CONSTITUTIONAL LAW.*

THERE is no maxim of the comman law of which courts and judges are so fond, as of that old conservative maxim, *stare decisis.* It is a very convenient and comfortable maxim for an ignorant or lazy judge, as it saves him the trouble and labor of investigating a case and forming his own opinion. It is a salutary maxim when judiciously followed and faithfully applied, but a most dangerous and pernicious one when the letter and not the spirit is regarded.

There is often an apparent resemblance or analogy between cases, when, upon closer scrutiny, they are found to be entirely diverse; and hence it is a matter of daily experience at the bar, that while courts profess to follow the decisions, they merely follow their letter and not their spirit and meaning, the consequence of which is, that they are perpetually running themselves into difficulties and absurdities from which they cannot extricate themselves without the aid of the legislature. Courts of justice, like certain insects, have an irresistible propensity to envelope themselves in their own web, from which the legislative sword alone can cut them loose. The history of all courts, with which *stare decisis* is a maxim, is full of examples which prove the truth of these observations, and which are familiar to every lawyer, and, therefore, need not be cited. But the course of the decisions of the Supreme Court of the United States on the subject of the constitutionality of the State Insolvent Laws, is worthy of more special notice.

In the 10th section of the 1st article of the Constitution of the United States is the following prohibition: "No state shall pass any bill of attainder, expost-facto law, or law impairing the obligation of contracts."

The first case in which the Supreme Court of the United States was called upon to give a construction to this clause of the constitution was the case of Sturges *vs.* Crowninshield, reported 4 Wheaton, 122. This was an action of assumpsit, brought in the Circuit Court of the United States for the District of Massachusetts, on a promissory note made in New-York on the 22d of March, 1811. The defendant pleaded in bar a discharge under the act for the benefit of Insolvent Debtors, passed by the legislature of New-York April 3d, 1811. To this plea the plaintiff demurred generally, on the ground that the contract was made before the law was passed. The judgment of the court was pronounced by Chief Justice Marshall in the following terms: "It is the opinion of the Court, that the act of the State of New-York, which is pleaded by the defendant in this case, so far as it attempts to discharge the defendant from the debts in the declaration mentioned, is contrary to the Constitution of the United States, and that the plea is no bar to the action." The phraseology of the certificate in this case is peculiar, as follows: "This Court is of opinion, that since the adoption of the Constitution of the United States, a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts."

What sort of a bankrupt or insolvent law that would be which did not impair the obligation of contracts, the court do not say, nor am I able to

* Case of Moffat *vs.* Cook, in the Supreme Court of the United States. Reported in 5 Howard, 295. *State Insolvent Laws.*

conceive, as all bankrupt or insolvent laws that I have ever heard of were passed for the express purpose of impairing the obligation of contracts, by discharging the obligor from his legal obligation to fulfil his contract according to its terms. To change the terms of a contract, without the assent, or against the will of either of the parties, would be impairing the obligation of that contract, in the ordinary sense of the term. The proviso or exception of the court is therefore exactly as broad as the rule, and nullifies it, so that the decision, when stript of unmeaning verbiage, is simply that the New-York insolvent law was void, because it impaired the obligation of the coutract, and was therefore incompatible with the Constitution of the United States.

It has generally been supposed by the profession, that this decision turned upon the fact that the date of the contract was prior to the date of the law, and the court itself, or at least certain members of it, have attempted to give it such a turn; but there is not the slightest grounds for such a supposition, as is abundantly manifest from the declaration of the court itself in the case of McMillan *vs.* McNeil, decided at the same term, if not on the same day with Sturges *vs.* Crowninshield. Judge Marshall delivered the opinion of the court in that case also, and says: "This case is not distinguishable in principle from the case of Sturges *vs.* Crowninshield. The circumstance of the state law under which the debt was attempted to be discharged, having been passed before the debt was contracted, made no difference in the application of the principle."

