HAWTHORNE *v.* CALEF.

A State statute repealing a former statute, which made the *stock* of stockholders in a chartered company liable to the *corporation's* debts, is, as respects creditors of the corporation existing at the time of the repeal, a law impairing the obligation of contracts, and void. And this is so, even though the liability of the stock is in some respects conditional only; and though the stockholder was not made, by the statute repealed, liable, in any way, in his *person* or property generally, for the corporation's debts.

THE Constitution of the United States ordains that "no State shall pass any law impairing the obligation of *contracts.*" With this provision in force, the State of Maine, on the 1st April, 1836, incorporated a railroad company; the charter providing that "the *shares* of the individual stockholders should be liable for the *debts of the corporation.*" "And in case of *deficiency of attachable corporate property or estate,*" the provision went on to say, "the *individual property, rights, and credits* of any stockholder shall be liable to the *amount of his stock*, for all *debts of the corporation* contracted prior to the transfer thereof, for the term of six months after judgment recovered against said corporation; and the same may be taken in *execution on said judgment*, in the same manner as if said judgment and execution were against him individually; OR, said creditor, after said judgment, may have his *action on the case* against said individual stockholder; but in no case shall the *property, rights*, and *credits* of said stockholder be taken in execution, or attached as aforesaid, beyond the *amount of his said stock.*" Another section provides, that if sufficient corporate property to satisfy the execution could not be found, the officer having the execution should certify the deficiency on the execution, and give notice thereof to the stockholder whose *property he was about to take;* and if such stockholder should show to the creditor or officer sufficient attachable *corporate* property to satisfy the debt, "his *individual property, rights, and credits shall thereupon be exempt* from attachment and execution."

The plaintiff, Hawthorne, who had supplied the corporation, then embarrassed and insolvent, with materials to build its road, having obtained judgment as a creditor against *it*, and being unable to get from *it* satisfaction (the company having, in fact, no property), sued the defendant, Calef, who was a stockholder, both at the time when the debt was contracted and when judgment for it was rendered; and no transfer of whose stock had been made. A few months *after* the debt was contracted, the legislature of Maine passed a statute repealing the "individual liability" clause of the charter.

On a question before the Supreme Court of Maine,—the highest court of law in that State,—whether such repeal was or was not repugnant to the clause, above cited, of the Constitution, that court held that it was not; that the original provision,—not making the stockholder *personally* liable in any way,—did not constitute a "contract" between the creditor and him, within the meaning of the Constitution; and that, while, *but* for the repealing act, the plaintiff would have been entitled to recover of the stockholder individually to the extent of his stock, this repealing act had taken away and destroyed such right.

Judgment being given accordingly, by the said court, in favor of the State statute, the correctness of such judgment was now, on error, before this court.

Mr. Curtis, for the creditor, Hawthorne: A charter is a contract between the State and the corporation; but not necessarily between them only. If it contain provisions on which third persons are invited to give credit, and which hold out assurances to them that if they will give credit a certain fund, or certain persons, will become responsible, such assurances, when accepted and acted on, become a contract, the obligation of which is protected by the Constitution. Thus in *Woodruff* v. *Trapnal*,* a charter contained the assurance that the bills of a bank would be accepted in payment of public dues. This was held to create a contract with all

* 10 Howard, 190.

Argument for the creditor.

persons who should receive the bills while the assurance remained unrepealed. So in *Curran* v. *The State of Arkansas*,* the charter of a bank contained an assurance that a certain fund should be responsible for the debts of the bank, and this was held to amount to a contract with creditors not to divert that fund from the payment of their debts. It has been held by the courts of New York, that such an act of incorporation as this is leaves the stockholders to stand as original contractors, and liable, as such original contractors, for the debts of the corporation; and the fact that the legislature has required the remedy against the corporation to be exhausted before proceeding against the stockholder does not vary the nature or ground of his liability. In *Corning* v. *McCullough*,† the court say:

"The original stockholders, by their acceptance of the charter, and subsequent purchasers in becoming members, assented and agreed to the terms and conditions of the act of incorporation. The defendant in this suit, in common with the other stockholders, by his acceptance of the charter, agreed to its terms, and especially to that feature of it so strongly marked, of the individual liability of the stockholders, equally with that of the corporate body, for the debts of the company. It is a liability which every stockholder must be understood to assume and take upon himself, and to be under to those who deal with the company. Dealers contract with the corporation on the faith of that security for the performance of the contract. The credit they give is given, and they trust as well to the personal liability of the stockholders, as to the responsibility of the corporation, for the fulfilment of the engagement; and each stockholder incurs that liability to the creditor the moment the contract of such creditor with the company is consummated."

