

Satterlee Vs. Mathewson

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Appellant : Satterlee

Respondent : Mathewson

Judgement :

Satterlee v. Mathewson - 27 U.S. 380 (1829)

U.S. Supreme Court Satterlee v. Mathewson, 27 U.S. 2 Pet. 380 380 (1829)

Satterlee v. Mathewson

27 U.S. (2 Pet.) 380

ERROR TO THE SUPREME COURT

OF THE STATE OF PENNSYLVANIA

SYLLABUS

S. and R. M. held land in Luzerne County, Pennsylvania, in common under a Connecticut title. A division of the land was made between them, and S. became the tenant of M. of his part of the land thus set off in severalty, under a lease, to be

terminated on a notice of one year. S. afterwards obtained a Pennsylvania title to the land leased to him by M. and on a trial in an ejectment for the land brought by M against S., the Court of Common Pleas of Bradford County, Pennsylvania, held that S., having held the land as tenant of M., could not set up a title against his landlord. Upon a writ of error to the Supreme Court of Pennsylvania in 1825, it was held that the relation between landlord and tenant could not exist between persons holding under a Connecticut title. The Legislature of Pennsylvania, on 8 April, 1826, passed an act declaring that

"The relation of landlord and tenant should exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as"

between citizens of the commonwealth.

The case came again before the Supreme Court of Pennsylvania, and the judgment of the Court of Common Pleas of Bradford County in favor of M., the landlord, was affirmed, that court having decided that the act of assembly of 8 April, 1826 was a constitutional act and did not impair the validity of any contract. S. brought a writ of error to this Court, claiming that the act of the Assembly of Pennsylvania of 8 April, 1826, was unconstitutional. *Held* that the act was constitutional.

Objections to the jurisdiction of this Court have been frequently made on the ground that there was nothing apparent on the record to raise the question whether the court from which the case had been brought had decided upon the constitutionality of a law, so that the case was within the provisions of the 25th section of the Judiciary Act of 1789. This has given occasion for a critical examination of the section, which has resulted in the adoption of certain principles of construction applicable to it. One of those principles is that if the repugnancy of a statute of a state to the Constitution of the United States was drawn into question or if that question was applicable to the case, this Court has jurisdiction of the cause 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 the state to any part of that Constitution was drawn into question.

There is nothing in the Constitution of the United States which forbids the Legislature of a state to exercise judicial functions.

There is no part of the Constitution of the United States which applies to a state law which divested rights vested by law in an individual, provided its effect be not to impair the obligation of a contract.

In the case of [Fletcher v. Peck](#), 6 Cranch 87, it was stated by THE CHIEF JUSTICE that it might well be doubted whether the nature of society and of government do not prescribe some limits to the legislative power, and he asks

"if any be prescribed, where are they to be found, if the property of an individual,

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fairly and honestly acquired, may be seized without compensation?"

It is nowhere intimated in that opinion that a state statute which divests a vested right is repugnant to the Constitution of the United States.

In 1784 or 1785, Elisha Satterlee, the father of the plaintiff in error, and Elisha Matthewson, the husband of the defendant in error, the defendant in error being the sister of Elisha Satterlee, went to a large body of land in Lezerne County, Pennsylvania, part of which was the land in controversy, and both took possession of the same under, as is believed, a supposed title from the Susquehanna Company. They worked on the lands in partnership, the same lying on both sides of the Susquehanna River, until 1790, when it was agreed that Matthewson, who had a house on the west side of the river, should occupy the land before held in common, on that side, and become the tenant of Satterlee for his portion of the land on the said west side of the river, and Elisha Satterlee moved on the lands on the east side, on precisely the same terms; that is that he should become the tenant of Matthewson for his portion of the land on the said east side of the river. By this arrangement each became possessed in severalty of the particular portion of the lands thus allotted to him, and the tenant to the other of portions of the land before held in common, and it was expressly agreed that either of the parties

might put an end to the tenancy at the end of anyone year, and in that case each was to be put into possession of his own lands.

In 1805, Elisha Matthewson died, having bequeathed by his will to his widow during life and to his children after her death the interest he had in the said land. Elisha Satterlee repeatedly, after Matthewson's death, acknowledged the original bargain and that he was a tenant of Matthewson's part, but he wished to buy it; he wished to give other lands for it, &c.;, but his sister could only sell for life, and her children were minors. In 1810, she built a house on part of the tract and put a tenant in it, but her brother would not give her possession of the part he had in cultivation. In 1811, she made application to the land office of

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Pennsylvania, and on 7 January, 1812, took out a warrant in her name in trust for her children, and had the land surveyed, and obtained a patent for it from the Commonwealth of Pennsylvania. She stated in her application an improvement made by her husband in 1785, and paid interest to the state on the purchase moneys from the date of the improvement. After his sister's warrant, survey, and return, Elisha Satterlee purchased a Pennsylvania title commencing in 1769, and consummated by a patent from the commonwealth in 1781, which he alleged covered the land in question, but he directed the deed to be made to his son, J. F. Satterlee, the plaintiff in error, and 1813 an ejectment was instituted in the name of the son against the father, in pursuance of a plan of the father's to release him from the situation of tenant to his sister. By a law of Pennsylvania then in existence but since repealed, a rule of reference might be entered the same day the writ was taken out, and by diligence a plaintiff might obtain a report of arbitrators, which had the effect of a judgment, before the return day of the writ.