The next was the case of the Merchants' and Mechanics' Bank of Pennsylvania *vs.* Smith, reported 6 Wheaton, 135. In that case the contract was made in Pennsylvania by parties who resided in that state, and was discharged under an insolvent law of Pennsylvania. A suit was subsequently brought in the courts of that state upon the note—the discharge was pleaded in bar and sustained by the state court, and an appeal taken to the Supreme Court of the United States, where the judgment was reversed, and the insolvent law of Pennsylvania declared unconstitutional by the unanimous opinion of the court. These three cases, then, cover the whole ground, and decide without qualification or exception, that all state insolvent laws are unconstitutional and void, because they attempt to impair, and, if carried into effect, would impair the obligation of contracts.

These decisions, although in conformity with the letter of the constitution, yet were so adverse to public sentiment, and so repugnant to the universal practice of the state legislatures and state courts from the adoption of the constitution down to that time, that they produced little or no effect; and the state legislatures continued to pass insolvent laws, and the state courts continued to execute them, as they had been accustomed to do, both before and after the adoption of the constitution. It was wholly incredible, that the convention, in framing the constitution, or the people in adopting it, could have intended to deprive the state legislatures of all power to relieve their insolvent debtors. Such a supposition was at war with the spirit of the age.

In 1827, nine years after the case of Sturges *vs.* Crowninshield was decided, the case of Ogden *vs.* Saunders came before the court for adjudication, and the court was called on to revise their decisions in the preceding cases. This was an action of assumpsit on a bill of exchange drawn in Kentucky and accepted in New-York, and protested for non-payment in New-York. The defendant pleaded in bar a discharge under an insolvent law of the State of New-York, passed before the bill was drawn. To

this plea the plaintiff demurred, and judgment was rendered for the plaintiff upon the demurrer, in the Circuit Court of the United States for the District of Louisiana. The case was taken to the Supreme Court of the United States by a writ of error. It excited great interest throughout the country, and was twice elaborately argued by eminent counsel. The judges delivered their opinions at length. Judges Marshall, Duvall and Story concurred in opinion, and adhered to the former decisions, that state insolvent laws were unconstitutional and void. Judges Washington, Johnson, Thompson and Trimble each delivered elaborate opinions, in favor of the constitutionality of state insolvent laws, and of course were for reversing the previous decisions. The majority then appointed Judge Johnson to pronounce the judgment of the court, which he did at a subsequent day of the term, and then delivered another elaborate opinion, in which he introduced a new distinction, which had not before been heard of, and, of course, had not been examined or argued by counsel. He still held the state insolvent laws to be constitutional, when the parties to a contract to which they were applied resided in the same state; but when the creditor resided in a different state from the one in which the debtor took the benefit of the insolvent law, then the insolvent law could not be constitutionally applied to his contract. In other words, that he had a right to collect his debt, although his debtor had been discharged under a constitutional state insolvent law. This new distinction enabled Judge Johnson to overrule the former decisions, and, at the same time, to concur with Judges Marshall, Duvall and Story in sustaining the plaintiff's demurrer in the case at bar; and although it decided the case upon entirely different ground from that upon which they put it, yet as he concurred with them in their conclusion to sustain the demurrer, they agreed to concur with him in his opinion. So says Judge Story in the case of Boyle *vs.* Zackery, reported in 6 Peters.

This is a beautiful sample of harmonious opinion. Three judges are for giving judgment for the defendant upon the ground that the states have a constitutional right to pass insolvent laws. Three judges are for giving judgment to the plaintiff upon the ground that state insolvent laws are unconstitutional, because they impair the obligation of contracts; and one judge, although he holds state insolvent laws to be constitutional, yet is for giving judgment for the plaintiff, because he lives over the state line—a rather narrow foundation, one would think, for a great constituttonal question to rest upon, more especially when it is recollected that the court has repeatedly said, that they will not declare a state law to be unconstitutional and void in a doubtful case. "On more than one occasion, (says Judge Marshall, in the case of Dartmouth College *vs.* Woodward) this court has declared, that in no doubtful case would it pronounce a legislative act to be contrary to the constitution.—4 Wheaton, 625.

