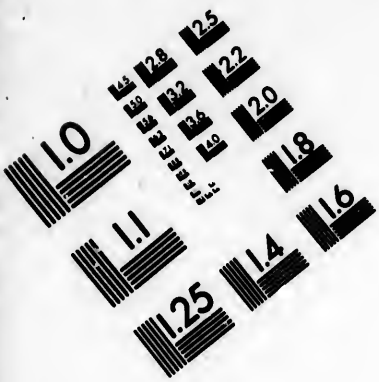

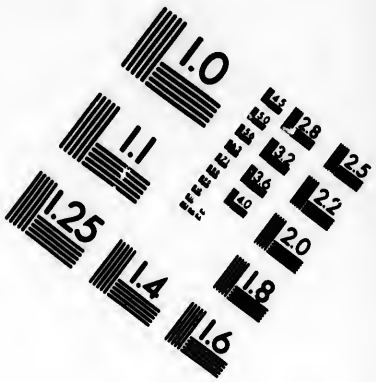

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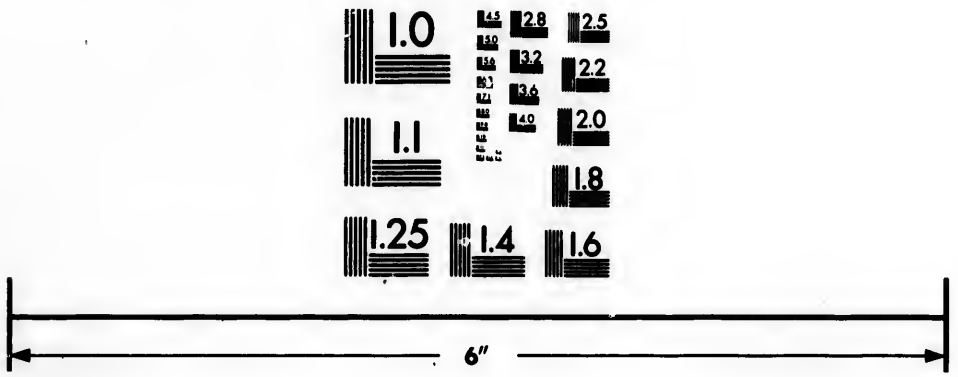

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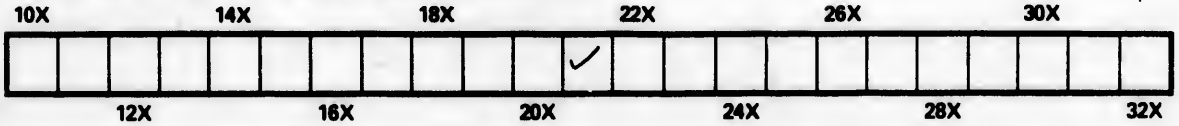

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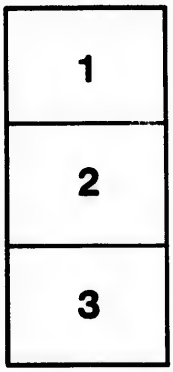

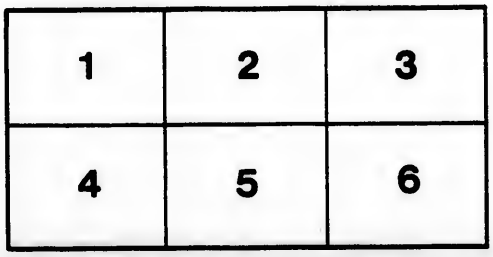

ARGUMENT

OF

ROBERT J. WALKER, ESQ.

BEFORE

THE SUPREME COURT OF THE UNITED STATES,

ON THE

MISSISSIPPI SLAVE QUESTION,

AT

JANUARY TERM, 1841.

INVOLVING THE POWER OF CONGRESS AND OF THE STATES TO PROHIBIT THE INTER-STATE SLAVE TRADE.

PHILADELPHIA:

PRINTED BY JOHN C. CLARK, 60 DOCK STREET.

1841.

ARGUMENT.

Mr. Walker said, he appeared only for Moses Groves, of Louisiana, whose defence was meritorious as well as legal. He was a mere accommodation endorser, who had been made a party to this illegal contract, without his knowledge or consent, through an endorsement in blank for the accommodation of the drawer of the note. This is evident from the record; but as the question resolved itself into a decision upon the validity of the contract, the following agreement was filed in the case below. "The case is to be defended solely on the question of the validity and legality of the consideration for which the notes sued on were given. It is admitted that the slaves, for which said notes were given, were imported into Mississippi as merchandise, and for sale, in the year 1835, 1836, by plaintiff, but without any previous agreement or understanding, express or implied, between plaintiff and any of the parties to the note; but for sale, generally, to any person who might wish to purchase. The slaves have never been returned to plaintiff, nor tendered to him by any of the parties to the notes sued on." It must be observed, that it is not alleged or pretended that my client, Moses Groves, ever had the possession or control of any of these slaves, or that it ever was in his power to tender or return them. The notes sued on were dated December 20, 1836, and were given and made payable in Mississippi; and the validity of the contract depends upon the following clause in the amended constitution of Mississippi, adopted October 26, 1832. That clause is in these words—"The introduction of slaves into this state as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833: *Provided*, That the actual settler or settlers shall not be prohibited from purchasing slaves in any State of this Union, and bringing them into this State for their own individual use, till the year 1845."