This proceeding was, by means of the father's waiving all objections as to time and notice, so carried on as that the son not only had judgment, but a writ of possession before the return of the writ.

J. F. Satterlee then gave to his father a lease for life of the land for the consideration of one dollar. Elizabeth Matthewson instituted an ejectment. J. F. Satterlee, in 1817, procured himself to be entered co-defendant in the suit, and, his father being dead, is now sole defendant.

On the trial of the cause, the defendant made title under an application of John Stoner of 3 April, 1769. Stoner conveyed to Mr. Slough, who in 1780 conveyed to Joseph Wharton. A patent issued to Wharton in 1781, and he in April, 1812, conveyed to the defendant. The judge of the Court of Common Pleas of Bradford County instructed the jury that if they found the ejectment brought by the son of J. F. Satterlee, in whose name the conveyance was taken, was actually instituted by the father, though in his son's name as agent for himself, and that the suit was all a trick, and so

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conducted on purpose to prevent his sister from interfering or being heard that he was still her tenant as much as if no such proceeding had taken place. But if the son was the real purchaser and the suit was instituted and conducted *bona fide*, and the lease to the father during life for a dollar a year was *bona fide*, that then E. Satterlee having been evicted by due course of law, might take a lease from him who recovered, and in that case the relation of landlord and tenant between him and his sister was at an end, and the cause must be decided upon the respective titles of the parties. But if they found him still a tenant, he could not set up against his landlord an adverse title, purchased during his life. But he must restore his possession to his landlord, and might then institute a suit on the title he had purchased, and if it was the best, recover from his former landlord. The verdict and judgment were for Mrs. Matthewson.

The case was removed by writ of error to the Supreme Court of Pennsylvania. On the argument of this cause before the supreme court, it was decided -- "That the relation between landlord and tenant could not exist between persons holding under a Connecticut title." And that court, in 1825, reversed the judgment of the common pleas and awarded a *venire facias de novo*.

Immediately after this decision, on 8 April, 1826, the Legislature of Pennsylvania passed an act, by which it was enacted

" That the relation of landlord and tenant should exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants, as between other citizens of the commonwealth. "

The ejectment depending in the Court of Common Pleas of Bradford County between the plaintiff in error and the defendant, again came on for trial after the law of April 8, 1826, on 10 May, 1826, and the judge gave in charge to the jury as follows, after stating the above recited act of assembly, to-wit:

"It is a general principle of law, founded on wise policy, that the tenant shall not controvert the title of his landlord and prevent the recovery of his possession by showing that the title of the landlord is defective. Among

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the exceptions to this general rule, the Supreme Court of Pennsylvania has decided that when the landlord claimed (as the plaintiff claimed on the former trial of this cause) under a Connecticut title, the case should form one of the excepted cases. The legislature has thought proper to enact the above recited law, and by it we are bound. And if the plaintiff in all other respects should be found entitled to a recovery, the mere claiming through a Connecticut title would not now deprive her of her right to a recovery."

A verdict and judgment were obtained in favor of the defendant in error, Elizabeth Matthewson.

To the charge of the judge, which is inserted at large and sent up with the record, the defendant excepted, and the judge signed and sealed a bill of exceptions.

A writ of error was taken by the defendant to the Supreme Court of Pennsylvania, and the following were among the errors assigned, to-wit:

The court erred in charging,

1. That by the laws of Pennsylvania, the plaintiff's testator could lease the land, and that the rights of landlord do extend to him, he having claimed under a Connecticut title.

2. That the Act of 8 April, 1826, gives a right of recovery, and does away the force of the law, as declared by the supreme court in this case.

On 1 July, 1827, the supreme court, after argument, affirmed the judgment of the court of common pleas. And on 6 July, 1827, a petition and prayer for reversal was filed by John F. Satterlee, the plaintiff in error, who survived Elisha Satterlee, on the ground that the said court had decided the said act of assembly to be constitutional and valid, though he had insisted that he ought not to be affected and barred of recovery by the said act, for that the said act was not valid, and was repugnant to the Constitution of the United States.

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MR. JUSTICE WASHINGTON delivered the opinion of the Court.

This is a writ of error to the Supreme Court of Pennsylvania. An ejectment was commenced by the defendant in error in the court of common pleas against Elisha Satterlee to recover the land in controversy, and upon the motion of the plaintiff in error, he was admitted as her landlord, a defendant to the suit. The plaintiff, at the trial, set up a title under a warrant dated 10 January, 1812, founded upon an improvement in the year 1785, which it was admitted was under a Connecticut title, and a patent bearing date 19 February, 1813.

The defendant claimed title under a patent issued to Wharton in the year 1781, and a conveyance by him to John F. Satterlee in April, 1812. It was contended on the part of the plaintiff that admitting the defendant's title to be the oldest and best, yet he was stopped from setting it up in that suit, as it appeared in evidence that he had come into possession as tenant to the plaintiff sometime in the year

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1790. The court of common pleas decided in favor of the plaintiff upon the ground just stated, and judgment was accordingly rendered for her. Upon a writ of error to the supreme court of that state, that court decided in June, 1825, 13 Serg. & R. 133, that by the settled law of Pennsylvania, the relation of landlord and tenant could not subsist under a Connecticut title, upon which ground the judgment was reversed and a *venire facias de novo* was awarded.

