law of the State can in no way impair a contract, without the agency of the State judiciary. When the law is so applied, and adjudged to be valid by the State court, as to impair a contract, the case arises under the constitution.

Now, if the constitutional prohibition were confined to State laws, which impaired contracts *proprio vigore*, the argument against its application to subsequent contracts would be very cogent. It might then be asked, with confidence, how can a law *per se* impair a contract not in existence when it was enacted? But we have seen that the case does not arise upon the law itself, nor until the act of the court concurs with the act of the legislature. The instant this double agency unites in the application of a law to a contract, so as to impair its terms, that instant it becomes, in the meaning of the constitution, a law impairing the obligation of the contract.

The constitutional prohibition must be understood as not applying to the law itself, but to its application by the court. What is said *by the majority of the judges in *Ogden* v. *Saunders* proceeds on that ground. Mr. Justice [*322 Trimble, one of the majority, uses this language (p. 316):—

"It is not the terms of the law, but its effect, that is inhibited by the constitution. A law may be in part constitutional and in part unconstitutional. It may, when applied to a given case, produce an effect which is prohibited by the constitution, but it may not, when applied to a case differently circumstanced, produce such prohibited effect. Whether the law under consideration, in its effects and operation upon the contract sued on in this case, be a law impairing the obligation of this contract, is the only necessary inquiry."

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We are then to understand, from this clear statement of the constitutional prohibition, that it is not necessary to show that the State law is unconstitutional *per se;* that, in fact, it may be constitutional for some purposes and unconstitutional for other purposes, just as it happens to be applied by the court to the particular case or contract. It is not the purpose or intent of the law *ab origine*, but its effect or application by the court, which is to be regarded.

This being so, what imaginable difference is there between its application to contracts made before or after its enactment? None whatever, except in such cases as *Ogden* v. *Saunders*, where the preëxisting law is of such a character as that the parties to the subsequent contract must have made their contract in reference to it, and tacitly adopted it into the terms of the contract. Such a preëxisting law is, in fact, a part of the whole body of law, which creates and defines the obligation of contracts.

But, with reference to the contract in this case, where no such intendment can be made, where all other laws are set aside by the legislative authority itself in the grant of the charter, which stands as the very law for the very case, what imaginable difference is there in its violation by the application of a preëxisting or subsequent law? At the best, it is a contract violated by a law of the State, not directly and by its terms, but by its effect, as applied to this charter.

Suppose this statute had been subsequent in date to the charter, and the court had then applied it to the charter, so as to impair the express stipulations as to interest; the case would have been clearly within the constitutional prohibition. Now, in the supposed case, if it clearly appeared that the court of the State had misunderstood the law in making such application, if it were manifest that the legislature had no intention, in passing the law, to impair the charter, or in any way to apply it to the charter, would all that oust the jurisdiction of this court, or take the case out of the constitutional prohibition? Surely not. It is the fact, not the intention; the effect and application of the law, not the law itself, or the motive with which it was passed, that we must look to.

*323] *Besides, after the application of the law to the charter by the State tribunal, the organ to expound and apply the State law, it must be taken conclusively that the law was intended to apply to the contract, and no argument, however cogent, would avail against such conclusion.

*Mr. Convers*, for defendants in error.

The contract, the alleged violation of which by legislative power is here complained of, is the act of incorporation of the plaintiffs in error, passed by the General Assembly of the State of Ohio, in the ordinary form of legislation, on the 11th day of February, 1829. The law of the State of Ohio, by which it is claimed that the obligation of this supposed contract was impaired, is the "Act to regulate judicial proceedings where banks and bankers are parties, and to prohibit issuing bank-bills of certain descriptions," passed on the 28th day of January, 1824. The plaintiffs in error are here to assert, before this court, that the State of Ohio, in passing a law in 1824, impaired, by the "passing" of that law, the obligation of a charter granted afterwards, in 1829; that the contract, although not in existence at the time of the passage of the law complained of, nor for five years thereafter, was nevertheless "impaired" by the prior passing of this pre-existing law!

Two questions, arising from the record, present themselves for consideration:—

First. Assuming that the Supreme Court of Ohio erred in its construction of the two statutes referred to, can this court correct the error?

Secondly. Is there any error in that construction of these statutes which was adopted by the Supreme Court of Ohio, and applied to the case?

I. Can this court correct the supposed error of the Supreme Court of Ohio?

I claim, for the defendants in error, that this court cannot reverse the judgment of the Supreme Court of Ohio, for the errors here alleged against this record.

The clause of the constitution of the United States, under which such reversal is asked, is as follows:—"No State shall pass any law impairing the obligation of contracts." I maintain that this provision applies only to statutes passed after a contract has been made, and which, when effect is given to them, according to the legislative intent, impair the obligation of the contract,—making its terms different from what they were, as previously settled by the parties, or its legal effect different from that which it was declared to be by the laws in force at the time when it was made.

This constitutional provision is plain, and construes itself. The law is valid, unless the passing thereof impair a contract. The inhibition directs itself, in express terms, against the passing of the *law, and nothing more. It was designed as a shield against the putting forth of legislative power [*324
to dissolve the obligations by which parties were bound to

each other; not to correct the errors or mistakes of the judicial power in their application of laws constitutionally passed. It is the wrongful passing of the law by the legislature, not the subsequent misapplication or abuse of a law rightfully passed, which is forbidden. The provision relates to the state of things at the time of the passing of the law. If the act do not then impair the contract, it is a valid law. If contracts are afterwards entered into, and the State courts improperly apply the preëxisting law to such contracts, it can in no sense be said that the passing of the law by the State impaired these contracts. The effect is matter *ex post facto*. It is an act of the court upon a question of purely judicial interpretation; and upon such questions the party must abide the final decision of the highest tribunal of his State. If the power of the legislature be constitutionally exercised at the time, the act cannot afterwards, by any fiction of relation, be divested of its constitutional character, and become unconstitutional and void. It is the fact, that the law when passed by the State is constitutional or unconstitutional, that determines whether it be valid or void. It is upon the act of passing that the constitutional prohibition operates, and, the act once done, it is not in the power of the future to change the fact, that the law was, when passed, constitutional or unconstitutional. This fact, with its character indelibly impressed upon it, as it was at the time of its occurrence, belongs to the past, and over it the future can have no power.