In *Conant* v. *Van Schaick*,‡ the question now under consideration arose; and it was held that a law repealing the liability of stockholders was inoperative as to existing creditors, because it would impair the obligation of their contracts.

Even if it should be held that no contract existed with

* 15 Howard, 304. † 1 Comstock, 47. ‡ 24 Barbour, 87.

the plaintiff, save his contract with the corporation; still, the law in question did impair the obligation of *that* contract. When the debts were contracted the plaintiff had two remedies: one against the corporation, the other against the stockholders. The former was, and was known to be, wholly useless; the latter was sufficient and effectual; and the law in question has destroyed this sole efficient and effectual remedy, and substituted no other in its place. Such a law impairs the obligation of the contract, to enforce which the remedy was given. The principle which is decisive of this case, was laid down in *Green* v. *Biddle*.* That principle is, that a law, which so changes the nature and extent of existing remedies as materially to impair the rights of the creditor, impairs the obligation of his contract.

In *Bronson* v. *Kinzie*,† the State law restrained the creditor from cutting off the right of redemption of mortgaged property, by a sale under a power contained in the mortgage; and gave twelve months, after such sale, to redeem the property. It did not affect the plaintiff's right of action against the debtor to recover the debt. It did not release the property held as collateral security for the debt; but it encumbered the remedy of the creditor upon his collateral security, so as materially to impair it. *For this reason* the law was held invalid.

In the case at bar, while the law in question does not affect the plaintiff's right of action against an insolvent corporation which contracted the debt, it deprives him of all recourse to his remedy on the property of the stockholders, which the charter had made liable for the debt. The difference between the two cases is, that, in the case decided, the collateral remedy for the debt was only materially impaired; in the case at bar it is destroyed.

In *McCracken* v. *Hayward*,‡ it was decided that a law prohibiting property from being sold on execution for less than two-thirds of its appraised value, so impaired the remedy as to be invalid, upon the ground that, when the contract was

* 8 Wheaton, 1. † 1 Howard, 311. ‡ 2 Howard, 608.

made, the creditor had the absolute right to levy his execution and sell the property of the debtor. Now in the case at bar, the charter of the corporation and the law of the State had conferred on the creditor the right to levy his execution on the property of the stockholders, or to subject their property to the payment of the debt by an action on the case. These laws of the State had, in the language of the court, created this right, and attached it to the contract; it was part of its obligation. As was said by the court, in *Curran* v. *The State of Arkansas*, "The obligation of a contract, in the sense in which these words are used in the Constitution, is that duty of performing it which is recognized and enforced by the laws. And if the law is so changed, that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same.'

Mr. Shepley, *contra*, *for the stockholder*, *Calef:* There was no privity of contract between the creditors of the corporation and the individual members. They are, therefore, not personally liable, unless this liability is expressly imposed by statute. "Such liability," says Shaw, C. J., in *Gray* v. *Coffin*,* "is a wide departure from the established rules of law, and is, therefore, to be construed strictly, and is not to be extended beyond the limits to which it is carried by positive provisions of the statute."

Then the provisions relied on to give this personal responsibility recognize the corporation as an entity, capable of contracting debts; and these are *its* debts, and not the debts of any other party. No other *person* is made liable for them; nor is even any other thing made liable for them, originally, or absolutely, or wholly, or permanently. "The *shares* of individual stockholders shall be liable for the *debts of the corporation.*" And only in *case of deficiency* of attachable corporate property, the *individual property*, *rights*, *and credits* of any stockholder shall be liable, to the *amount of his stock.*

* 9 Cushing, 192.

This property might be taken on the execution, which had been issued on the judgment against the corporation, to which the stockholder was *no* party; OR, the creditor might have his action on the case, on the statute; manifestly to reach, by the process of foreign attachment, the "rights and credits," which could not be reached by the execution against the corporation. But in no case could property, rights, and credits of a stockholder be taken in execution or attached, beyond the amount of his stock. And the stockholder could exempt his property entirely from the execution and attachment, by disclosing and showing sufficient attachable corporate property.

In all this, there is no recognition of any contract on the part of the stockholder, or liability under contract. The remedy, to enforce whatever liability the statute creates, *excludes* the theory of contract. It is a statute remedy, to enforce a statute burden against the *property* of the stockholder.