The question arises only on the first branch of this clause; which, it is said, is but a mandate to the legislature to prohibit the introduction of slaves for sale from and after the 1st of May, 1833. But the clause is not directed to the legislature, and is not a mandate in substance or in form, but an absolute prohibition, operating proprio vigore. It requires no legislation to give it efficacy to avoid this contract; and none such could prevent or postpone its operation. To declare it a mandate, is to interpolate into this provision words of solemn import. No court can introduce into a law, or exclude from it, words not used by the legislature; unless it be clearly necessary to give effect to the law, ut res magis valeat quam pereat. Now the clause—"The introduction of slaves into this state as merchandise, or for sale, shall be prohibited from and after the first day of May, eighteen hundred and thirty-three," is complete of itself, as a prohibition, operating by force of the constitution itself, from and after the day designated by that instrument; and to change it into a mandate, the words "by the legislature" must be interpolated. It was an operative fundamental law, ordained by the sovereign power of the state, which called the legislature itself into being; and though that body might prevent the violation of this prohibition by more effectual guards and penalties, as they

have done in 1837; yet as the prohibition could not be repealed by the legislature by positive enactments, neither would their omission to act, expunge this prohibition from the fundamental law. This Court, through Chief Justice Marshall, have said, that the nature of a constitution "requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the objects themselves." "The constitution unavoidably deals in general language;" it does not "*enumerate the means*" by which its provisions shall be carried into operation. 4 Wheat. 407, 8. 1 Wheat. 326. Baldwin's Const. Views, 99, 100, 192. So also the constitution of Mississippi contained only the important objects and great outlines of the government, written and ordained by the people acting in their highest sovereign capacity, by their delegates in convention assembled; and all the details of legislation were left to that branch and department of the government to whom that duty appropriately belonged. The legislature, in regarding the objects designated, might well surround a constitutional interdict with appropriate penalties; but they could not render it inoperative, either by positive or negative action; and whatever course they might pursue, all laws and contracts repugnant to the prohibition would be void.

When was this prohibition of the constitution to go into effect? That instrument assigns the day; it is "from and after the first day of May, 1833;" not *after* the 1st of May, 1833, but *from* and after that day and no other. From and after a day specified, fixes absolutely the very day when this prohibition would commence to operate; and to postpone its operation to any future, unknown, indefinite period, at the discretion of the legislature, would be to disregard the plain language and manifest intent of the constitution. Nor were these words, "from and," after the day fixed, introduced by accident. On the contrary, the clause, as originally proposed, was, "the introduction of slaves into this state as merchandise shall be prohibited after the —— day," &c., page 57 of Journal; and the provision was amended subsequently by introducing the words "*from* and" after, &c. Why thus cautiously designate the very day for the commencement of the operation of this prohibition, unless it was certainly to go into effect on that very day, by force of the constitutional interdict? To postpone, then, the operation of this prohibition to any day subsequent to that named in the constitution, is to expunge the time altogether, and leave it dependent upon the fluctuating will of the legislature, obeying or disregarding, at pleasure, this constitutional provision, and giving or refusing operation to it, from time to time, by enacting or repealing laws upon the subject, and thus changing a fixed, permanent, established, fundamental law, into a mere directory provision, operative or inoperative, as the legislature might act or refuse to act, or repeal its action upon the subject. But this provision was not only designed to operate of itself from a day fixed and certain, but unchangeably through all time to come, or to be changed only by the same sovereign power which framed the constitution. The convention have said, "the introduction of slaves for sale shall be prohibited," &c. This language is general; it is addressed to every one, and to all the departments of government; and why should it, by implication or interpolation, be limited to a direction to the legislature? It was competent for the convention itself to prohibit this trade; and if they have used language which, in a statute, all admit would be a prohibition, why shall it receive a different construction in the organic law? Is a state constitution merely a mandate to the legislature? Is it so in its prohibitions, and especially in those which are contained in general provisions, as in this case, and not in the article creating the legislative department, and assigning its appropriate powers and duties? If this construction be adopted by implication, in regard to other clauses equally imperative in the constitution of Mississippi, it will be rendered, in many of its most important provisions, absurd and incongruous, nugatory and repugnant.

These words "from and after the 1st of May, 1833," have received a settled construction by this court, in 9 Cranch, 104, 119, where they say "The act 1st July, 1812, provided that an additional duty of 100 per cent. upon the permanent duties now imposed by law, &c., shall be levied and collected upon all goods, wares and merchandise which shall, *from and after* the passing of this act, be im-

ported into the United States from any foreign port or place. It is contended that this statute did not take effect until the 2d day of July; nor indeed, until it was formally promulgated and published. We cannot yield assent to this construction,"—and the court exacted the double duties upon an importation *on the 1st July.* Here it is decided, that these words, *from and after*, included the day named, and such was the settled legal construction when the words were used in our constitution; and in such cases it is conceded, that the construction is adopted with the words. Why then introduce the word *from* by an amendment in this case, unless the prohibition was to commence on that *very day named*, and in all time thereafter? Thus to designate by an amendment the *very day* when this probitition "*shall*" commence to operate, clearly proves that this should be an absolute prohibition; and never to put it into operation unless the legislature acted upon the subject, or at such indefinite and distant period as they might designate, is to defeat the meaning of the constitution. Here then the precise date is fixed, and the words are *shall be prohibited* from and after that date. In 2 Wheat., 148, 152, 153, it was decided by this court, that "under the Embargo Act of the 22d Dec. 1807, the words '*an embargo shall be laid*' not only imposed upon the public officers the duty of preventing the departure of registered or sea-letter vessels on a foreign voyage, but, consequently rendered them liable to forfeiture under the supplementary act of the 9th Jan. 1808." In this case the court said, this vessel was "libelled for a violation of the Embargo Act of the 22d Dec. 1807, and the Supplementary Act of the 9th Jan. 1808, the former of which enacts 'that an embargo shall be laid on all ships and vessels in the ports of the United States, bound on a foreign voyage,' and the latter forfeits the vessel that shall proceed to any foreign port or place 'contrary to the provisions of this act, or of the act to which this is a supplement.'" "Was then the sailing to a foreign port, a prohibited act under the embargo law, to a registered or sea-letter vessel? If so, the commission of such an act was a cause of forfeiture under the act of Jan. 9, 1808. And here the only doubt is, whether the words 'an embargo *shall be laid*,' operate any further than to *impose a duty on the public officers* to prevent the departure of a registered or sea-letter vessel on a foreign voyage. The language of the act is certainly not very happily chosen; but when we look into the definition of the word *embargo*, we find it to mean 'a prohibition to sail;' substituting this periphrasis for the word embargo, it reads 'a prohibition to sail shall be imposed, &c.,' or in other words, 'such vessels *shall be prohibited* to sail,' which words, had they been used in the act, would have left no scope for doubt."