Again; the prohibition is against passing a law "impairing the obligation of contracts." The very term "*impairing*, here used, shows that the law must have the effect of impairing, when passed, or it does not fall within the prohibition,—it is not an "impairing" law. Of necessity, it implies that there must be a contract *in esse*, upon which the law, at the time of its passage, operates,—a contract to be impaired by the passing of the law. The term "impaired" incorporates into itself, as of the very essence of its meaning, that there is a subject-matter to be affected,—something to be impaired.

Can it, for a moment, admit of controversy, that the sole object of this provision was a restraint upon that dangerous species of legislation, which, after contracts had been made, interposed to discharge them, or alter their terms, without the consent of the parties,—that it was to preserve existing contracts inviolate against legislative invasion? Beyond this, it was not intended to abridge the power of legislation belonging to the States. In the case of *Sturges* v. *Crowninshield*, 4 Wheat., 122, Mr. Chief Justice Marshall, speaking of this provision, says,—"The convention appears to have intended

to establish the great principle that contracts should be inviolate. The constitution, therefore, declares *that no State shall pass any law impairing the obligation of contracts." (p. 206.) [*325

The whole matter of contracts,—what may, and what may not, be the subject of agreement,—the competency of parties,—the form of the contract,—the manner of the discharge,—are all left within the range of State legislation; subject only to the qualification, that when a contract, valid according to the laws in force at the time, is once made, no State shall pass any law to change,—to weaken,—to "*impair*," in any respect, the obligations by which the parties have bound themselves. If the State have not attempted such interference by passing a law,—no matter what errors the courts may commit in their endeavour to ascertain the meaning of the parties, the terms and obligations of their contract,—the party aggrieved can find no protection, under this clause of the federal constitution. He must look for relief to the constitution and laws of his State, and if they fail him, it is his misfortune, to which he must submit; but such defect in the constitution and laws of the State furnishes no ground upon which he can invoke the interposition of this court, whose function, under this clause of the constitution, is not to supply the defects of State tribunals, but to check any attempt of the law-making power of the State to retroact upon past contracts and impair their obligations. The point is almost too clear for argument, especially since the authoritative exposition of the meaning of this provision afforded by the decisions of this court in *Sturges* v. *Crowninshield*, 4 Wheat., 122, and in *Ogden* v. *Saunders*, 12 Id., 213; which, it is respectfully submitted, are conclusive of the question. See also *Bronson* v. *Kinzie et al.*, 1 How., 311, and *McCracken* v. *Hayward*, 2 Id., 608. The highest judicial tribunals of the States of Massachusetts, Connecticut, and New York have, in like manner, declared that if the law be in force at the time when the contract is made, it cannot have the effect of impairing its obligation, and is, therefore, obnoxious to no constitutional objection. *Blanchard* v. *Russell*, 13 Mass., 16; *Betts* v. *Bagley*, 12 Pick. (Mass.), 572; *Smith* v. *Mead*, 3 Conn., 254; *Mather* v. *Bush*, 16 Johns. (N. Y.), 237; *Wyman* v. *Mitchell*, 1 Cow. (N. Y.), 321. So decided, also, by the Supreme Court of the State of Ohio in 1821, in the case of *Smith* v. *Parsons*, 1 Ohio, 236. The opinion of the court, pronounced by Judge Burnett, contains a full and able exposition of the principle, that statutes in existence when the contract is made are not within the constitutional prohibition.

See also *Belcher et ux.* v. *Commissioners, &c.*, 2 McCord (S. C.), 23; *In re Wendell*, 19 Johns. (N. Y.), 153; *Sebrig* v. *Mersereau*, 9 Cow. (N. Y.), 345, 346; *Hicks* v. *Hotchkiss*, 7 Johns. (N. Y.) Ch., 308–313; *Blair* v. *Williams*, 4 Litt. (Ky.), 38, 39, 43–46; *Golden* v. *Prince*, 3 Wash. C. C., 318, 319; *Johnson* v. *Duncan*, 3 Mart. (La.) L. R., 531; 1 Cond. (La.), 161, 162.

*326] *The truth is, the only question as to the impairing effect of statutes that can arise in this case is, whether the act of the legislature passed on the 11th day of February, 1829,—the charter,—impaired the provisions of the act of the legislature in relation to banks passed on the 28th day of January, 1824. The Supreme Court of Ohio declared that the act of 1829 did not impair the act of 1824; that it left it just as it was,—in full operation as to this bank, as well as to other banks. It held, that all that the charter did, in respect to a failure of the bank to redeem its notes, was, not to relieve it of the general liability which attached to all banks, under the law of 1824, but leaving that act in full force, to provide "additional" security that the bank would fulfil its engagements to the public, and so subserve the purpose of its creation. How, then, can this court, in the exercise of the narrow jurisdiction over State tribunals to which it is confined, reverse the judgment of the Supreme Court of Ohio, even if it were admitted that any error had here intervened?

Again; the question being merely a question as to the meaning of two statutes of Ohio, *in pari materia*, when taken together, this court, according the principle settled by its repeated adjudications, will be guided by the construction adopted by the highest judicial tribunal of the State. The Supreme Court of Ohio simply decided, that when the legislature of that State employs, in relation to a bank, the language contained in the fourth section of this charter, it intends to subject the bank to the provisions of the act of 1824, precisely as if, *in totidem verbis*, it were so expressly declared. In the case of *Elmendorff* v. *Taylor*, 10 Wheat., 159, Mr. Chief Justice Marshall says:—"This court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of that State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the court

of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction of the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle, the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the constitution, laws, or *treaties of the United States." Among the many other cases to the same effect are *United States* v. *Morrison*, 4 Pet., 124; *Green's Lessee* v. *Neal*, 6 Id., 291. [*327

Now, it would have been unconstitutional for the legislature to have provided by the charter expressly, in so many words, that the plaintiffs in error, on default in the redemption of their notes, should be subject to the six per cent. given by the act of 1824, as well as to the twelve per cent. "additional" thereto, it surely was not unconstitutional for the Supreme Court of the State, to which alone belongs the right of interpreting the language used by the legislature, to hold that the terms contained in the fourth section of the charter did express just that thing,—to declare that the legislature, by the act of incorporation, had said that this bank should be subject to the six per cent. of the act of 1824, as well as also to the twelve per cent. "as additional" thereto.