On 8 April, 1826, and before the second trial of this cause took place, the legislature of that state passed a law in substance as follows, *viz.*,

"That the relation of landlord and tenant shall exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between other citizens of this commonwealth on the trial of any cause now pending or hereafter to be brought within this commonwealth, any law or usage to the contrary notwithstanding."

Upon the retrial of this cause in the inferior court in May, 1826, evidence was given conducing to prove, that the land in dispute was purchased of Wharton by Elisha Satterlee, the father of John F. Satterlee, and that by his direction, the conveyance was made to the son. It further appeared in evidence that the son brought an ejectment against his father in the year 1813, and by some contrivance between those parties, alleged by the plaintiff below to be merely colorable and fraudulent, for the purpose of depriving her of her possession, obtained a judgment and execution thereon, under which the possession was delivered to the plaintiff in that suit, who immediately afterwards leased the premises to the father for two lives at a rent of one dollar per annum. The fairness of the transactions was made a question on the trial, and it was asserted by the plaintiff that notwithstanding the eviction of Elisha Satterlee under the above proceedings, he still continued to be her tenant.

The judge, after noticing in his charge the decision of the supreme court in 1825 and the act of assembly before recited, stated to the jury the general principle of law which prevents a tenant from controverting the title of his

landlord by showing it to be defective, the exception to that principle where the landlord claims under a Connecticut title, as laid down by the above decision, and the effect of the act of assembly upon that decision, which act he pronounced to be binding on the court. He therefore concluded, and so charged the jury, that if they should be satisfied from the evidence, that the transactions between the two Satterlees before mentioned were *bona fide*, and that John F. Satterlee was the actual purchaser of the land, then the defendants might set up the eviction as a bar to the plaintiff's recovery as landlord. But that if the jury should be satisfied that those transactions were collusive, and that Elisha Satterlee was in fact the real purchaser, and the name of his son inserted in the deed for the fraudulent purpose of destroying the right of the plaintiff as landlord, then the merely claiming under a Connecticut title would not deprive her of her right to recover in that suit.

To this charge, of which the substance only has been stated, an exception was taken, and the whole of it is spread upon the record. The jury found a verdict for the plaintiff, and judgment being rendered for her, the cause was again taken to the supreme court by a writ of error.

The only question which occurs in this cause which it is competent to this Court to decide is whether the statute of Pennsylvania which has been mentioned, of 8 April, 1826, is or is not objectionable on the ground of its repugnancy to the Constitution of the United States? But before this inquiry is gone into, it will be proper to dispose of a preliminary objection made to the jurisdiction of this Court upon the ground that there is nothing apparent on this record to raise that question or otherwise to bring this case within any of the provisions of the 25th section of the Judiciary Act of 1789.

Questions of this nature have frequently occurred in this Court, and have given occasion for a critical examination of the above section, which has resulted in the adoption of certain principles of construction applicable to it, by which the objection now to be considered may without much difficulty be decided. [15 U. S. 2](#) Wheat. 363; [17 U. S. 4](#) Wheat. 311;

12 Wheat. 117. One of those principles is that if it sufficiently appears from the record itself that the repugnancy of a statute of a state to the Constitution of the United States was drawn into question or that that question was applicable to the case, this Court has jurisdiction of the cause under the section of the act referred to, 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 the state to any part of that Constitution was drawn into question.

Now it is manifest from this record not only that the constitutionality of the statute of 8 April, 1826, was drawn into question and was applicable to the case, but that it was so applied by the judge and formed the basis of his opinion to the jury, that it should find in favor of the plaintiff if in other respects she was entitled to a verdict. It is equally manifest that the right of the plaintiff to recover in that action depended on that statute, the effect of which was to change the law as the supreme court had decided it to be in this very case in the year 1825. 13 S. & R. 133.

That the charge of the judge forms a part of this record is unquestionable. It was made so by the bill of exceptions, and would have been so without it, under the statute of 24 February, 1806, of that state, which directs that in all cases in which the opinion of the court shall be delivered, if either party require it, it is made the duty of the judges to reduce the opinion, with their reasons therefor, to writing and to file the same of record in the cause. In the case of *Downing v. Baldwin*, 1 Serg. & R. 298, it was decided by the Supreme Court of Pennsylvania that the opinion so filed becomes part of the record and that any error in it may be taken advantage of on a writ of error without a bill of exceptions.

It will be sufficient to add that this opinion of the court of common pleas was, upon a writ of error, adopted and affirmed by the supreme court, and it is *the judgment* of that court upon the point so decided by the inferior court, and not the *reasoning of the judges* upon it, which this Court is now called upon to revise.

We come now to the main question in this cause. Is the

act which is objected to, repugnant to any provision of the Constitution of the United States? It is alleged to be so by the counsel for the plaintiff in error for a variety of reasons, and particularly, because it impairs the obligation of the contract between the State of Pennsylvania and the plaintiff who claims title under her grant to Wharton as well as of the contract between Satterlee and Matthewson, because it creates a contract between parties where none previously existed by rendering that a binding contract which the law of the land had declared to be invalid, and because it operates to divest and destroy the vested rights of the plaintiff. Another objection relied upon is that in passing the act in question, the legislature exercised those functions which belong exclusively to the judicial branch of the government.