This was the first time that such a distinction had been heard of. That a law should be constitutional as to one set of creditors, and unconstitutional as to another set, was a striking novelty; but when the distinction was still farther refined by making its constitutionality depend on the place where the parties resided, it appeared to be not only novel, but in direct conflict with the 4th article of the constitution, which requires "full faith and credit to be given in each state to the public acts and judicial proceedings of every other state." Hitherto it had been supposed that a state insolvent law was a *public act*, and that a decree or judgment of insolvency was a *judicial proceeding*, and, of course, protected by the constitution.

The constitution also declares, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states;"—in other words, that a citizen of the United States is a citizen of each state, and entitled to all the privileges, immunities and disabilities of citizens in the several states, when within their jurisdiction; yet this decision assumes that citizens of the United States are foreigners or aliens in all the states except the one in which they reside—that the states of this Union are foreign states as regards each other—their laws foreign laws—the judgments of their courts foreign judgments; and what is stranger still, this decision assumes that these foreigners or aliens are entitled to special privileges and advantages over citizens, in their own domestic tribunals; and to cap the climax, the rights of the citizens of this Union are to be determined by the laws of nations, and not by the Constitution of the United States! An important article of the constitution is to be overlaid by the laws of nations!

But so far as that case was concerned, the court as much mistook the laws of nations as they did the Constitution of the United States. The idea that foreign contracts or foreign creditors are protected by the laws of nations from the operation of bankrupt or insolvent laws, of the debtors forum, is an entire novelty. Neither the civil law, nor the common, nor the laws of any nation in Europe, sanction any such doctrine. If an American creditor were to appear in Westminster Hall, and demand that his contract should be exempt from the operation of the bankrupt laws of England for the reason that he was not a liege subject of Queen Victoria, or because he did not reside in England, or because the contract was not made in England, he would be thought to be demented, and would be in danger of a commission of lunacy. But if this American creditor should chance to catch his English debtor in this country, he might sue him and collect his debt, notwithstanding his discharge under the English bankrupt laws. Our courts show no comity or respect to foreign bankrupt laws, (see 5 Cranch, 259,) and hence, I suppose, comes the idea that no comity or respect was to be paid by the states of this Union to the insolvent laws of each other, nor by the Supreme Court to the state insolvent laws. But it does not follow, that because one nation pays no regard to the bankrupt laws of another nation, it will therefore exempt foreign creditors from the operation of its own bankrupt laws. The decision of the Supreme Court in the case of Ogden *vs.* Saunders is as alien to the laws of nations as it is to the Constitution of the United States.

The next case was that of Boyle *vs.* Zackery, reported in 6 Peters, in which Judges Marshall and Story expressed their concurrence with Judge Johnson in his opinion in the case of Ogden *vs.* Saunders. Next came the case of Moffat *vs.* Cook, which was decided at the last term of the Supreme Court. Moffat, the plaintiff, resided in New-York—Cook, the defendant, resided in Maryland. The suit was brought in the Circuit Court of the United States for the District of Maryland. The plaintiff declared on a promissory note, made, as the court said, in New-York, although it was dated and executed in Baltimore. The defendant pleaded in bar a discharge under the insolvent laws of Maryland. To this plea the plaintiff demurred, and judgment was rendered for the plaintiff. This case differs from Ogden *vs.* Saunders in one particular only. In Ogden and Saunders the place of making and discharging the contract were the same. The contract was made in New-York, and Ogden, the obligor, was discharged under an insolvent law of New-York, but the residence of the parties was in different states. In Moffat and Cook the places of making