The Supreme Court of Ohio having decided that the act of 1824 is by the legislature referred to in the charter and made part of it, and the legislature having full constitutional power to do so when it passed the act of incorporation, when it made its contract with the plaintiffs in error, how can it be that the recovery of the defendants in error, in the Supreme Court of Ohio, is obnoxious to any constitutional objection?

The plaintiffs in error ask this court to wrest from the judicial tribunals of the States the right of expounding the statutes of their own legislatures,—to do what Mr. Chief Justice Marshall says "no court in the universe, which professed to be governed by principle, would undertake to do," —erect itself into a tribunal to correct the alleged misinterpretations of their own statutes by the judiciary of the States.

Unless the construction of the State court make the legislature to do an act which the legislature cannot constitutionally do,—if the legislature might rightfully have done

precisely what the interpretation of the State court says it did do,—can it be possible that there is any violation of the constitution?

The Supreme Court of Ohio has only decided that the legislature of that State, by the act of incorporation of the plaintiffs in error, did what it had an undoubted constitutional right to do,—incorporated in the charter the provisions of the act of 1824, and added to the penalties which it provided in case of suspension of specie payments.

Indeed, the learned counsel for the plaintiffs in error (who has furnished me with his printed brief) admits the soundness of the opinion in *Ogden* v. *Saunders*, as applied to a contract to which individuals alone are parties. But he insists that a different rule should obtain where the State is one of the contracting parties,—that, in the eye of the constitution, the properties of a contract as between individuals do *328] not belong to an act of incorporation passed *by the legislature of a State. Well, this may be so. But it occurs to me, that this is dangerous ground for him to tread. I had always supposed that the whole basis of the decision of this court in the case of *Dartmouth College* v. *Woodward*, by which charters were impaled within the protection of this constitutional provision, was, that the charter was similar to, —identical with,—a contract between individuals. To establish this, the arguments of the learned counsel and the reasoning of the court in that case were all directed. Every argument of the counsel for the plaintiffs in error, which tends to make good a difference between a charter and an ordinary contract, directly assails the soundness of this leading case, without which the plaintiffs in error have no place here in this court;—for the foundation of this writ of error is, that this charter is a contract, and as such within the protection of the constitution of the United States.

The learned counsel for the plaintiffs in error also says, that "undoubtedly contracts may be impaired by errors of the judiciary; and that it is not for such errors that resort can be had to this court from State tribunals." He admits, "that if a contract be impaired, by the application, on the part of the court, of some legal principle, or by misconstruction of the terms of the contract, a case does not arise for the jurisdiction of this court." "But," says he, "if the contract is impaired by the application of a State law, then the jurisdiction does attach."

The admission amounts to this,—that the State court may impair the contract, by the misapplication of a legal principle, or by the misconstruction of the terms of the contract, and

yet the case not fall within the jurisdiction of this court. But, if this same error be committed, under pretext of a law of the State, even preëxistent in the contract, the case is within the jurisdiction. According to this, if there had never been any such law in existence as the act of 1824, and the court had rendered precisely the same judgment as that now presented in this record, the error would, by the counsel's own admission, be beyond the reach of this court. There would then be the case of "misconstruction of the terms of the contract,"—of "misapplication of a legal principle,"—which he concedes to be an error for which the judgment is not amenable to this court; and still he says, that because the mistaken "legal principle," which the court below improperly followed, was the preëxisting statute of 1824, instead of some other legal principle, this court may interpose to reverse the judgment. The same judgment might have been rendered by the Supreme Court of Ohio, and any other ground assigned for it than the act of 1824,—although no better in judgment of law than that, both being equally erroneous,—and, by the admission of learned counsel, it could not be impeached in this court for error.

If the State court had the power to render the judgment, it is *sufficient. The question with this court, whose power over State tribunals is limited, is, whether the [*329 judgment can stand, without carrying out, in accordance with the legislative intent, a law of the State passed to impair a contract. If it can, then there is no error here for the correction of this court. It is only where a law is passed to operate upon existing contracts, and where the decision of the State court is "in favor of the validity" of such law, that jurisdiction to reverse is vested in this court. It matters not how erroneous, in other respects, the opinion of the State court may be. A wrong ground assumed for its judgment is no cause for reversal by this court, unless that ground be solely that the State court has made itself instrumental in giving effect to a law of the legislature, which, in its enactment, was levelled against an existing contract. *Crowell* v. *Randell*, 10 Pet., 368; *McKinney et al.* v. *Carroll*, 12 Id., 66; *McDonogh* v. *Millaudon*, 3 How., 693.

It cannot be, *in rerum natura*, that the *passing* of a law can impair a contract, unless the contract be in being when the law is passed. To hold otherwise,—to declare that contracts are, by this provision of the constitution, withdrawn not only from all *future*, but also from all *past* legislation,—is to sweep from the States *all* legislative power over the subject-matter of contracts.

If the legislature cannot pass laws to operate, *in futuro*, upon charters subsequently granted, then, as it is conceded that corporations cannot be affected by any laws enacted after the grant of the charter, corporations are indeed supreme. Charters rise independent of all law. Well may learned counsel say that they are a "law unto themselves"; for beyond the few meagre provisions embodied in them, they stand exempt from *all* legislative power and control.

The learned counsel for the plaintiffs in error, in his endeavour to maintain the position that the constitution extends to the improper application, by the State court, of a preëxisting law, observes that the wrong is not done by the passing of the law. He says, that the law does not, *per se*, impair the contract; but that it is by the concurrence of the act of the court with the act of the legislature that the thing is affected.

If this be so, what is the result? Now, it was the intention of the legislature, when this charter was granted, that the provisions of the act of 1824 should apply to it, or that they should not apply. If, in legislative intent, the statute of 1824 was to operate upon this bank,—if the fourth section of the charter were, what it purports to be, "additional" to that act,—then the law of 1824, by the terms of the original compact between the State and the plaintiffs in error, became part of the charter. It is parcel of the contract itself; as much so as if set out in it at large. Of course, then, there is no error in the judgment; for, upon this hypothesis,

*330] *it only enforces the agreement of the parties, according to the terms and true meaning of their contract.