Let these objections be considered. The grant to Wharton bestowed upon him a fee simple estate in the land granted, together with all the rights, privileges, and advantages which, by the laws of Pennsylvania, that instrument might legally pass. Were any of those rights, which it is admitted vested in his vendee or alienee, disturbed, or impaired by the act under consideration? It does not appear from the record, or even from the reasoning of the judges of either court, that they were in any instance denied or even drawn into question. Before Satterlee became entitled to any part of the land in dispute under Wharton, he had voluntarily entered into a contract with Matthewson by which he became his tenant under a stipulation that either of the parties might put an end to the tenancy at the termination of any one year. Under this new contract, which, if it was ever valid, was still subsisting and in full force at the time when Satterlee acquired the title of Wharton, he exposed himself to the operation of a certain principle of the common law which estopped him from controverting the title of his landlord by setting up a better title to the land in himself or one outstanding in some third person.

It is true that the supreme court of the state decided, in the year 1825, that this contract, being entered into with a person claiming under a Connecticut title, was void, so that

the principle of law which has been mentioned did not apply to it. But the legislature afterwards declared by the act under examination that contracts of that nature were valid and that the relation of landlord and tenant should exist and be held effectual as well in contracts of that description as in those between other citizens of the state.

Now this law may be censured, as it has been, as an unwise and unjust exercise of legislative power; as retrospective in its operation; as the exercise by the legislature of a judicial function; and as creating a contract between parties where none previously existed. All this may be admitted, but the question which we are now considering is does it impair the obligation of the contract between the state and Wharton or his alienee? Both the decision of the supreme court in 1825 and this act operate not upon that contract, but upon the subsequent contract between Satterlee and Matthewson. No question arose or was decided to disparage the title of Wharton or of Satterlee as his vendee. So far from it that the judge stated in his charge to the jury that if the transactions between John F. Satterlee and Elisha Satterlee were fair, then the elder title of the defendant must prevail and he would be entitled to a verdict.

We are then to inquire whether the obligation of the contract between Satterlee and Matthewson was impaired by this statute. The objections urged at the bar and the arguments in support of them apply to that contract if to either. It is that contract which the act declared to be valid in opposition to the decision of the supreme court, and admitting the correctness of that decision, it is not easy to perceive how a law which gives validity to a void contract can be said to impair the obligation of that contract. Should a statute declare, contrary to the general principles of law, that contracts founded upon an illegal or immoral consideration, whether in existence at the time of passing the statute or which might hereafter be entered into, should nevertheless be valid and binding upon the parties, all would admit the retrospective character of such an enactment, and that the effect of it was to create a contract between parties

where none had previously existed. But it surely cannot be contended that to create a contract and to destroy or impair one mean the same thing.

If the effect of the statute in question be not to impair the obligation of either of those contracts, and none other appears upon this record, is there any other part of the Constitution of the United States to which it is repugnant? It is said to be retrospective. Be it so; but retrospective laws which do not impair the obligation of contracts or partake of the character of *ex post facto* laws are not condemned or forbidden by any part of that instrument.

All the other objections which have been made to this statute admit of the same answer. There is nothing in the Constitution of the United States which forbids the legislature of a state to exercise judicial functions. The case of *Ogden v. Blackledge* came into this Court from the circuit court of the United States, and not from the Supreme Court of North Carolina, and the question whether the act of 1799, which partook of a judicial character, was repugnant to the Constitution of the United States did not arise, and consequently was not decided. It may safely be affirmed that no case has ever been decided in this Court upon a writ of error to a state court which affords the slightest countenance to this objection.

The objection, however, which was most pressed upon the court and relied upon by the counsel for the plaintiff in error was that the effect of this act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a state law of this description, nor are we aware of any decision of this or of any circuit court which has condemned such a law upon this ground provided its effect be not to impair the obligation of a contract, and it has been shown that the act in question has no such effect upon either of the contracts which have been before mentioned.

In the case of *Fletcher v. Peck*, it was stated by THE CHIEF JUSTICE that it might well be doubted whether the nature of society and of government do not prescribe some limits to the legislative power, and he asks, "if any be

prescribed, where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation?" It is nowhere intimated in that opinion that a state statute which divests a vested right is repugnant to the Constitution of the United States, and the case in which that opinion was pronounced was removed into this Court by writ of error not from the supreme court of a state, but from a circuit court.

The strong expressions of the Court upon this point in the cases of *Vanhorne's Lessee v. Dorance* and *Society for the Propagation of the Gospel v. Wheeler*, were founded expressly on the Constitution of the respective states in which those cases were tried.

We do not mean in any respect to impugn the correctness of the sentiments expressed in those cases or to question the correctness of a circuit court, sitting to administer the laws of a state, in giving to the constitution of that state a paramount authority over a legislative act passed in violation of it. We intend to decide no more than that the statute objected to in this case is not repugnant to the Constitution of the United States, and that unless it be so, this Court has no authority, under the 25th section of the Judiciary Act, to reexamine and to reverse the judgment of the Supreme Court of Pennsylvania in the present case.

That judgment therefore must be

Affirmed with costs.

MR. JUSTICE JOHNSON.

I assent to the decision entered in this cause, but feel it my duty to record my disapprobation of the ground on which it is placed. Could I have brought myself to entertain the same view of the decision of the Supreme Court of Pennsylvania with that which my brethren have expressed, I should have felt it a solemn duty to reverse the decision of that court as violating the Constitution of the United States in a most vital part.