and discharging the contract were different. The contract was made in New-York, (as the court says,) but the discharge was under an insolvent law of Maryland, the residence of the obligor. Had the contract been made in Baltimore, as the defendant contended was the fact, it would have been identical with Ogden and Saunders, and had that been the case, the Court admits that the discharge would have been constitutional and valid, and that judgment must have been for the defendant. Indeed the case turned upon the question of fact, whether it was a New-York or a Maryland contract. Judge Grier, who pronounced the judgment of the court says, "the only question, then, to be decided at present is, whether the bankrupt law of Maryland can operate to discharge the plaintiff in error from a contract made in New-York with the citizens of that state;" and Judge Woodbury adds, "as a matter of fact, the contract must be deemed a foreign one, or in common parlance, a New-York and not a Maryland contract. The *lex loci contractus* which must govern its construction and obligations is, therefore, the law of New-York, unless on its face the contract was to be performed elsewhere. As a question, then, of *international law*, such a contract and its obligations cannot be affected by the legislation of bankrupt systems of other states. It is understood that the whole court concur in this opinion."

Now, although the court profess to follow the decision in Ogden and Saunders, yet they do in fact overrate it, and adopt a new criterion by which to test the constitutionality of state insolvent laws. According to Ogden and Saunders, if the parties lived in different states, their contracts could not be affected by state insolvent laws. According to Moffat and Cook, the residence of the parties was immaterial, but if the place of the contract and the place of the discharge are different, then the contract is safe from the influence of state insolvent laws. Judge Grier also says, that "the case of McMillan and McNeil is precisely similar in all respects to Moffat and Cook, and rules it." But the learned judge knew or ought to have known that it was ruled in McMillan and McNeil, that all state insolvent laws are unconstitutional, without reference to either the *lex loci contractus* or the residence of the parties, while in Moffat and Cook, all state insolvent laws are held to be constitutional, except when the place of the contract and the place of the discharge are different; and yet the learned judge claims, that his decision is in accordance with the safe maxim of *stare decisis!*

Chief Justice Taney was of opinion that the discharge of Cook, under the insolvent laws of Maryland, ought to have protected him within the State of Maryland, but admits that it was no protection in New-York, or any of the other states, except by *comity*. In other words, that a state insolvent law may be constitutional in the Circuit Court of the United states, when sitting in Maryland, and unconstitutional in the same court when sitting in New-York or in any of the other states. Thus he says, "if a state may pass a blue-knight law, it would seem to follow, that it would be valid and binding, not only upon the state courts, but also upon the courts of the United States, when sitting in the state and administering justice according to its laws, and that in the tribunal of the other states, it should receive the respect and comity which the established usages of civilized nations extend to the bankrupt laws of each other. But how far this comity should extend, would be a question for each state to decide for itself." The constitution, however, says, that a law of a state or the judgment of a state court, which is constitutional in one state, shall be constitutional in all the states. "Full faith and credit

shall be given in each state to the public acts and judicial proceedings of every other state." It also says, that a citizen of the United States is a citizen of each of the states, and shall be entitled to all the privileges and immunities of citizens in the several states; but Chief Justice Taney says, that the extent of these privileges and immunities, so far, at least, as the state insolvent laws are concerned, will be a question for each state to decide for itself. He therefore concurs with the rest of the court in referring those questions to the laws of nations, instead of the constitution. This is carrying state rights a little farther than either a fair construction of the constitution itself, or the people, will bear. The people are not yet so sick of the constitution as to be willing to exchange any part of it for the laws of nations; nor are they so blinded by state pride, as not to be able to distinguish between independent sovereign states and independent sovereign nations. Although the court confess their inability to reconcile these cases, yet they do not think it "prudent to depart from the safe maxim of *stare decisis!*

There are some other things in these cases worthy of observation. In the first three the court appear to have been unanimous in their opinion, that all state insolvent laws were unconstitutional, without regard to the residence of the parties, or the locality or date of the contract. This opinion was perspicuous and intelligible, and in accordance with its spirit and meaning. Neither the convention, nor the people in making and adopting that article of the constitution, ever thought of state involvent laws. This is manifest from the fact, that the states all continued to pass involvent laws after the constitution was adopted, precisely as they did before. But although no dissent is expressed or hinted at in the reports of these cases, yet Judge Johnson, in pronouncing the judgment of "the court in the case of Ogden *vs.* Saunders, says, that in the case of Sturges and Crowninshield, "the court were very much divided in their views, and that the judgment partakes as much of a compromise as of a legal adjudication. The minority thought it better to yield something, rather than risk the whole."