If, on the other hand, the legislature did not design that the law of 1824 should apply, then there could be no "concurrence of the act of the legislature with the act of the court." The "law-making and law-expounding authorities of the State" did not "concur." This "double agency," of which he speaks, did *not* "unite." It was the sole, unauthorized act of the court; an act, too, not only concurring with, but in direct violation of, the legislative intent. The legislative and judicial acts, so far from being concurrent, were antagonist. The wrong complained of is pure, unmixed judicial wrong. So far as legislation is concerned, all is right. That has not transcended its power to strike at the contract. The blow comes from the judiciary alone; and it is not less the sole act of the judiciary, because, to secure its aim, it seizes upon an act of the legislature, and, wresting it from its true design, gives it force and direction never contemplated by the legislature.

The whole complaint of the plaintiffs in error hath this extent, no more,—that the court of Ohio, on looking into the contract, with a view to ascertain its meaning, mistook its terms, supposing that the parties had adopted, as part of the charter, the provisions of the act of 1824; whereas a right interpretation of the contract, as they claim it, excludes these provisions. That law was applied to the case, because, in the judgment of that court, the parties had, when the contract was entered into, made its provisions part of the terms of the contract. The court simply declared, that, as the contract presented itself to the judicial mind, it was a contract incorporating into itself the provisions of the act of 1824, as claimed by the defendants in error, and not excluding them, as claimed by the plaintiffs in error. It was, in short, nothing more or less than a simple "misconstruction of the terms of the contract"; and upon that, the learned counsel tells us, "a case does not arise for the jurisdiction of this court."

Again, the act of 1824 relates to the remedy. It is entitled, "An act to regulate judicial proceedings where banks and bankers are parties." By its express terms, it applies to "*all* actions brought against any bank or banker." Regarded in this light, it has been held, in respect to this liability on suspension, applicable even to charters *previously* granted. *Atwood* v. *Bank of Chillicothe*, 10 Ohio, 526.

Indeed, the case of *Brown* v. *Penobscot Bank*, 8 Mass., 445, cited by the learned counsel for the plaintiffs in error,—proceeding upon the obvious distinction which obtains between the obligation of a contract and the remedy, as repeatedly declared by this court,—is to the same point. The Penobscot Bank was chartered in the year 1805. In the year 1809, the legislature of *Massachusetts passed a general law, providing, that "from and after the first [*331 day of January, 1810, if any incorporated bank within this Commonwealth shall refuse or neglect to pay, on demand, any bill or bills of such bank, such bank shall be liable to pay to the holder of such bill or bills after the rate of two per cent. per month on the amount thereof, from the time of such neglect and refusal." It was claimed, on the part of the Penobscot Bank, that the act of 1809, "as applied to its charter," was repugnant to the constitution. The court say, that "if the act upon which the plaintiff relied in this case was unconstitutional, and therefore void, it must be by force of some specific provision in the constitution of the United States, or in that of this Commonwealth. But none such had been cited at the bar, nor was any such known to exist. The incorporation of a banking company was a privilege

conferred by the legislature on the members. Punctuality and promptness in meeting every demand made on such an institution are essential to its existence; and a failure in this respect, now that bank-bills form, almost exclusively, the circulating medium of the country, is a public inconvenience of great extent, and introductive of much mischief. It was, therefore, a duty highly incumbent on the legislature, by all means within its constitutional authority, to prevent and punish such a mischief, and this the rather, as these corporations received all their powers from legislative grants. The provision made by the act under consideration was equitable and wise, and the community is probably indebted to it for the correction of an evil, which, at the time of passing the law, had increased to an alarming degree. As it had no retrospective effect, there was no ground for complaint on the part of the banks, nor did it militate against any known and sound principle of legislation." (p. 448.)

In the case of *Dartmouth College* v. *Woodward*, 4 Wheat., 696, Mr. Justice Story says, that "a law punishing a breach of contract, by imposing a forfeiture of the right acquired under it, or dissolving it because the mutual obligations were no longer observed, is, in no correct sense, a law impairing the obligations of the contract."

Now, if the act of 1824 can apply to previously granted charters, can there be a doubt as to its appropriate application to *subsequently* granted charters? Such an act, passed after the charter, is held valid, upon the ground that it does not impair any franchise which the corporation may lawfully exercise under the charter. Its object is to prevent an unlawful act,—a violation of chartered duty. It takes away no vested right, unless the corporation has a vested right to disregard the great purpose of its being, a "vested right to do wrong."

In no case is it held that a corporation is exempt from a general law, passed even after the grant of its charter, which is remedial in its character, and operates upon acts *in futuro*, unless the language of the charter imperatively require it.

*332] *How much more cogent is the act of 1824 in its application to charters granted *after* its enactment!

How, then, under the simple clause of the constitution, relied upon by the plaintiffs in error, can the jurisdiction of this court be called into exercise, to reverse, for such an error as this, if error it be, the judgment of the Supreme Court of the State of Ohio?

I take the simple language of the constitution as I find it: —"No State shall pass any law impairing the obligation of

contracts." The construction of the plaintiffs in error interpolates. As they read the constitution, it declares,—"No State shall pass any law, nor shall its judiciary make any decision, impairing the obligation of contracts."

In *Satterlee* v. *Mathewson*, 2 Pet., 413, it is declared, that "there is nothing in the constitution of the United States which forbids the legislature of a State to exercise judicial functions," and in that case it was accordingly decided, that the constitution did not extend to an act which was of a judicial nature, although in the form of a law passed by the legislature of a State. And this was precisely in accordance with the decision made at an early day in the case of *Calder* v. *Bull*, 3 Dall., 386. See opinions of Iredell, J., and Cushing, J. With much less reason can it be claimed that a pure judicial act, done not by the passing of a law by the legislature, but by the decision of a court, is within the prohibition of the constitution.

In reply to what is said, as to the case now before the court falling within the mischief which the constitution designed to remedy, I have only to say, that, if the court here incline to go beyond the plain language of the constitution itself, and look into the evils which led to the insertion of this clause, as the history of the times discloses them, ample reasons will be found coming to the support of the position which I maintain. See 4 Wheat., 205, 206.

Besides, in the case of *Satterlee* v. *Mathewson*, 2 Pet., 381, this court held, that retrospective statutes were not repugnant to the constitution of the United States, unless they were *ex post facto* (using those terms in their restricted sense, as confined to criminal laws), or unless they impaired a contract; although of like mischief with that against which the constitution expressly provided. And it was well remarked by Mr. Chief Justice Marshall, in the case of *Providence Bank* v. *Billings*, 4 Pet., 563, that the "constitution was not intended to furnish the corrective of every abuse of power which may be committed by the State governments."