Here too, the question raised is whether the words "shall be prohibited," operate any further than "to impose a duty" on the legislature to "prevent" the introduction, or amount to a prohibition. Now the words "an embargo shall be laid" operated in presenti, as an embargo, and not merely as directory to the public officers; the words "a prohibition to sail *shall be imposed*," operated in the like manner, as also did, beyond all doubt, the words "such vessels *shall be prohibited to sail.*" The words then *shall be prohibited* operated as a prohibition, and in presenti, and if the words *shall be prohibited to introduce* would so operate, what difference is there in the words *the introduction shall be prohibited?* The case then is clear in point, and that too, on the construction of a penal statute inflicting a forfeiture; and the construction of these words *shall be prohibited* had thus been settled when our convention adopted them in 1832. And here it was a traffic that was prohibited. Now what is the meaning of the terms *prohibited traffic?* It is an *unlawful traffic*, for the past participle is thus repeatedly used as an adjective.

The clause would then read, the introduction of slaves for sale, shall be *unlawful* from and after the 1st of May, 1833, and the proviso would then read, Provided, that it shall not be unlawful for the actual settler or settlers to purchase slaves, in any state in this Union, and bring them into this state for their own individual use, until the year 1845. But if the proviso, from the different terms used, and failure to designate the day upon which the prohibition should commence to operate, was susceptible of a different construction, it would only render still more imperative the main provision, by which the *traffic* was prohibited *from* and after the day named in the constitution.

Grants of legislative power mandatory and permissive, frequently occur in the constitution, and the convention well knew how to make such grants, and to distinguish between those which were mandatory or permissive. The first section contains three distinct grants of power, permissive to the legislature, in relation to slaves; and one of these was a power to prohibit the introduction of a certain description of slaves. This power to prohibit the introduction of slaves of one class by all persons, and the positive prohibition in this case of the introduction of slaves as merchandise, demonstrates, that the convention well understood the difference between a power to prohibit, and an absolute prohibition. Throughout the same instrument numerous grants of power occur mandatory to the legislature. Thus in the 26th section of the 4th article, it is declared, that "the legislature shall provide by law for determining contested elections of judges and other officers." The 10th section of the 7th article, declares "the legislature shall direct by law in what manner, and in what courts suits may be brought against the state." These and many other grants in the constitution are mandatory injunctions to the legislature to pass certain laws. Whenever, then, the convention designed to address the legislature in the language either of permission or command, they used invariably appropriate words for that purpose, and differing entirely from those provisions or prohibitions designed to operate by their own authority; and in this as in many other similar cases, operating by virtue of the constitution itself. If the terms in the constitution "*shall be*" are mere directions to the legislature, mandatory or permissive, and inoperative until the legislature shall have obeyed the constitutional injunction, then much the most important part of the constitution, which went into operation immediately, would have remained suspended until the legislature acted upon the subject. Thus the 1st section of the 2d article declared, that "the powers of the government of the state of Mississippi *shall be* divided into three distinct departments;" thus seeming to contemplate a future distribution of these powers; yet we know that this division was made and operated by virtue of the constitution itself. Section 9, article 1, declares: "The people shall be secure in their persons, houses," &c. Section 17, "All persons shall, before conviction, be bailable," &c. Section 2, article 3, "Electors shall in all cases, except, &c., be privileged from arrest during their attendance on elections." Section 4, "The legislative power of this state shall be vested in two distinct branches," &c. Section 19, "Senators and representatives shall in cases except, &c., be privileged from arrest," &c.; not by future legislation, but by this provision of the constitution. Section 1, article 5, "The chief executive power of this state shall be vested in a governor," &c. Section 2, article 6, "All impeachments shall be tried by the senate." "The governor, &c., shall be liable to impeachment." In all these cases, and throughout this constitution, the terms *shall be*, operate proprio vigore. The terms "shall be secure," "shall be bailable," "shall be privileged," "shall be vested," mean *are secure, are bailable, are privileged, are vested.* This is the settled meaning of these terms *shall be*, in the constitution; they operate proprio vigore, and should receive the same construction in the clause now under consideration.

The terms "shall be" operated immediately in all these clauses, and present a much stronger case than the one now under consideration. Here the terms "shall be" are the appropriate and proper terms, requiring no construction by which they shall be made to operate in presenti; but operating from and after a future day fixed unchangeably by the constitution. The day too thus fixed, was but six months distant, a time barely sufficient to give full and fair notice throughout the state and Union, of the existence of this prohibition, conforming in this particular to many similar laws on the same subject in other states, quoted in the concluding branch of this argument. Why name a day at all, and especially a day fixed and certain, and so near at hand, if this clause were merely directory to the legislature? If any doubt could still remain, it must vanish upon an investigation of the legislation of the state on this subject. By the act of the territorial legislature of Mississippi, of the 1st of March, 1808, certain restrictions are imposed upon the introduction of slaves as merchandise, but chiefly designed to prevent the introduction of dangerous or convict slaves. (Tur. Dig. 386.) Thus stood the law, when

in 1817, we formed our first constitution, which contained the following clause: "They (the legislature) shall have full power to prevent slaves from being brought into this state as merchandise;" but there was no prohibition of the traffic. By the act of June 18, 1822, the territorial law before quoted was substantially re-enacted. Revised Code, 369.