What boots it that I am protected by that Constitution from having the obligation of my contracts violated if the legislative power can create a contract for me or render binding upon me a contract which was null and void in its creation? To give efficacy to a void contract is not, it

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is true, *violating* a contract, but it is doing infinitely worse -- it is advancing to the very extreme of that class of arbitrary and despotic acts which bear upon individual rights and liabilities, and against the whole of which the Constitution most clearly intended to interpose a protection commensurate with the evil.

And it is very clear to my mind that the cause here did not call for the decision now rendered. There is another and a safe and obvious ground upon which the decision of the Pennsylvania court may be sustained.

The fallacy of the argument of the plaintiff in error consists in this, that he would give to the decision of a court on a point arising in the progress of his cause the binding effect of a statute or a judgment; that he would in fact restrict the same court from revising and overruling a decision which it has once rendered, and from entering a different judgment from that which would have been rendered in the same court had the first decision been adhered to. It is impossible in examining the cause not to perceive that the statute complained of was no more than declarative of the law on a point on which the decisions of the state courts had fluctuated, and which never was finally settled until the decision took place on which this writ of error is sued out.

The decision on which he relies to maintain the invalidity of the Connecticut lease was rendered on a motion for a new trial; all the right it conferred was to have that new trial, and it even appears that before that new trial took place, the same court had decided a cause which in effect overruled the decision on which he now rests, so that when this act was passed, he could not even lay claim to that imperfect state of right which uniform decisions are supposed to confer. The latest decision in fact, which ought to be the precedent if any, was against his right.

It is perfectly clear when we examine the reasoning of the judges on rendering the judgment now under review that they consider the law as unsettled, or rather as settled against the plaintiff here at the time the act was passed, and if so, what right of his has been violated? The act does no more than what the courts of justice had done and

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would do without the aid of the law -- pronounce the decision on which he relies as erroneous in principle, and not binding in precedent.

The decision of the state court is supported under this view of the subject without resorting to the portentous doctrine (for I must call it portentous) that a state may declare a void deed to be a valid deed, as affecting individual litigants on a point of right, without violating the Constitution of the United States. If so, why not create a deed or destroy the operation of a limitation act after it has vested a title?

The whole of this difficulty arises out of that unhappy idea that the phrase "*ex post facto*" in the Constitution of the United States was confined to criminal cases exclusively -- a decision which leaves a large class of arbitrary legislative acts without the prohibitions of the Constitution. It was in anticipation of the consequences that I took occasion in the investigations on the bankrupt question to make a remark on the meaning of that phrase in the Constitution. My subsequent investigations have confirmed me in the opinion then delivered, and the present case illustrates its correctness; I will subjoin a note to this opinion devoted to the examination of that question.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Pennsylvania for the Middle District of Pennsylvania, and was argued by counsel, on consideration whereof it is considered, ordered, and adjudged by this Court, that the judgment of the said supreme court for the State of Pennsylvania in this cause be and the same is hereby affirmed with costs.

* The case in which the meaning of the phrase "*ex post facto*" in the Constitution came first to be considered, was that of [*Calder v. Bull*](#), 3 Dall. 386.

Mrs. Calder claimed as heiress to one Morrison; Bull and wife claimed by devise, and the question was *devisavit vel non*. The Court of Probate in Connecticut, having jurisdiction of the question, decided against the will, but there was a right to appeal from that decision to the Supreme Court of Errors, provided it was prosecuted within eighteen months. It was not prosecuted within the limited time, and thereby it was contended the decision of the court of probate became final against the will, and ought to have quieted Calder and wife in possession of the property. But Bull and wife made application to the Legislature of Connecticut for relief and obtained from them a resolution or law setting aside the decree of the court of probate and granting Bull a new hearing in that court. On that new hearing, the decision was in favor of the will, and Calder and wife were of course evicted of an interest, which they contended had been finally affirmed in them by the previous decision and the effect of the limitation barring the right of appeal. The argument of counsel is not reported, but it is obvious from the opinions ascribed to the judges that in behalf of Calder it was contended that the act of the Connecticut Legislature was an *ex post facto* law in the sense of the Constitution, and void, and in behalf of Bull that the legislature had exercised a power constitutional in Connecticut and therefore not *ex post facto* in the sense of the Constitution. This appears distinctly the ground upon which Cushing, the presiding judge, places his opinion: "The case," he says,

"appears to me to be clear of all difficulties, taken either way; if the act is a judicial act, it is not touched by the federal Constitution, and if it is a legislative act, it is maintained and justified by the ancient and uniform practice of the State of Connecticut."

That state, it must be observed, had at that time no written Constitution, and as in Rhode Island at the present day, what it could constitutionally do could only be decided by what it did habitually. The decision therefore rendered at this term in the case of *Wilkinson v. Leland* was precisely that in case of *Calder v. Bull*.

That the cause did not go off on the ground that the phrase "*ex post facto*" in the Constitution was inapplicable to civil acts, is distinctly expressed also by Judge Iredell. "Upon the whole," says, he,

"though there cannot be a case in which an *ex post facto* law in criminal matters is requisite or justifiable, yet in the present instance the objection does not arise, because 1. If the act of the Legislature of Connecticut was a judicial act, it is not within the words of the Constitution, and 2. even if it was a legislative act, it is not within the meaning of the prohibition."

In the commencement of the opinion, he expresses himself thus:

"From the best information to be collected, relative to the Constitution of Connecticut, it appears that the Legislature of that state has been in the uniform and uninterrupted exercise of a general superintending power over its courts of law by granting new trial."