This court will not feel inclined to enlarge the construction of the constitution, in order to abridge the power of legislation belonging to the States, their highest attribute of sovereignty, by any implication extending this constitutional inhibition to all preëxisting *laws relating to the subject-matter of contracts. Of such latitudinarian construction, so startling to State power, the end cannot be seen from the beginning. [*333

While this court, in the exercise of that high function which sits in judgment upon the validity of the legislative acts of a

sovereign State, has always shown itself firm to maintain all just rights under the constitution of the United States, it has also shown itself not less careful to guard against trenching, by its decisions, upon the remnant of rights which that constitution has left to the States. So cautious does it move, in the execution of this most delicate trust, that it will not set aside an act of the legislature of a State, as a void thing, unless it appear clearly to be repugnant to the constitution. If its constitutionality be doubtful only, the doubt resolves itself in favor of the exercise of State power, and the act takes effect.

But I submit to the court, with great confidence, that, as to this bank, it is clear that the State of Ohio has not, by the passing of any law, impaired the obligation of its charter contract; and that therefore, upon this record, no case arises to which the constitutional inhibition relied upon by the plaintiffs in error can extend.

*Mr. Gilpin*, for the plaintiffs in error, in conclusion.

The act of the General Assembly of Ohio of 11th February, 1829 (3 Chase's Ohio Stat., 2059), created this corporation for banking purposes, declared its powers, duties, and liabilities, and especially provided for the contingency of its suspending the payment in gold and silver of its bank-notes and deposits, by imposing a penalty of twelve per cent. per annum, from the time of demand and refusal. An act of the 28th January, 1824 (2 Chase's Ohio Stat., 1417), had been previously passed by the same legislature, making several general regulations in regard to banks and bankers in that State; and, among them, providing for the same contingency, by imposing a payment of six per cent. per annum from the time of suspension. This corporation suspended payment, and the defendant in error, holding a large amount of its notes, brought suit in the Supreme Court of Hamilton county, to recover the penalty. Judgment was given in her favor in that court, for the principal of the notes, and also eighteen per cent. interest, subjecting the corporation to the penalty provided by its charter, and then, in addition, to that provided by the act of 1824. This judgment was carried by appeal to the Supreme Court in bank of the State of Ohio, being the highest court of law in that State, and the plaintiffs in error contended that it was erroneous, because it recognized the validity of the act of 1824 as applicable to the charter of the corporation, and thus impaired the obligation of the contract made by that instrument. At the hearing of the case the court were equally divided in opinion on the cases

assigned, and therefore, according to its practice in such cases, the judgment of the inferior court was *affirmed. [*334
No opinion was delivered by the Supreme Court in bank, nor either of the judges. No authoritative construction of that court has been given to the act of assembly on the point in question.

The plaintiffs in error contend that this judgment should be reversed by this court, because it is expressly founded on the alleged validity of the act of 1824, as applicable to their charter; and as that charter was a contract between the State and the corporation, its stipulations are thereby changed, and its obligation impaired.

The charter of 1829 is a *contract*, to which the parties on one side are the State of Ohio and those claiming privileges reserved to them by the State, and, on the other, this corporation. It is a contract with mutual benefits, not merely of a general kind, but specific, for the State reserves to itself a certain portion of the profits of the institution. It is such a contract as the constitution of the United States meant to preserve inviolate in its stipulations. It is not a legislative act, operating on the transactions of third parties, or entering into or forming part of their contracts, by the mere force of paramount legislation, but it is an agreement made by the State itself, as a party, for equivalents exacted and received by it from the corporation. It is, even more strongly than in the case of a charitable institution from which the State creating it receives no direct benefit, a contract to which the stockholders, the corporation, and the State are the original parties. "It is," in the words of Chief Justice Marshall (*Dartmouth College* v. *Woodward*, 4 Wheat., 518), "a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal property has been conveyed to the corporation. It is, then, a contract within the letter of the constitution, and within its spirit also." It is a contract "to be held as sacred as the deed of an individual." *Waddell* v. *Martin*, cited 1 Pet. Dig., 481. The government which is a party to it "can rightfully do nothing inconsistent with the fair meaning of the contract it has made." *Crease* v. *Babcock*, 23 Pick. (Mass.), 340.

If it is a contract, how are its terms to be ascertained? The charter is the formal and deliberate act of both parties, reducing to literal stipulations what they mutually agree to; laws not introduced form no part of it, except so far as they are general municipal laws regulating all property; the laws that govern contracts between man and man govern this; in

such a case, would not the written instrument made by and between the parties be taken as the declaration of their liability? Nothing is better settled than that it would be. Vattel, 2, 17, 263; Co. Litt., 147; *Parkhurst* v. *Smith*, Willes, 332; *Schooner Reeside*, 2 Sumn., 567; *Truman* v. *Lode*, 11 Adolph. & E., 597; *Kain* v. *Old*, 2 Barn. & C., 634; *Thomas* v. *Mahan*, 4 Greenl. (Me.), 516. It is true, that written *contracts do not contain all the municipal regulations necessary to their execution. These are tacitly embraced in them. Not so, however, where the State is a party to the contract, and those regulations would essentially vary its terms. In such a case the subsequent law is substituted for the previous one, just as a subsequent contract between the same individuals, relative to the same subject-matter, would control, modify, or extinguish a former one.

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The contract, then, between the State of Ohio and the Commercial Bank of Cincinnati is that contained in the charter passed by the former in 1829, and agreed to and accepted by the latter. What is the obligation of it? The State obliged the corporation to pay a certain penalty in a certain contingency; for that it was to be liable, and for no more; if any law of the State imposed a larger payment in that contingency, the obligation was changed,—impaired. *Sturges* v. *Crowninshield*, 4 Wheat., 122; *Green* v. *Biddle*, 8 Id., 84; *Ogden* v. *Saunders*, 12 Id., 257.