What, then, the plaintiff had, was a remedy created by statute. And the legislature has power to take away by statute that remedy which statute alone gave. The exception is, that it may not take away vested rights. But the rights of a party, when they exist only to the extent of statute remedy, are not vested until after judgment.

It will be conceded that the legislature might take away and destroy all legal process for compelling the corporation to perform its contract, and still leave the liability of the stockholder's property, and the creditor's statute right against that, unimpaired. So it may take away and destroy all power to enforce any rights against the stockholders, or their property, and leave the obligation of the corporation's contract unimpaired.

The obligation of the maker of a promissory note is different from that of the indorser or guarantor of the same note. But the holder has two remedies,—one against the maker, the other against the indorser or guarantor. A law which should take away the remedy against the indorser or guarantor, would not impair the obligation of the maker's contract expressed in the note,—though it would impair the obligation of the contract with the indorser or guarantor. If, now, the liability of the indorser or guarantor, instead of arising from a contract, were arbitrarily imposed by a statute, which declared, that whenever a promissory note was made for a good consideration, certain relatives of the maker, or neighbors, or religious, or literary, or political, or business associates of his, should be liable, as guarantors or indorsers of such note, who would be bold enough to contend, that the repeal of such statutory liability would impair the obligation of the contract between the maker and the payee of such note? It would add no strength to an argument in support of such a proposition, to say, that when the payee of the note parted with the consideration for it, he trusted to this liability which the statute imposed; or that the maker was insolvent, and the remedy against him was insufficient and useless, and that the repeal of the statute liability of the other persons had taken away and destroyed the only sufficient remedy which the payee had.

As respects the authorities cited by Mr. Curtis: *Woodruff* v. *Trapnal*, and *Curran* v. *The State of Arkansas*, were both decisions on the same charter, that of an Arkansas bank, and both rested upon special facts.

The legislature of Arkansas had chartered a banking corporation, of which the State was the sole owner; and in the charter had declared that the bills of this bank, which was nothing but an agent of the State itself, should be received in payment of debts due to the State. The bank, by its charter, was simply a convenient agent of the State to negotiate between the State and third parties, and its bills were substantially bills of the State of Arkansas.

Speaking in another case* of its own decision, in *Woodruff* v. *Trapnal*, this court has said:

"We held that the charter constituted a contract between the State and the holder of the bills of the bank; that the pledge of the State to receive the notes of the bank, in payment of debts,

* Paup et al. *v.* Drew, 10 Howard, 218.

was a standing guarantee, which embraced all the paper issued by the bank until the guarantee was repealed: *and that this construction was founded upon the fact, that the bank belonged exclusively to the State, was conducted by its officers, and for its benefit.* That, in this respect, the obligation of the contract applied to a State equally as to an individual; and that as to the binding force of a similar guarantee by an individual, there would seem to be no ground for doubt."

To make the case at bar analogous to this, the stockholders of *our* railroad company should be the supreme power which chartered the company; so that the *charter*, instead of being a contract between the State and the stockholders, should be a contract between the stockholders who created it, and the community who accepted and acted upon its guarantees, voluntarily inserted in it by these stockholders. The State of Arkansas had, in the cases relied on, *promised* to receive the bills of their bank, expressly, by its charter, made by the State. The stockholders of this railroad company simply submitted to "*liabilities* and *duties*," to which the legislature compelled them to be "*subject.*"

The New York decisions furnish still less support to the plaintiff's counsel. The passage from the opinion in *Corning* v. *McCullough*, in its reasoning, does, indeed, *primâ facie*, sustain this position; and if, as the counsel affirms, this reasoning were predicated upon "*such* an act of incorporation" as that which incorporated the railroad company in Maine, it would have some weight, though it would not, to this court, be an authority. But the language of the charter there was, "that the *stockholders* of the corporation shall be, *jointly and severally*, *personally* liable for the *payment of all debts and demands* contracted by the corporation." By their charter, those stockholders were liable for the payment of *all* debts and demands, not *of* the corporation, but contracted by the corporation. They were the stockholders' debts, as well as the debts of the corporation,—contracted by the corporation, as if *it* were the agent of the stockholders. The stockholders were liable; not the "property, rights, and credits" of the stockholders, nor their "*shares*," but the men themselves. They were liable for the *payment of all debts and demands;* not to the amount of their stock or shares which they severally owned, only. They were liable in the first instance, at the very creation of the debt or demand; not only in case of deficiency of corporate property. They were liable permanently; as long as the debt remained a debt; not for a year only after the transfer of their stock, or six months after judgment recovered against the corporation, on a suit brought within such year; but *forever*, if the debt was kept alive; without any power of exonerating themselves by showing corporate property.