Thus stood the statutes and the organic law when the convention assembled which adopted the new constitution of 1832. The first contained the fullest grant of power on this subject to the legislature. Why then this important change in this provision from a mere grant of power to the legislature, into the prohibitory terms of the constitution of 1832, unless an absolute prohibition was designed by the framers of that instrument? The one was a grant of power to the legislature, the other was a prohibition. The reason of the change is obvious. The legislature, during the intervening period of fifteen years between the adoption of the old and of the new constitution, had never fulfilled the trust confided to them by prohibiting the introduction of slaves as merchandise; and therefore the framers of the new constitution determined to confide this trust no longer to the legislature, but to prohibit this traffic themselves, by an absolute constitutional interdict, operating of itself, upon a day very near at hand, fixed and certain, and placed, as were many other subjects by the constitution, above the control of the legislature. The history of that period will also furnish other reasons why the constitution of 1817 was changed by that of 1832 from a direction to the legislature, into a prohibition. Events had occurred in Southampton, Virginia, but a few months preceding the period when the convention of 1832 assembled, which had aroused the attention of the Southern States to the numbers and character of the slave population. The influence of that insurrection is no where more clearly demonstrated than in the extraordinary votes and speeches in the legislature of Virginia, assembled shortly after that catastrophe. If insurrection had not appeared in Mississippi, there had been many apprehensions upon the subject; and looking at the tragedy just enacted in our sister state, the convention introduced this provision, to produce among other good effects, additional security to the people of Mississippi. Whilst, in this constitution, they gave to the governor power to call forth the militia of the state "to suppress insurrection," they guarded against the supposed danger of that event, by this important constitutional interdict. If Virginia had been driven to the very verge of the abandonment of her ancient institutions, by the events which had occurred within her limits, was there not some reason that the convention to which was entrusted the security of the people of Mississippi, should interpose some guards for their protection? In looking at the general census of 1830, then recently published, they saw, that whilst in Virginia the whites outnumbered the slaves 224,541, in Mississippi the preponderance of the whites was but 4784, and that the slave population was increasing in an accelerated ratio over the whites, the former now greatly outnumbering the latter. In looking beyond the aggregates of the two races in the state to particular counties, they found that in an entire range of adjacent counties, the preponderance of the slave over the white population was three to one; in many of the contiguous patrol districts, more than ten to one, and in many plantations more than one hundred to one. In looking at the policy adopted by our coterminous and sister state of Louisiana, they found that, in that state, the legislature, by laws passed the 19th November, 1831, and 2d April, 1832, had under severe penalties prohibited the introduction of slaves as merchandise, and declared the slaves so introduced to be free. Such was the legislation of Louisiana immediately preceding the assembling of our convention, and such the circumstances and example under which we acted. We acted as Louisiana had just done, by introducing a provision designed to operate after the short notice of six months, as an absolute prohibition. The subject had attracted great attention when the delegates were elected to the convention; and the people fully expected and required final and definitive action by the convention itself on this question, and they were not disappointed.

Such was the opinion which prevailed when the first legislature assembled under the new constitution, in Jan. 1833. This legislature was assembled at the time specified by the convention, by virtue of writs issued by that body, to orga-

nize the government under the new constitution. If this clause be in itself a prohibition, then it did not operate as a command to the legislature. But if it be not a prohibition, then it is conceded to be a mandate, directed specifically to the legislature, commanding them to prohibit the introduction of slaves as merchandise *from* and after the 1st of May, 1833. If that legislature adjourned without fulfilling this injunction, it must have remained forever unfulfilled in one most important particular, namely, the time fixed by the convention from which the prohibition should commence to operate; for, under the provision of the constitution, no other legislature could convene until November, 1833, a period long subsequent to the time designated for the commencement of the operation of this prohibition.

The legislature was a department of the government, created by the convention, and assembled in pursuance of its authority. Under the 7th article of the new constitution, every member of this legislature has taken a solemn oath to support that instrument, and had they conceived the provision in controversy to be a mandate directed to the legislature, they would have disregarded those oaths, if they had failed to make any prohibitory enactment in pursuance of this injunction of the constitution. Had even this mandate been in opposition to their views of public policy, it would still have been obligatory upon them. But this legislature passed no laws in pursuance of this provision, because they did not conceive this clause to be a mandate directed to them, but an operative prohibition of the constitution; and that the omission was not casual, is proved by the fact, that they proposed for the consideration of the people at the next November election, an amendment to the constitution, striking out this 2d section in regard to slaves, and introducing in lieu thereof, the following provision: "The legislature of this state shall have, and are hereby vested with power to pass, from time to time, such laws regulating or prohibiting the introduction of slaves into this state as may be deemed proper and expedient." (Laws of Mississippi, 478; March 2d, 1833.) The legislature thus endeavoured to change a prohibition, by their proposed amendment, into a mere discretionary authority, which they might or might not exercise at their pleasure. This attempt on the part of the legislature to obtain for themselves this discretionary power failed, as they conceded at the succeeding session of 1833. The amendment, in order to be incorporated into the constitution, must have been voted for by "a majority of the qualified electors voting for the members of the legislature;" and it is obvious that 4500 votes given for this amendment, must have constituted a small fraction of the voters of the state at that period. The vote of the state for governor in November, 1839, was 34,532. I have not the vote of Nov. 1833, but 4500 could not have been one-third of the vote then actually given for members of the legislature. A very small vote was given against the amendment, and it is surprising that so many votes were given, as no vote on the question was a vote against the amendment. The legislature, in December, 1833, acknowledged, that their proposed amendment had failed. The subject was then again before them. They had renewed their oaths to obey the mandate of the constitution, and why was obedience again refused? Because this legislature, like its predecessor, did not view this provision as a mandate directed to them, but as a prohibition. It is said, that at the date of this note, the validity of such a contract was not disputed in Mississippi; but this is entirely erroneous, and the mistake is proved by the very quotation made by our opponents, from the message of Governor Lynch, of the 1st Monday in January, 1837. That message declares at that date, that "it has now become a mooted question, under this clause of the constitution, whether contracts for that description of property can be enforced." Now the date of this contract is the 20th of December, 1836, but two weeks preceding the admission thus made in the executive message, that the validity of these contracts was then "a mooted question." There is no fact more notorious in the state, than that the legality of these transactions was disputed at the date of this contract; and the suggestion that this illegality is an ex post facto discovery, when bankruptcy became universal, is entirely erroneous. This message shows no embarrassments at that date. The legislature were then engaged in making banks and paper money. We were then careering onward upon the tide of a delusive prosperity; and the explosion of the succeeding spring, came upon us like