Is there any State law imposing a larger liability than the contract contained in the charter imposes? It imposes a penalty of twelve per cent. for suspension; that is the entire liability. The act of 1824, as construed by the highest court of law in the State, imposes an additional penalty of six per cent. more. This certainly changes and impairs the obligation of the contract between the State and the bank, unless the two laws are so blended together as to be but one regulation; or the mere priority of existence of the act of 1824 makes it necessarily a part of that of 1829; or the constitutional prohibition does not apply to laws passed previously to the contract; or the effect of the law upon the contract must result directly from its own language, and not from its judicial construction or application. None of these exceptions can be successfully maintained in the present case.

The act of 1824 is not blended with that of 1829. The latter is a written instrument, deliberately drawn so as to embrace the whole subject-matter; if the provisions of the act of 1824 were part of it, this would have been so declared. The act of 1829 is not a mere legislative act, prescribing a

municipal regulation affecting citizens or corporations, but it is the agreement of the State itself, for its own benefit, securing what it claims for itself, and imposing the conditions on the other contracting party. If there were clauses in the act of 1824 less favorable to the State, could they be construed so as to affect privileges it might reserve in that of 1829? If the State had agreed, by a general law, in 1824, to advance its bonds to the amount of a million to every bank, and in 1829 agreed by the charter to advance to this bank bonds to the amount of half a million, would it be contended that the former agreement was not superseded by, but added to, the latter? It would be easy to suggest similar contingencies. No. The charter is complete, so far as regards all matters of mutual stipulation between the parties; *there is nothing in it which requires the act of 1824 to be blended with it. [*336

Nor is any inference to be drawn, by legal construction, that the parties intended to include the provisions of the act of 1824 in that of 1829, because it was then in existence, and was not expressly repealed. The facts of the case are at variance with such an implication; so is every legitimate legal inference. Were this a contract between individuals, —and so, in the cases before cited, this court has construed such charters,—unquestionably the legal presumption would be that the new superseded the existing contract. Such, too, is the presumption in legislation; a subsequent provision by law for the same subject-matter is a substitute for a previous one. General laws are so construed; where penalties are imposed, they are not treated as cumulative; where different remedies are given for the same money, both cannot be resorted to, but one or the other must be chosen. *Titcomb* v. *Union F. & M. Insurance Company*, 8 Mass., 333; *Bartlet* v. *King*, 12 Id., 545; *Adams* v. *Ashby*, 2 Bibb (Ky.), 98; *Morrison* v. *Barksdale*, 1 Harp. (S. C.), 103; *Smith* v. *The State*, 1 Stew. (Ala.), 506; *Stafford* v. *Ingersoll*, 3 Hill (N. Y.), 41; *Sharp* v. *Warren*, 6 Price, 137; *United States* v. *Freeman*, 3 How., 564; *Daviess* v. *Fairbairn*, 3 Id., 644; *Beals* v. *Hale*, 4 Id., 53. Besides, there can be no inference founded on a general legal principle which is to prevail against an inference derived from the law in the particular case. The act of 1829 provides for the entire case of suspension of payment of notes and deposits in gold and silver. Even the same court recognized it as so doing, when it was before them on another occasion. *State* v. *Commercial Bank*, 10 Ohio, 538. The only expression contained in it, which can be cited as at variance with this view, is the imposition of the

increased interest as "additional damages," which, it is contended, should be construed to be in addition to that imposed by the act of 1824. But the language does not justify this construction; the imposition of the increased interest not merely on notes, but on deposits, which are not provided for in the act of 1824, is inconsistent with it; why double the rate, if not to substitute one for the other? it was to be an increase of interest, not a penalty imposed, as is shown by the express language to that effect in the charter of the Franklin Bank, of which the provisions on this point are the same. 3 Chase's Ohio Stat., 2078. Nor do judicial interpretations of corresponding provisions warrant such a construction. *Hubbard* v. *Chenango Bank*, 8 Cow. (N. Y.), 99; *Brown* v. *Penobscot Bank*, 8 Mass., 448; *Suffolk Bank* v. *Worcester Bank*, 5 Pick. (Mass.), 106; *Suffolk Bank* v. *Lincoln Bank*, 3 Mason, 1. It is not denied that there are many cases in which laws, existing at the time of making a contract, will be regarded by courts as necessarily forming a part of it. But it is not so where the State is a party to the contract; where the law to be construed is itself the *contract; *337] where it is not apparent that the parties must have contemplated such an incorporation of previous laws. 3 Story, Com. on the Constitution, 247; 1 Kent, Com., 395. There is no decision of this court on the effect of an existing State law on a contract made by the State itself; every one relates to cases of contracts between third persons; yet even in these it has always been held that it must appear that the existing law was intended to be embraced, either from a reasonable interpretation of the terms of the contract itself, or from the place where it was made, which justifies the inference of intention that the *lex loci* was to govern. *Sturges* v. *Crowninshield*, 4 Wheat., 122; *Clay* v. *Smith*, 3 Pet., 411; *Baker* v. *Wheaton*, 5 Mass., 509, 511. The whole series of decisions in regard to the effect of State insolvent laws on contracts, and as being considered to form, by implication, a part of them, rests on this view of the subject, as does the application of the *lex loci* to the construction of them.

The prohibition of the constitution had for its object to prevent the obligation of a contract being impaired by any law whatever, no matter whether its passage was before or subsequent to the contract. The inquiry is, Does a contract exist? What is its obligation? Does a law impair it? If there is in existence a contract, valid in itself, such as the parties had a right to make, not embracing by its terms or by just legal implication the provisions of other laws, then any State law that changes or controls it, or can be so applied by

the judicial tribunals of the State as to change or control it, is contrary to the language and intention of the constitutional prohibition, no matter when such law bears date,—no matter whether its operation be prospective or retrospective,—on contracts existing when it was passed, or entered into subsequently. In the first plan of the constitution there was no such clause; it was introduced to prevent any interference by laws of the States with private contracts. It was proposed to restrict this to such State laws as were "retrospective," but that was not adopted, and the existing limitation was made with a view to reach the declared object,—"a restraint upon the States from impairing the obligation of contracts" in any way. 2 Madison Papers, 1239, 1443, 1445, 1552, 1581. The reference to a future action,—that no State "shall pass" such laws,—relates to the date of the constitution; it is a prohibition future as to that instrument, not to the contract to be affected. No State law, after the constitution should be adopted, was to impair the obligation of a contract; this was the object of the prohibition. *Calder* v. *Bull*, 3 Dall., 388; *Sturges* v. *Crowninshield*, 4 Wheat., 206; *McMillan* v. *McNeill*, 4 Id., 212; *Ogden* v. *Saunders*, 12 Id., 255.