This is strange language in the mouth of a judge. We often hear of compromised verdicts of juries, but never before of a compromised judgment of a court, more especially on a question of constitutional law. Has a judge a right to compromise and bargain away any part of the constitution? "The minority thought it better to yield something, rather than risk the whole!" Strange language this in the mouth of a judge. I do not understand it. One would think that the court was deliberating about what they should make the constitution and not about what it was. But this noted case of Ogden *vs.* Saunders is pregnant with other strange things. Judges Washington, Johnson Thompson and Trimble, each delivered elaborate opinions in favor of the constitutionality of state insolvent laws, and all but Judge Johnson are for overruling the demurrer. Judges Marshall, Duvall and Story also, deliver an elaborate opinion, in accordance with the former decisions of the court, and are for sustaining the demurrer. Judge Johnson then joins the minority, and sustains the demurrer upon a point not acquired at the bar, and never before heard of in any of the discussions of this question, to wit, the geographical locality of the plaintiff; and six years afterwards, in the case of Boyle *vs.* Zackery (Reported in 6 Peters) we are, for the first time, informed by Judges Marshall and Story, that they "concurred in and adopted the opinion of Judge Johnson, and, of course, abandoned their own, as the two opinions were wholly irreconcliable; and now, in Moffat and Cook, the court

abandons the locality or residence of the plaintiff and adopts the *lex loci contractus* as the test of the constitutionality of state insolvent laws, and at the same time tells us that they do not think it "prudent to depart from the safe maxim of *stare decisis!*

All this comes from undue pride of opinion—from an unwillingness to overrule their own decisions—and from an unwise reverence for that dangerous old maxim, *stare decisis*. Such discordant decisions, and such discrepancy of opinion, among the members of the Supreme Court, never can settle a question of constitutional law.

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THE HERMAN AND DOROTHEA OF GOETHE.

POLYHYMNIA.

THE CITIZEN OF THE WORLD.

(CONTINUED)

Hasted Herman straight to the stalls, where the spirited horses
Quiet stood, and quickly the grained provender ate up,
And the well dried hay, on the best of the meadows produced;
Speedily then in their mouths, the bit, all bright, he inserted,
Drew with practised hands the straps through the silvery buckles,
Firmly fasten'd the leathern length of the reins to the head-gear,
Led the horses into the fold, where ready the groom had
Now drawn forward the car, by the pole it easily moving.
Firmly then they two to the car, with the leathern traces,
Bound the vigorous force of the fleet impetuous horses.
Herman grasped the whip, took his seat, drove under the gateway.
And when the friends in the roomy recess had taken their places,
Speedily rolled the car, and left behind it the pav'd road,
Left behind the walls of the town and the turrets of smooth stone.
Quickly did Herman drive to the well-remembered causey,
Pausing not, but up-hill and down-dale driving with like speed.
But when he now once more the tow'r of the village espied,
And not afar off now lay the houses, garden-encircled,
Thoughtful he in his mind rein'd in the powerful horses.

By the reverend gloom of tall limes shadily shelter'd,
In that place already many a century rooted,
Lay, with sward well-clothed, a broad and spacious green spot,
Close to the village, a field for the games of the neighboring country.
Hollow'd below the ground a well lay under the lime-trees;
When you the steps went down, appear'd there benches of hewn stone
Round the source disposed were live floods constantly well'd forth,
Neat, with a low wall girt, well fitted for those that would draw there.
Herman here had resolved, beneath this shadow, the horses
With the car to detain. This straightway did he, and thus spoke:
"Now descend from the car, my friends, and go and inform you
Whether the maiden merit the hand that I would to her offer.
Doubtless I so do think. To me not sudden nor strange 'twere.

THE

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AND

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