When *Conant* v. *Van Schaick*—the other New York case relied on—was decided, a general statute of the State had created certain corporations, by language precisely identical with that in the charter considered in *Corning* v. *McCullough;* and the liability of stockholders of one of these corporations was, on the authority of *Corning* v. *McCullough*, held to rest on a contract, at common law, and, *therefore*, a statute repealing such liability was held to impair the obligation of a contract.

Reply: The only question is, whether, when the repealing law destroyed the existing right of action by the plaintiff against the defendant to recover from him the amount of the debt due to him from the corporation, it impaired the obligation of a contract? One argument of the other side is, that the right of the plaintiff was *created by statute;* that the legislature have power to take away by statute what was given by statute, except vested rights; and that the right of a party when it exists *only* by statute, does not become vested till after judgment. But this is erroneous doctrine when applied to this case.

1. The *right* of the plaintiff was not *created* by statute, and did not exist "only by statute." It is true there was a statute in existence which enacted that if the plaintiff should sell merchandise to a corporation which should fail to pay for it, he should have a right of action against any one of its stockholders to recover its price, to the amount of his stock.

But this law did not *create* the plaintiff's *right*. This plaintiff parted with his merchandise to an insolvent corporation *on the faith of this liability which the defendant, by taking stock, had assented to be subject to.* The only effect of the law was to apprise the parties that if such a sale should be made, the defendant would come under a legal obligation to the plaintiff to pay the debt, and to create that legal obligation upon the sale; just as the law apprises the vendee of goods, that he will come under a legal obligation to the vendor for the price, and creates that legal obligation on the sale. The right in neither case is created by the law alone; but in both cases the law does create the legal obligation; and in one case just as entirely as in the other. It may be true that a statute may take away what a statute has given, except vested rights. But the question still remains whether this plaintiff had not a vested right to the obligation of the defendant, and to some adequate remedy to enforce that obligation. In *McCracken* v. *Hayward* the right of the plaintiff to sell the defendant's property on execution was given by a State law. Yet it could not be taken away or impaired by a State law, because the creditor had a vested right to some adequate remedy, such as existed when his contract was made. This plaintiff sold his property to an insolvent corporation on the faith of the obligation of the defendant to pay for it, and of the remedy the law then allowed him to enforce the obligation of the defendant to perform the contract.

If A. is under a complete legal obligation to B. to perform the contract of C., which B. can enforce by an action against A., and which contract B. made on the faith of A.'s obligation to perform it, has not B. a vested right to have A. perform the contract? and can A.'s obligation be released by law without impairing the obligation of a contract, within the meaning of the Constitution? It is A.'s duty to perform the contract. *That duty is recognized and enforced by the law.* The law is so changed that this duty can no longer be enforced. The obligation of the contract which A. was under is released. Is it any answer that C., an insolvent debtor, is yet under the obligation of the contract? The contract created two perfect and complete and several obligations,—one of A., the other of C. One is as much the obligation of the contract as the other.

It is an unfounded assumption that the *obligation* of a contract can be incumbent only on *the party that makes the promise.*

The obligation of a contract is a duty of performing it recognized and enforced by the laws. An executor or administrator, though he has made no promise, is under a legal duty to perform the contracts of the deceased; *the obligation of the contract is incumbent on him;* and a State law releasing him would as clearly impair the obligation of the contracts of the deceased as a law releasing the living debtor. So a husband is bound to perform the contracts of his wife before marriage. Without making any promise, he takes on himself the legal duty of performing these contracts of hers, by voluntarily entering into the marital relation at a time when and place where the law made this duty incumbent on him. Could he be released without impairing the obligation of such contracts? For still stronger reasons was the obligation of this contract incumbent on the defendant. He voluntarily entered into such relations with this corporation as created a perfect legal obligation to pay this debt when it was contracted, and the plaintiff parted with his property to an insolvent corporation on the faith of this legal obligation incumbent on the defendant.

The defendant's counsel has pointed out a supposed distinction between the cases cited from the New York reports and this case. It is that, in those cases, the charters made the stockholders jointly and severally *liable* for all the debts and demands *contracted by the corporation. But the defendants were not contractors.* The contracts were made by a third person, viz., the corporation. The relation of the stockholders to the contracts *was not created by the contracts themselves, but by the law*, as in this case; and the obligation of this defendant to perform this contract is as complete and perfect, and arises from the same causes as the obligations of the defendants in the cases in New York.