some of those tropical hurricanes, whose only warning consists in one sudden overwhelming sweep of ruin and desolation. It is true Governor Lynch did, afterwards, in his message of May, 1837, recommend the enforcement of this prohibition. It is true also that the legislature did then guard against the violation of this prohibition, by punishing the transgressors of it with fine and imprisonment: but all this implies no admission of the previous validity of these contracts, for this court have said that a constitution is not the place in which the minor details of legislation, these pains and penalties are to be found. But if this question was mooted as we have seen at the date of this contract, it was not on the ground that this was a mandate; but that, as a prohibition, it interdicted only the importation and not the sale. The proof on this point is ample; but we need only refer to the opinion of Chancellor Buckner, so much relied on by our opponents, in which he recites all the grounds assumed in behalf of the negro traders, namely:—

"1st. That though the introduction of the negroes may have been illegal, yet that the consequences of that act could not be communicated to the contract of sale and purchase, which was a separate and distinct transaction between themselves and the complainants.

"2d. If the reverse of the first proposition were true, it is contended that the illegality of the contract was a matter of pure defence in the court of law."

Here, even at that late day in this controversy, neither these wealthy and powerful traders, nor their learned counsel, deemed it even a point in the controversy, that this provision was not a constitutional interdict, but that the only question was, whether that interdict affected the sale or the introduction only. Chancellor Buckner also takes up fully the constitutional question, and declares his determination "to put it in train for ultimate decision." In that opinion, which is very elaborate, he does not pretend that this clause in the constitution was not of itself prohibitory; but on the contrary, he says: "Thus we intend to prohibit the multiplication of slaves in this state, but as we do not intend to extend it so far as to prohibit our own citizens from bringing them in for their own use, in order to render the *introduction* illegal, it must appear as a part of the act, that the *intention* existed to use the slave so introduced, as an article of merchandise or for sale. If the framers of the constitution intended any thing beyond this construction, instead of the language employed, we should expect to find them declaring that the sale of negroes in this state, which were introduced as merchandise or for sale, shall be prohibited from and after the first day of May, 1833. Such a construction *would fully sustain the construction contended for by the complainants counsel;* there the 'sale' not the 'introduction' would be the thing prohibited. To show my understanding of it more clearly, I mean to declare, that the *moment* the negroes were 'introduced as *merchandise* or for sale,' *the offence was at once complete. No further step was necessary to bring it within the meaning of the prohibitory clause of the constitution.*" Here it is most distinctly conceded, that the act of importation with intent to sell, is rendered illegal by "the *prohibitory clause* of the constitution;" and that the contract by virtue of the true construction of that clause would have been illegal, if the sale had been embraced in the provision. And not only is this point thus clearly conceded in this case, but no decision, so far as my knowledge extends, has ever been made by any judge against us on this point.

Upon this point then we have the decision of the district judge of the United States for the state of Mississippi (Mr. Gholson); the decision of Chancellor Buckner so much relied on by our opponents; and finally, the decision of the highest court of the state of Mississippi, after the most elaborate argument, the question being sent up for the express purpose of obtaining a final adjudication. That opinion, too, was delivered by a gentleman distinguished at the bar and on the bench, as a stateeman and jurist; who had repeatedly served with distinction in the legislature of the state, upon the bench of the circuit court, in the convention which framed this very constitution, in the Senate of the United States, and finally as a member of the highest court of the state. He was not only a member of the convention which framed the constitution, but chairman of the very committee to which this clause was referred. He was a witness of all that transpired in that committee and in that convention; he participated in all the debates upon the question, observed

all the modifications of this provision from the imperfect form in which it was originally presented, until it was perfected as it now stands; and his opinion as to the intention of the convention, is the testimony of a witness, as well as the decision of a judge. Concurring with him, was the able and learned Chief Justice of the state, and there was no dissenting opinion.

As authority merely, such a decision under such circumstances, pronounced by the highest court of the state upon a question regarding the construction of a clause in their own constitution, upon a local question with which, and all the proceedings relating to it in the convention and in the legislature, they must be more familiar than this court can be, ought to be conclusive.

In delivering, after solemn argument, the deliberate opinion of the high court of errors and appeals of Mississippi, Judge Trotter says—

"Two questions present themselves for the consideration of this court: 1st. Whether the consideration of the note for which the judgment was given is illegal, and renders it void. 2d. Whether a court of chancery can give relief.

"The constitution of 1832 provides that 'the introduction of slaves into this state as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833.' That it is competent for the people in convention to establish a rule of conduct for themselves, and to prohibit certain acts deemed inimical to their welfare, is a proposition which cannot be controverted. And such rule, and such prohibition will be as obligatory as if the same had been adopted by legislative enactment. In the former case it is endowed with greater claims upon the approbation and respect of the country, by being solemnly and deliberately incorporated with the fundamental rules of the paramount law, and thus placed beyond the contingency of legislation. It has been argued that this provision in the constitution is merely directory to the legislature. This interpretation is opposed, as I conceive, to the plain language of the provision itself, as well as to the obvious meaning of the convention. It cannot surely be maintained that this provision is less a prohibition against the introduction of slaves as merchandise, because it is not clothed with the sanction of pains and penalties expressed in the body of it. That belonged appropriately to the legislature. Their neglect or refusal to do so, might lessen the motives to obedience, but could not impair the force of the prohibition."