And again,

"When Connecticut was settled, the right of empowering her legislature to superintend the courts of justice was, I presume, early assumed, and its expediency as applied to the local circumstances and municipal policy of the state is sanctioned by a long and uniform practice. The power, however, is judicial in its nature, and whenever it is exercised, as in the present instance, it is an exercise of *judicial*, not of *legislative*, authority."

Here, then, is a positive opinion as to the judicial character of this transaction, and it shows that his vote upon the decision rendered must rest upon the first of the alternatives stated in his conclusion. And the mode in which he enters upon the examination of the second alternative shows that he attaches no importance to it. He enters upon it hypothetically, commencing with the words "But let us for a moment suppose." Judge Paterson also says

"True it is that the awarding of new trials falls properly within the province of the judiciary, but if the Legislature of Connecticut have been in the uninterrupted exercise of this authority in certain cases, we must in such cases respect their decisions as flowing from a competent jurisdiction or constitutional organ, and therefore we may, in the present instance, consider the legislature of the state as having acted in their customary judicial capacity."

Judge Chase express himself thus:

"Whether the legislature of any state can revise and correct by law a decision of its courts of justice, although not prohibited by the constitution of the state, is a question of very great importance, and not necessary to be now considered, because the resolution or law in question does not go so far."

And again,

"It does not appear to me that the resolution or law in question is contrary to the charter of Connecticut or its constitution, which is said by counsel to be composed of its charter, acts of assembly, and usages and customs. I should think, that the courts of Connecticut are the proper tribunals to decide whether laws contrary to the Constitution thereof are void. In the present case, they have, both in the inferior and superior courts, decided that the resolution or law in question was not contrary to either *their state* or the federal Constitution."

Thus it appears that all the judges who sat in the case of *Calder v. Bull* concurred in the opinion that the decision of the court of probate and the lapse of the time given for an appeal to their court of errors were not final upon the rights of the parties; that there still existed in the legislature a controlling and revising power over the controversy, and that this was duly exercised in the reversal of the first decree of the court of probate. And who can doubt that the legislature of a state may be vested by the state Constitution with such a power? And what invasion of private right can result from the exercise of such power when so delegated? All the rights claimed or exercised in a state which thus modify the administration of justice are held and exercised under the restrictions which such a Constitution imposes.

How, then, could the question whether the phrase *ex post facto* was confined to criminal law arise in this cause? The law complained of was equally free from that characteristic, though the phrase be held to extend to laws of a civil character.

I then have a right to deny that the construction intimated by three of the judges in the case of *Calder v. Bull* is entitled to the weight of an adjudication. Nor is it

immaterial to observe that an adjudication upon a fundamental law ought never to be irrevocably settled by a decision that is not necessary and explicit.

It is laid down, indeed, as a principle of the Roman civil law "that in cases which depend upon fundamental principles, from which demonstrations may be drawn, millions of precedents are of no value." Ayliffe 5. And the English law concurs with the Roman in this,

"That an extrajudicial opinion, given in or out of court, is no good precedent, for it is no more than the *prolatum*, or saying of him who gives it. . . . An opinion given in court, if not necessary to the judgment given of record, is, according to Vaughan, no judicial opinion at all, and consequently, no precedent, for the same judgment might well as have been given if no such, or a contrary opinion had been brought; nor is such an opinion any more than a *gratis dictum*. "

Ayliffe 9.

That the phrase " *ex post facto* " is not confined in its ordinary signification to criminal law or criminal statutes admits of positive demonstration, and with great respect for my learned predecessors but a due regard to what I owe to the discharge of my own duties, I will endeavor to show that they have not proved the contrary.

I think it will not be doubted by anyone who has considered the remarks made by the learned judges on the translation and construction of the phrase *ex post facto* that some misapprehension must have prevailed as to the parts of speech of which it is composed. By applying the English preposition *after* so often to the translation of *post* in the sentence, I am warranted in believing that the latter word was mistaken for the Latin preposition *post*, whereas it is unquestionably an abbreviation of the adjective *postremo*, as will appear by reference to the maxims of Sir Francis Bacon, and comparing the 8th in the table with the 8th maxim in the text, in the latter of which *post* is extended to *postremo*, and such must be the fact to comport with the sense attached to the phrase in its common use and application. But the phrase is of such antiquity and so generally used in its

abridged form that its origin and derivation, as is the case with a vast proportion of every language, has been nearly forgotten.

I am indebted to a friend for a quotation from the Pandects in which it appears, even in Justinian's time, to have been used as a quaint phrase; just as a *ca. sa.*, or *writ in the pone, or qua minus*, is used at the present date (L. 34, tit. 4, law 15). The antiquity of its use among the English jurists may be fairly inferred from its being engrafted into the maxims of the law constituting its fundamental rules, as we see in Elements of the Com.Law, by Lord Verulam, Max. 8 and 21.

But my present purpose is to fix its signification and legal import, and this is best done by reference to an adjudged case.

At the time of the great speculation in England in south-sea stock, it was thought necessary, for the peace of the nation, to pass the Stat. 7 Geo. I., c. 8, 2, which required a registry of contracts for south-sea stock, to be made by 29 September, 1721, and if not so registered, they were declared void. W. bought of M., stock to a large amount, for which an assignment was duly executed, dated 19 August, 1720 (which was prior to the passing of the act), but exception was taken on the ground of defect in the form of registration, on which the defendant insisted that the contract was avoided by the statute. Raymond, Justice:

"This act being *ex post facto*, the construction of the words ought not to be strained in order to defeat a contract to the benefit whereof the party was well entitled at the time the contract was made."