It is evident, that, if such be the object of this prohibition of the constitution, then to make it effectual it must operate, not only where its violation is the result of the direct language of the law, but *wherever the law is so applied by that branch of the State government—its judiciary [*338 —which enforces the law, as to produce this result, to violate this prohibition. A legislative act seldom, perhaps never, violates a contract *proprio vigore;* it is the judgment of a court, applying the act to the contract, which does so; the law impairs the contract only by force of the judgment, it is indeed the law that does so, but only because the judicial application of it has given that construction and application to its provisions. If this were not so, then the law would in every case be constitutional, or the reverse, in itself, and not by reason of its application. Yet this will hardly be contended. Suppose a law confers special privileges on a corporation, and a subsequent general law forbids corporations to possess such privileges; the latter law is in itself constitutional, but if the judiciary so applies it as to infringe the privileges of the particular corporation, is it not a violation of the constitutional prohibition? On what other principle do the decisions of this court, in regard to State insolvent laws, rest? They have been held to be constitutional or the reverse, not in themselves, but according to the manner and circumstances to which they are applied by the judgment of

a court; if applied to contracts made within the State enacting it, an insolvent law is held to be valid; if applied to those made without the State, the identical law is held to be unconstutional, or, to speak more correctly, the judgment of the court founded upon it is reversed, as making the law violate the constitutional prohibition. When this whole question was so elaborately discussed by this court (*Ogden* v. *Saunders*, 12 Wheat., 255), no point received more unequivocally than this the concurring assent of the judges; they affirmed the validity of the State insolvent law, as not contrary to the constitutional prohibition in its operation on the contract, because it was made and to be executed within the State that passed the law, and on that ground Judge Johnson placed the ultimate judgment of the court. 12 Wheat., 368. In one case (*Clay* v. *Smith*, 3 Pet., 411) the contract was make in Kentucky, the suit was instituted in Louisiana, a discharge under an insolvent law of the latter was pleaded and admitted, because it appeared that the plaintiff, though a citizen of Kentucky, had received a dividend from the syndics in Louisiana; had not that circumstance occurred, the application of the law of Louisiana to the Kentucky contract would have been held to impair its obligation. Was this the law itself, or its application, which constituted the violation of the constitutional provision? There is scarcely a prohibition of the constitution that might not be evaded by State laws, if the evasion must arise necessarily from the law itself, and not from its application by the State courts. Cannot a State pass a general law placing certain restrictions on the travelling of coaches and stages, but not referring in terms, or by necessary implication, to the mail-coach, and if the highest court
*339] of the State recognizes *the law to be valid as applied to such a coach, is not that a violation of the constitutional reservation to the United States exclusively of matters connected with the post-office? Would the decision of the State court be affirmed by this court, or, what is equivalent thereto, jurisdiction over it be declined, on the ground that it was a mere judicial misconstruction of the State law? A State may pass a law requiring, in general terms, the captain of a vessel to adopt certain sanatory regulations on board, to carry certain lights, to steer in a certain way so as to avoid collisions, and impose a penalty for neglect; but if the highest court of the State sustained a suit to recover the penalty, when it appeared that the violation of the law was in the course of a foreign voyage, and not within the local jurisdiction of the State where its authority to enforce police regulations prevails, would not that judgment be subject to the re-

vision of this court? A State has a right to borrow money; it may pass a law authorizing its executive to do so on the faith of the State; if in so doing he should issue "bills of credit," and the highest court of the State should sustain their legality as founded on that law, would this court refuse to revise that judgment, on the ground that the law itself was constitutional, and that its application to the particular case was a mere act of the court, not contemplated by the State legislature, and therefore not violating the constitutional prohibition?

Again; it is not alone on the language itself of the State law, it is on its construction also by the State court, that the supervising judgment of this tribunal will be founded. The decision of a question arising under a local law of a State by its highest judicial tribunal is regarded by this court as final, not because the State tribunal has power to bind it, but because it has been deliberately held and decided that "a fixed and received construction by a State in its own courts makes a part of the statute law." *Elmendorf* v. *Taylor*, 10 Wheat., 152; *Shelby* v. *Guy*, 11 Id., 361; *Green* v. *Neal*, 6 Pet., 298. We have here a local law of the State of Ohio; referring to the law itself, we find it to contain nothing which impairs the obligation of the contract between the State and the Commercial Bank of Cincinnati, nothing which violates the constitutional prohibition; it has received a construction by the highest State tribunal which makes it a law impairing that contract, violating that prohibition; that construction has therefore become "a part of the statute law," as fully as if it were in terms contained in it; the judgment of the Supreme Court of Ohio is founded upon the law as so construed; this court, in revising that judgment, would not, under its own well-considered decisions, give a different construction to a local law; much less would it do so when the effect would be to sanction, under the form of a judicial proceeding, an infringement of a constitutional prohibition.

The legislation of Congress also seems to have contemplated the enforcement of this constitutional prohibition, where its infringement *arises from the judicial construction of a State law. The constitution prohibits [*340
the passage of a State law impairing the obligation of a contract. It leaves to Congress the legislation necessary to enforce this prohibition. How has Congress enforced it? Not by reserving to itself a direct supervision of the State laws; not by subjecting them to a direct supervision of the Supreme Court of the United States; but by requiring that they should first be passed upon and construed by the highest court of the

State itself, and that, if the judgment of that court so construes them, or gives them such validity, as to make them repugnant to the constitutional provision, then this court may reverse such judgment, and by so doing make void such an application of the law. What could be the object of this act of Congress, if it was not to sanction a revision of a judgment of the highest court of a State, founded upon its construction of a State law,—upon its holding a State law so construed to be valid,—whether that construction was in itself right or wrong, whenever the direct effect of such judgment was to impair, under color of that law, the obligation of a contract?

Even the language of the constitution itself is more comprehensive than if it meant to prohibit an infringement of its provision by a mere legislative "act"; it seems to use the term "law" in a broader sense, as if it was the complete and sovereign action of a State, commenced by its legislature but consummated by its judiciary. In another section, where it draws the distinction between the actions of these branches of the State government (art. 4, § 1), it refers to "public acts" and "judicial proceedings." Did it not mean by a "law" the union of the two? In the clause of the ordinance for the government of the Northwest Territory, intended to embrace the same object as that of the constitution, and adopted by the Continental Congress almost at the same time, it was declared that no such law ought ever to be made "or have force,"—as if any enforcement of it, whether legislative, executive, or judicial, was as much to be guarded against as its formal enactment. 1 Stat. at L., 51.