Here, then, is the question made for the final adjudication of the court, and clearly determined by them, and with an ability worthy of their high reputation. It was, too, a decision in favour of the trader in slaves, upon the doubtful question of chancery jurisdiction, and he was permitted, for want of a defence at law, to reap the fruits of his unlawful contract; thus vindicating the court in this very decision, from the charge of any bias as judges in favour of our own citizens, so unjustly urged by our opponents, as a reason why that decision should have no weight with this court. The judges of that court, for integrity and impartiality, are universally esteemed by the bar and by the people, and by all men and all parties in the state; any insinuation that these judges or any one of them ever had been or ever could be governed by any unworthy bias, could only subject to just suspicion those by whom such a suggestion could be made, and those upon whom it could have the slightest operation. I am restrained by my respect for this court, from expressing here my indignation at the assault made upon the functionaries and people of Mississippi. It is true, as stated, that great embarrassments pervade the state, and that it is strewed with the wrecks of broken hopes and bankrupt fortunes. But has the honour of the state been tarnished, have the laws been disregarded, the courts overthrown or corrupted, or the constitution subverted? Has rebellion arrested for a time the progress of justice, as it once did from similar causes, in the great state of Massachusetts? Have we followed the evil example of another great state of the west, by enacting laws permitting a tender of worthless paper upon executions for debts payable in gold and silver? Have we, to enforce these enactments, trampled upon the fundamental law of the state and of the Union? Have we entered the sacred halls of justice, and by the strong arm of legislative and popular power, expelled from the bench the highest judicial functionaries, and placed usurpers there upon the broken fragments of the constitution? Have we—but even in retaliation I will darken no more, with

the pencil of truth, those scenes of misfortune, delusion and folly, which a thousand glorious deeds and ennobling sacrifices, in war and in peace, should expunge from the history of that patriotic commonwealth. But from that state at least, if not from all the Union, though we have never asked their sympathy for our sufferings, might we not justly challenge their respect for the fortitude with which they are borne. Again and again has the stern mandate of the law entered the dwelling of the husband and wife, and driven forth from it, them and their children, without a roof to shelter or a home to receive them. Again and again have endorsers and sureties for others suffered the fate of the principals, and stood by in silence whilst the sheriff or marshal proclaimed the sale, for the debts of others, of the last remnant of that property, which years of honest industry had accumulated. And was the law resisted? No! These gloomy scenes have been marked, almost universally, by a quiet endurance of suffering, and virtuous submission to the laws of the land. I regret the occasion that has extorted these remarks upon a subject which should never have been introduced into this argument; but, when Mississippi is thus arraigned before this high tribunal, this vindication is just and proper.

But, if this clause be not a prohibition, it is conceded to be a mandate to the legislature, requiring from them implicit obedience. It is admitted, that if the legislature had passed an act repugnant to this provision, that act would have been as clear a violation of their oaths and of the constitution, and as utterly void as if this clause had been an absolute prohibition. The mandate then established a policy which the legislature could not overthrow; and being binding upon the legislature, was obligatory on the judiciary. The government itself, in all its branches, was created by the convention; they were all creatures of the constitution, and no one department of that government could violate any mandate or provision of that constitution. The time was not indefinite, but fixed on the 1st of May, 1833, from which very day, in all time to come, this mandate should be made to operate; and if the legislature neglected to enforce this mandate by penal sanctions, did it therefore follow, that the judiciary should decree a performance of a contract, thus required to be prohibited from and after a certain day fixed by the constitution? A contract contrary to the public policy of a state will not be enforced by the judiciary. This policy may arise from the common unwritten law of a state, from its peculiar situation and institutions, or expressly or by implication, from a statute or constitutional provision. Now the convention had promulgated it as the policy of the state, that from and after the 1st of May, 1833, slaves should not be introduced as merchandise; and was the will of the convention or of the legislature to be obeyed by the courts in regard to this policy? It was the will of the convention that this traffic should cease on a day certain and fixed by the constitution; and if the legislature, which could not change this policy, failed to discharge their duty, that was no reason why the courts should follow their evil example. The courts might well say, and it was their duty to say, that although we cannot act affirmatively against the violators of this policy, they shall not make the judiciary the instruments, by a decree in their favour, to overthrow a great constitutional mandate, designed to accomplish important purposes. The courts of a country will often ascertain without a statute, and often from the mere implication of a statute, or merely from the situation of the country, what is contrary to the policy of a state, and they will enforce no contract repugnant to that policy. To no higher source then, could the courts of a state go, in order to ascertain what was the true policy of a state, than to a mandatory clause in the constitution. Had the clause in question been a mere grant of power to the legislature, the courts might have waited the action of that body; but, when the clause was mandatory, it promulgated the policy of the state, from an authority paramount to that of the legislature, and which policy, the legislature, neither by acting nor declining to act, could expunge from the constitution.