Wilkinson v. Meyer, 2 Ld.Raym. 1350-1352.

This case is authority to three points: 1st, to show that the phrase is used in a sense equally applicable to contracts and to crimes; 2d, that it was applied to statutes affecting contracts; and 3d, that as late as Lord Raymond's time, it has not received a practical or technical construction, which confined it to criminal cases.

The learned judges, in the case of *Calder v. Bull*, rely on Blackstone and Wooddeson for a contrary doctrine, but on examining these writings, the latter will

be found to be anything but an authority to their purpose, and that in the former there is nothing furnished that can be held conclusive on the subject. The passage in Wooddeson will be found in vol. 2, p. 641. The author is animadverting upon bills of attainder, bills of pains and penalties, and other laws of that class, and his words are these:

"It must be admitted that in all penal statutes passed *ex post facto*, except where the innovation mollifies the rigor of the criminal code, justice wears her sternest aspect."

Penal statutes, passed *ex post facto*; but why say *penal statutes*, and not simply statutes passed *ex post facto*, if the use of the phrase was exclusively limited to penal statutes? And with what propriety could the phrase be applied to statutes mollifying the rigor of the criminal law if it had the fixed restriction since attached to it which they propose to assign to it in their reasoning upon the cause?

Judge Blackstone is by no means conclusive, if any authority at all upon the subject. Arch. & Christ., Black. 41, old edit., p. 46. He is commenting upon the definition of a law generally and that member of the definition which designates it as "a rule prescribed." And when illustrating the nature and necessity of this attribute of a law, he illustrates it by referring to the laws of Caligula, written in small characters, and hung up out of view, to ensnare the people, and then remarks

"There is still a more unreasonable method than this, which is called making of laws *ex post facto*, where, after an action, indifferent in itself, has been committed, the legislator then for the first time declares it to have been a crime and inflicts a punishment upon the person who has committed it."

This is precisely what Wooddeson calls a penal statute passed *ex post facto*, but it by no means follows that because a penal statute may be *ex post facto* that none other can be affected with that character, and certainly his commentary, Mr. Christian, in his note upon the phrase "*ex post facto*," seems to have had no idea of this restrictive application of it. His words are

"An *ex post facto* law may be either of a public or private nature, and when we speak generally of an *ex post facto* law, we perhaps always mean a law which comprehends the whole community. The Roman *privilegia* seem to correspond to our bills of attainder and bills of pains and penalties, which, though in their nature they are *ex post facto* laws, yet are seldom called so."

Here he speaks of a law, not of a penal law, which comprehends the whole community, and of certain penal laws *in their nature ex post facto* -- that is, of the description of *ex post facto* laws, which they certainly are, without being exclusively so.

The "Federalist" also is referred to for an exposition of the phrase. The passage is found in the 44th number, and is from the pen of Mr. Madison. But the writer has made no attempt at giving a distinct exposition of the phrase as used in the Constitution. Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts are all considered together, and regarded, as they really are, as forming together "a bulwark in favor of personal security and private rights;" but on the separate office of each in the work of defense he makes no remark and attempts no definition or distribution.

Some of the state constitutions are also referred to as furnishing an exposition of the words *ex post facto* which confine its application to criminal cases. But of the four that have been cited, it will be found that those of Massachusetts and Delaware do not contain the phrase; and, as if sensible of the general application of its meaning to all laws giving effects and consequences to past actions which were not attached to them when they occurred, simply give a description of the laws they mean to prohibit, without resorting to the aid of a quaint phrase which can only be explained by an extended periphrasis.

The Constitutions of Maryland and North Carolina would seem to have applied the phrase in the restricted sense. And yet there is good reason to think that in the application of those articles to questions arising in their courts of justice, before the provision in the Constitution of the United States superseded the necessity of resorting to their own Constitutions in the defense of private rights when invaded

by *ex post facto* laws, a general application of the phrase as well to civil as to criminal cases would have been justified by the generality of the prohibition to pass *ex post facto* laws, as used in both those constitutions.

But if otherwise, why should the erroneous use of language in two instances only control the meaning of it everywhere, or anywhere but in the construction of the particular instrument in which it is so used?

It is obvious in the case of *Calder v. Bull* that the great reason which influenced the opinion of the three judges who gave an exposition of the phrase "*ex post facto*" was that they considered its application to civil cases as unnecessary and fully supplied by the prohibition to pass laws impairing the obligation of contracts. Judge Chase says

"If the prohibition against making '*ex post facto*' laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated were unnecessary and therefore improper, for both of them are retrospective."

Judge Paterson says

"Where is the necessity of use of the latter words if a law impairing the obligation of contracts be comprehended within the terms *ex post facto* law? It is obvious from the specification of contracts in the last member of the clause that the framers of the Constitution did not understand or use the words in the sense contended for on the part of the plaintiffs in error. They understood and used the words in their known and appropriate signification, as referring to crimes, pains, and penalties, and no further. The arrangement of the distinct members of this section necessarily points to this meaning."

Judge Iredell considers the extended construction of the phrase as unnecessary for another reason. "The policy, the reason and humanity of the prohibition do not, I repeat," says the judge, "extend to civil cases, to cases that merely affect the private property of citizens."