In those cases, as in this case, there was a liability created by law, and made incumbent on one person to perform the contracts of another person. If that liability could not be discharged without impairing the obligation of a contract, how can this liability be discharged without a similar violation of the Constitution?

Mr. Justice NELSON delivered the opinion of the court.

The question upon the provisions of the charter of the railroad company—in connection with the sale of the property by the plaintiff to the corporation, out of which this debt accrued—is, whether a contract, express or implied, existed between him and the stockholder?

It is asserted, in behalf of the latter, that a contract existed only between the creditors and the corporation; and that the obligation of the stockholder rests entirely upon a statutory liability, destitute of any of the elements of a contract.

Without stopping to discuss the question upon the clause of the statute, we think that the case falls within the principle of *Woodruff* v. *Trapnal*,* and *Curran* v. *State of Arkansas*,† heretofore decided in this court.

In the first of these cases, the charter of the bank provided that the bills and notes of the institution should be received in all payment of debts due to the State. The bank was chartered 2d November, 1836. On the 10th January, 1845, this provision was repealed, and the question was, whether or not, after this repeal, the bills and notes of the bank, outstanding at the time, were receivable for debts due to the State. The court held, after a very full examination, that the clause in the charter constituted a contract with the holders of the bills and notes on the part of the State, and that the repealing act was void as impairing the obligation of the contract.

* 10 Howard, 190.

† 15 Id., 304.

In the second case, the charter of the bank contained a pledge or assurance that certain funds deposited therein should be devoted to the payment of its debts. It was held by the court, that this constituted a contract with the creditors, and that the acts of the legislature withdrawing these funds were void, as impairing the obligation of the contract.

Now, it is quite clear that the personal liability clause in the charter, in the present case, pledges the liability or guarantee of the stockholders, to the extent of their stock, to the creditors of the company, and to which pledge or guarantee the stockholders, by subscribing for stock and becoming members of it, have assented. They thereby virtually agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability.

This question has been repeatedly before the courts of the State of New York, and they place the obligation of the stockholders upon two grounds. The *first* is that of contract. In *Corning* v. *McCullough*,* Chancellor Jones, then in the Court of Appeals, observes that the liability of the defendant, upon which the action is grounded, is for the payment of a debt of the company incurred by the purchase of merchandise of the plaintiffs, for the use and benefit of the company, and wherein the defendant, as one of the members, was interested, and for which he thereby, and under the provisions of the charter, became and was, concurrently with the company, from the inception of the debt, personally liable. It is, he says, virtually and in effect, a liability upon a contract and the mutual agreement of the parties; not, indeed, in form an express personal contract, but an agreement of equally binding obligation, consequent upon and resulting from the acts and admissions or implied assent of the parties. The *second* ground is upon the view that the legislature, by subjecting the stockholders to personal liability for the debts of the company, thereby removed the corporate protection

* 1 Comstock, 47, 49.

from them as corporators, and left them liable as partners and associates as at common law.*

There is another view of the case, involving a violation of the principal contract between the creditors and the corporation, which we think equally conclusive against the judgment of the court below. This view rests upon a principle decided in *Bronson* v. *Kinzie*,† and the several subsequent cases of this class. There Kinzie executed a bond mortgage to Bronson, conditioned to pay $4000 on the 1st of July, 1842, and covenanted, that in case of default, the mortgagee should sell the premises at public auction, and convey them to the purchaser. Subsequently to the execution on the mortgage, the legislature passed a law that mortgagors on a sale of the premises, under a decree of foreclosure in chancery, should have a right to redeem them at any time within twelve months from the day of sale. By another law it was provided, that when the premises were offered for sale, they should not be struck off unless at two-thirds of a previous valuation. The court held that these acts so seriously affected the remedy of the mortgagee as to impair the obligation of the mortgage contract within the meaning of the Constitution, and declared them void. Now, applying the principle of this class of cases to the present one, by the clause in the charter subjecting the property of the stockholder, he becomes liable to the creditor, in case of the inability or insolvency of the company for its debts, to the extent of his stock. The creditor had this security when the debt was contracted with the company over and above its responsibility. This remedy the repealing act has not merely modified to the prejudice of the creditor, but has altogether abolished, and thereby impaired the obligation of his contract with the company.

We are of opinion, upon both of the grounds above recited, that the court below erred.

JUDGMENT REVERSED.

* Conant *v.* Van Schaick, 24 Barbour, 87.

† 1 Howard, 311.