If the will of the legislature were ascertained to be one way in regard to this policy, and that of the convention the other, which should be obeyed by the judiciary, when required to act by decrees affirmatively upon the question? Can there be a doubt that the true answer to such a question should be in the language of this court, in 4 Wheat. 408, "If indeed such be the *mandate* of the constitution,

we have only to obey." This view of the subject is sustained by a late unanimous decision of the Supreme Court of Tennessee, in which they say: "In the precise state above supposed stood the matter, when the convention in 1834 adopted the 5th section of the 11th article of the reformed constitution, in which they provide, that the legislature 'shall pass laws to prohibit the sale of lottery tickets in this state.' This was itself a prohibition, and was announced to the complainants before the formation of their contract with the defendants." Bass vs. Mayor, &c. Meigs, 421. Upon this ground alone, the court pronounced the contract invalid, which was dated March 3d, 1835, and no law was passed till the 13th February, 1836, when a law was enacted prohibiting lotteries; as a law was passed in 1837 by the legislature of Mississippi prohibiting the introduction of slaves as merchandise. But independent of the subsequent law in Tennessee, their courts pronounced the contract invalid, in a case where many thousand dollars had been advanced to the city of Nashville, upon the sale of this lottery for the useful purpose of improving the streets of that city, and which money would be entirely lost if the contract were declared invalid. But it was so pronounced upon the sole ground that the constitutional mandate to pass laws prohibiting lotteries "was itself a prohibition;" because by this mandate the policy of the state "was announced to the complainants before the formation of their contract with the defendants," and they had no right to ask the court to disregard that policy, upon the ground that the legislature had failed to provide the proper penalties. The court could not supply those penalties, but they might well declare that they would not become instrumental in defeating this great public policy by decreeing the performance of contracts repugnant to it. If such a construction of the constitution of Tennessee, upon a mere mandate to prohibit lotteries was proper, how much stronger is the case before us? Here the subversion by the courts of the policy promulgated in the constitution, might involve not merely the property, but the lives of the people of Mississippi. Had not the people then in such a case a right to require that their courts should not become auxiliary in encouraging the subversion of this policy, by the enforcement of contracts repugnant to it? The legislature might never agree upon the details of a bill for the punishment of the transgressors of this policy; and must this mandate therefore be expunged by the courts from the constitution, or changed into a grant of discretionary power to the legislature? If so, this clause might as well never have been inserted in the constitution. It is sufficient for courts to know in any case, that the enforcement of a contract will be dangerous to the peace and prosperity of a state; and they have invariably refused, from a regard to the public good, to enforce such contracts. What better evidence could the courts of Mississippi desire, that the enforcement of this contract would be subversive of the true policy of the state, and dangerous to its peace and prosperity, than the prohibitory mandate of the constitution? If, as a consequence of a refusal of the courts to maintain this cardinal policy, the state had been filled with insurgent slaves, or with slaves in an excess too far beyond the white population, and the scenes of Southampton had been re-enacted within our limits, would the judicial ermine be unstained with the blood of the innocent victims, who had appealed to them in vain to discharge their duty, by denying their aid to all these contracts thus clearly repugnant to the prohibitory policy of the constitution? Why should the judicial sanction be given to the violation of a constitutional mandate; and the legislature, thus encouraged by a co-equal and co-ordinate department of the government, to persist in refusing to discharge the duty imposed by the constitution? It is clear then to my mind, that, whether the clause in question be of itself an absolute prohibition, or a prohibitory mandate, the contract is alike invalid, in accordance with reason and argument, as well as upon the authority of the unanimous decisions of the Supreme Courts of Mississippi and Tennessee.

Such was the view which those courts took of their duty to the people under these clauses in their respective state constitutions; and it would be strange indeed if this court should now inform those tribunals, that they had erred in this respect, and direct them to retrace their steps on this question. The people of Mississippi in convention, when creating a government had said, this traffic "shall be prohibited from and after the 1st of May, 1833." Was it then competent or proper for the judiciary,

who are but agents for the people under this government, deriving their existence and authority from the constitution, and bound by all their functions, to say this trade *shall not be prohibited* on the day fixed by the convention, but shall continue upheld by our decrees, until certain other agents of the people superadd legislative penalties? A "law" against the mandate would be "void," and so must be declared by the courts; and yet negative action, or a failure to act in pursuance of the mandate, it is contended, is obligatory upon the judicial tribunals. These tribunals are not created by nor do they derive their appointment or authority from the legislature, nay more, they are expressly authorized to restrain that department within the constitution, by invalidating all their acts repugnant to that instrument; and it would be strange indeed, if when that paramount law which all were bound to obey, declared this traffic shall be prohibited on a day certain, that the courts who are the guardians and interpreters of the constitution, should say, it shall not be prohibited on that day named by the convention, but only on such other future day, as may be designated by the legislature. Even if legislation, additional and penal, was contemplated by the convention, does it therefore follow that the trade was lawful and proper for judicial sanction? On this second point also our highest court, in the case above quoted, declare it immaterial whether it be a mandate or a prohibition. They say, "in either case it fixes the policy of the state on this subject, and renders illegal the practice designed to be suppressed."

These views, thus declared unanimously by the supreme courts of two of the states of this Union, are in accordance with just views of constitutional liberty. The formation of the constitution of a state is an act of sovereign power emanating directly from the people. Legislation is not an act of sovereign power. The legislature is not sovereign. It is but a co-ordinate department of the government, created by the constitution from which it derives all its powers; and when the people have inserted therein a mandate, declaring that from and after a day named by them, such a thing *shall be prohibited*, would it not be strange, because one department of the government, to whom this mandate was addressed, had disobeyed it, that it should therefore be considered a dead letter by another co-equal and co-ordinate department of the government, sworn to support the constitution, to maintain inviolate all its provisions, to repudiate all contracts repugnant to its spirit or policy, and to declare void, and render inoperative, all acts of any department or persons opposed to its provisions? The legislature could pass no act of grace or indulgence, dispensing with this mandate, and legalizing contracts repugnant to it; nor would their disobedience and failure to act constitute a just cause of disobedience by that very department which was not only sworn to support the constitution, but whose peculiar duty it was to expound that instrument, and to keep all persons and departments within its limits, whenever a case arose for the exercise of their judicial functions. What is the meaning of the oath taken by the judges of our high court to "*support* the constitution?" It is to maintain the supremacy of the constitution, and to enforce no laws or contracts repugnant to any of its mandates. And if an act giving bounties for the violation of this mandate would have been void, why is a contract repugnant to it, unsanctioned by any law, valid, the first being a legislative enactment, the second a confederacy of individuals to disregard the mandate? Suppose this mandate had been addressed to the Executive, could the legislature, with his concurrence, or without it, by the constitutional majority of two-thirds, have passed a valid law in opposition to such a mandate; and would the judiciary, by affirmative decrees, have enforced such an enactment? Or if the mandate had been addressed to the judiciary, would an opposing law have been valid? Surely not. And the reason in all these cases is the same, because no one of the departments of the government, *when required to act affirmatively*, can disregard any mandate of the constitution. The policy of a state may be announced in the constitution as the will of the people, either in a mandate, or in any other form; and however announced, no court can disregard that will, or subvert that policy. The supremacy of the constitution is the great cardinal principle of American liberty, from which there is no appeal but to force; and to subvert its principles, or disregard its mandates, is anarchical and revolutionary. If the clause in question be converted into a mandate to the legislature by interpolation and im-