On these opinions, a variety of remarks may be made.

And the first is that the learned judges could not then have foreseen the great variety of forms in which the violations of private right have since been presented to this Court. The case of a legislature declaring a void deed to be a valid deed is a striking one to show both that the prohibition to pass laws violating the obligation of contracts is not a sufficient protection to private rights and that the policy and reason of the prohibition to pass *ex post facto* laws does extend to civil as well as criminal cases. This Court has had more than once to toil uphill in order to bring within the restriction on the states to pass laws violating the obligation of contracts, the most obvious cases to which the Constitution was intended to extend its protection -- a difficulty which it is obvious might often be avoided by giving to the phrase *ex post facto* its original and natural application. It is then due to the venerable men whose opinions I am combating to believe that had this and the many other similar cases which may occur and will occur been presented to their minds, they would have seen that in civil cases, the restriction not to pass *ex post facto* laws could not be limited to criminal statutes without restricting the protection of the Constitution to bounds that would import a positive absurdity.

2. High and respectable as is the authority of these distinguished men, it is not unpermitted to say that when they speak of the known and settled and technical meaning of words, they submit their opinions to their arbiter of truth to whose jurisdiction all men have an equal right to appeal. I think, I have gone far to show that their quotations do not fix the meaning of the phrase under consideration with immovable firmness. Maryland first used it in this restricted sense, and North Carolina copied from Maryland, and if the evidence of contemporaries may be relied on, Mr. Chase was one of the committee who reported the Constitution of Maryland, and thus stands the authority for the restricted use. Very many instances of the more general use of the phrase may be added to the authority of Lord Raymond, some of which I will mention. Certainly, in Lord Raymond's time it had not received this technical established signification, and how it can be proved to have acquired it since is not very easy to perceive.

The following instances of its ancient general use will show that if acquired, it must be in modern times, and therefore the proof ought to be the more accessible.

In Sir. F. Bacon's Maxims, Max. 8: *Estimatio preteriti delicti ex post facto nunquam crescit.*

And all the cases given to illustrate the maxim are cases at common law, such as "slander of one who after becomes noble; this is not *scandalum magnatum.* " Thus showing that it has no peculiar connection with statute law.

Max 21. *Clausula vel dispositio inutilis per praesumptionem vel causam remotam ex post facto non fulcitur.* And all the examples furnished on this maxim are cases of civil rights and liberties.

1 Sheppard's Touchstone, 63. "It is a rule that if a contract be not in its inception usurious, no matter *ex post facto* shall make it so." *Ibid.*, 68. "Where a deed good in its creation shall become void *ex post facto*; by rasure, &c.;" *Ibid.*, 20. "Where a deed is void *ab initio*, and where it doth become void by matter *ex post facto.* "

Godolphin's View of the Admiralty 109.

"And the performance of something *ex post facto* within the realm, in pursuance of a preceding contract, &c.;, doth not make it cease to be maritime.' The same, in his Law of Executors, table D. 'How a devise originally void may become good *ex post facto.* "

Bulstrode, 17, 5, B, a, 416. "Where the first contract is not usurious, it shall never be made so by matter *ex post facto.* "

3. It is a remark of Judge Paterson that the arrangement of the distinct members of this section in the Constitution necessarily points to the restrictive meaning which he assigns to this phrase. But with all deference, I must contend that if anything is to be deducted from the arrangement of the three instances of restriction, the argument will be against him. For by placing " *ex post facto* laws" between bills of attainder, which are exclusively criminal, and laws violating the obligation of

contracts, which are exclusively civil, it would rather seem that *ex post facto* laws partook of both characters, was common to both purposes.

4. There is one view in which the consistency and comprehensiveness of the views of the learned judges, whose opinions I have ventured to examine, may be well defended. And it presents an alternative to which I have no doubt that this Court will sooner or later be compelled to resort in order to maintain its own consistency and yet give to the Constitution the scope which is necessary to attain its general purposes in this section and to rescue it from the imputation of absurdity in guarding against the minor evil and making no provision against a greater; in leaving uncontrolled the exercise of a power to create the contracts of parties while it restricts the exercise of a power to violate those contracts when made by parties themselves.

That is to bring cases similar to the present within what the law terms the equity of a statute. According to my construction, this is unnecessary, and I shall never be compelled to resort to this application of a principle so exceptionable in its influence upon a fundamental law. But I see not how those who think differently from me will be able to advocate it unless by an amendment of the Constitution.

If the correct exposition of "the equity of a statute" be "a construction made by the judges, that cases out of the letter of the statute, which are within the same mischief or cause of making the statute, shall be within the remedy thereby given," 1 Inst. 24, or as another author defines it, "*verborum legis directio effeciem cum una res solummodo legis cavetur verbis, ut omnis alia in aequali genere eisdem caveatur verbis,*" Plowd. 407; there could be no objection to bringing the case of making a void deed valid within the provision of the Constitution against violating the obligation of contracts if we were construing a statute. And then the protection which is lost to the Constitution by the restricted construction of "*ex post facto* laws" would be, I believe, wholly restored. But whether this latitude of construction can be safely and on principle applied to the Constitution is with me a serious doubt, and hence I have felt an interest in endeavoring to avoid the necessity of resorting to it by showing that the case of *Calder v. Bull* cannot claim the preeminence of an adjudged case upon this point, and if adjudged, was certainly

not sustained by reason of authorities.

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