Is not the case now before the court exactly that which was adverted to by Judge Trimble, as within the intent and operation of the constitutional prohibition (12 Wheat., 316), where a law might in itself produce no effect prohibited by the constitution, yet would do so when applied to a case differently circumstanced? He held that the "only necessary inquiry" was, What was "its effect and operation" in the suit upon the particular contract,—whether that effect was to impair its obligation? What has been the effect and operation of applying the act of 1824 to the suit which has been brought upon this contract of 1829; has it not been to impair its obligation? Such, too, is the whole scope of Chief Justice Marshall's remarks in the same case (12 Wheat., 337), where he denies that the constitutional prohibition is confined to "such laws only as only *operate of themselves." He says that the law itself, at its passage, may have no effect whatever on the contract, and asks,—"When, then,

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does its operation (in violation of the constitutional prohibition) commence? We answer, when it is applied to the contract; then, and not till then, it acts on the contract, and becomes a law impairing its obligation." Can language lay down a legal principle more directly applicable to the case before the court than this? can there be any doubt that the principle itself is in entire harmony at once with the language and the object of the constitutional prohibition?

It is submitted, therefore, that there is no circumstance to withdraw this application of the act of 1824 to the charter of the Commercial Bank of Cincinnati from being included within the constitutional prohibition as impairing its obligation. If this has been established, then it is clear that the judgment of the Supreme Court of Ohio, recognizing that act as valid when so applied, may and ought to be reversed by this court; for it appears by the record that the validity of the State law was drawn in question on that ground in the State court, and its validity there affirmed. *Miller* v. *Nichols*, 4 Wheat., 311; *Wilson* v. *Blackbird*, 2 Pet., 250; *Satterlee* v. *Mathewson*, 2 Id., 409; *Harris* v. *Dennie*, 3 Id., 292; *Crowell* v. *Randell*, 10 Id., 391.

Mr. Justice GRIER, after giving the statement of the case which is prefixed to this report, proceeded to deliver the opinion of the court.

The first and only question necessary to be decided in the present case is, whether this court has jurisdiction.

To bring a case for a writ of error or an appeal from the highest court of a State, within the twenty-fifth section of the Judiciary Act, it must appear on the face of the record,—1. That some of the questions stated in that section did arise in the State court; and, 2. That the question was decided in the State court, as required in the section.

It is not enough, that the record shows that "the plaintiff in error contended and claimed" that the judgment of the court impaired the obligation of a contract, and violated the provisions of the constitution of the United States, and "that this claim was overruled by the court"; but it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment. Let us inquire, then, whether it appears on the face of this record, that the validity of a statute of Ohio, "on the ground of its repugnancy to the constitution or laws of the United States" was drawn in question in this case.

The Commercial Bank of Cincinnati was incorporated by

an act of the legislature of Ohio, passed on the 11th of February, 1829, which provided, that, in case that the bank *342] should at any time *suspend payment, and refuse or delay to pay in gold or silver any note or bill on demand, it should be "liable to pay, as additional damages, to the holder of such notes twelve per cent. per annum on the amount thereof, for the time during which such payment shall be refused or delayed." By a previous act of 24th of January, 1824, all banks had been declared liable to pay six per cent. interest on their notes, when they had refused payment on demand, from the time of such demand or refusal, "or from the time that such bank or banker shall have ceased or refused to redeem his notes with good and lawful money of the United States." The only question which arose on the trial of the case was, whether the bank was liable to pay the twelve per cent. in addition to the interest of six per cent. given by the act of 1824, or only the twelve per cent. imposed by the act of incorporation.

Did the decision of this point draw in question the validity of either of these statutes, on the ground of repugnancy to the constitution of the United States? Or was the court merely called upon to decide on their construction?

We are of opinion that there can be but one answer to these questions, and but few words necessary to demonstrate its correctness.

It is too plain for argument, that, if the act of incorporation had stated, in clear and distinct terms, that the bank should be liable, in case of refusal to pay its notes, to pay twelve per cent. damages in addition to the interest of six per cent. imposed by the act of 1824, the validity of neither of the statutes could be questioned, on account of repugnancy to the constitution. But the allegation of the plaintiffs' counsel is, that the statute of 1824 was not intended by the legislature to apply to their charter, and that the court erred in their construction of it; and therefore made it unconstitutional by their misconstruction. A most strange conclusion from such premises.

But grant that the decision of that court could have this effect; it would not make a case for the jurisdiction of this court, whose aid can be invoked only where an act alleged to be repugnant to the constitution of the United States has been decided by the State court to be valid, and not where an act admitted to be valid has been misconstrued by the court. For it is conceded that the act of 1824 is valid and constitutional, whether it applies to the plaintiffs' charter or not; and if so, it follows, as a necessary consequence, that the

question submitted to the court and decided by them was one of construction, and not of validity. They were called upon to decide what was the true construction of the act of 1829, and what was the meaning of the phrase "additional damages," as there used, and not to declare the act of 1824 unconstitutional. If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be, not whether the statutes of Ohio are repugnant to the constitution of the United States, but *whether the Supreme Court of Ohio has erred in its construction of them. It is the peculiar province and [*343 privilege of the State courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretence that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary.

We are of opinion, therefore, that this case must be dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Ohio, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed, for the want of jurisdiction.

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JOHN SCOTT AND CARL BOLAND, PLAINTIFFS IN ERROR, *v.* JOHN JONES, LESSEE OF THE DETROIT YOUNG MEN'S SOCIETY, DEFENDANTS IN ERROR.

An objection to the validity of a statute, founded upon the ground that the legislature which passed it were not competent or duly organized, under acts of Congress and the constitution, so as to pass valid statutes, is not within the cases enumerated in the twenty-fifth section of the Judiciary Act, and therefore this court has no jurisdiction over the subject.[1]

In order to give this court jurisdiction, the statute the validity of which is drawn in question must be passed by a State, a member of the Union, and a public body owing obedience and conformity to its constitution and laws.

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[1] *S. P. Permoli* v. *New Orleans*, 3 How., 589.