plication, why is it not *declaratory* by construction, as well as *mandatory;* declaratory of the policy of the state on a day fixed and certain, and mandatory to the legislature to enforce that policy by appropriate legislation? This clause, marking the will of the convention as to this policy upon the day named by them, was declaratory of that policy; not a policy to be established hereafter by grants of discretionary power to the legislature, but declared in a mandate, imperative upon that body, and announcing to all the will of the convention. The words *shall be prohibited*, on a day named by the convention, did announce the policy designed by them to be established on that very day; and if, by interpolation and implication, we change these words into a mandate addressed to the legislature, shall we also so interpret these words, thus interpolated by conjectural construction, as to subvert the policy thus announced in terms clear and explicit, and render the whole clause dependent, from time to time, upon the fluctuating will of the legislature, inoperative without their action, changeable at their pleasure, and amounting to nothing more than the mere grant of discretionary power to the legislature, commencing when they legislate, and ceasing when they repeal the present or any future enactment on the subject.

In 2 Dal. 304, Judge Patterson, of this court, said:—"Every state in the Union has its constitution reduced to written exactitude and precision. What is a constitution? It is the form of government delineated by the mighty hand of the people, in which certain *first principles* of fundamental laws are established. The constitution is *certain and fixed;* it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. What are the legislatures? Creatures of the constitution." "The constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity. The one is the work of the creator, and the other of the creature. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move." "It is a *rule* and *commission* by which both *legislators* and *judges* are to proceed;" and "the judiciary in this country is not a subordinate, but co-ordinate branch of the government."

Was not the prohibition of the introduction of slaves as merchandise from and after a day "certain and fixed" by the constitution, one of those "first principles" announced in that instrument as "the permanent will of the people," "paramount to the power of the legislature," and furnishing the "rule and commission by which both *legislators* and *judges* are to proceed?" Now, by disregarding this mandate, the courts would make an act, or the absence of an act, of legislation, paramount to the fundamental law; they would exalt the legislature above the people, the creature above the creator, and elevate the policy of the legislature above that of the constitution.

It is admitted that if this clause were in a law it would be a prohibition, but as it is in a constitution it is said to be a mere direction to the legislature. Now the constitution is *a law*, the sovereign law, the paramount law, the fundamental, the supreme law, the permanent law, the law of highest obligation, the *lex legum*, the law of laws. The constitution of Mississippi of 1817, of which that of 1832 is an amendment, declares that therein and thereby the people "do ordain and establish;" which is quite as strong as *do enact;* and all laws contrary to any of its provisions are declared "void." It is then an act of *sovereign legislation, ordaining and establishing* certain permanent rules and fundamental principles of public policy, of universal obligation throughout the state, and not mere directions to any one department of government. In England, their early and fundamental laws, and especially their Magna Charta, were called constitutions; and before the revolution these were called by our ancestors, "the constitution," the "English constitution," "the constitution venerable to Britons and Americans"—1 Journal American Congress, 60, 65, 138, 148, 149, 163. Many of the fundamental principles of public liberty contained in Magna Charta are copied into the constitution of Mississippi and of the other states. How then is this great constitutional law regarded and construed in England? In the first place, then, it was a law, and is thus described in Dwaris on Statutes, 801—"Magna Charta, 9. H. 3, is the earliest *statute*

we have on record"—"It contains 37 chapters." Among the rules of construing this fundamental law here laid down was this, that "*no sanction* was wanting to *enforce* its obligations," that *no judgment could be given by any court* "contrary to any of its points," but that it should be observed with "the most scrupulous care"—Lord Coke says in regard to it, "As the gold finer will not out of the dust, threads, or shreds of gold, *let pass the least crumb*, in respect of the excellency of the metal, so ought not the learned reader to let pass any syllable of this law in respect of the excellency of the matter." But here in our Magna Charta, the fundamental law of the state, consecrated as the act of the people in their highest sovereign capacity, we are to give *less effect* to its provisions than to subordinate legislative enactments. In a statute, it is admitted these words would be a prohibition, but in this fundamental law, these same words are not so to operate, but are to be changed by implication and interpolation, or rather by what Coke calls "divination," guessing, or judicial astrology, into a mere direction to the legislature. Was Magna Charta ever regarded as a mere direction to parliament? No, it was universally interpreted as addressed to the courts, and to be enforced by them with the most "scrupulous observance" of all its provisions. And if by implication or interpolation we shall construe one portion as addressed to the legislature for their direction, where is the rule to stop? Parts of this constitution are addressed in words to the legislature, and other portions are not so addressed; and when the framers of the constitution intended merely to give directions to the legislature, they so declared, and not otherwise. No British court would so construe any clause of Magna Charta as to defeat any of its fundamental principles, or to change them into mere directions to the legislature; and shall an American court regard as less sacred the prohibitory enactments of the constitution? Among the canons for construing Magna Charta is the maxim "Verba ita sunt intelligenda, ut res magis valeat quam pereat;" but here we are asked so to construe this provision that it may perish and be treated as a dead letter. Indeed this clause is asked to be expounded as the young interpret dreams, by contraries; and when our fundamental law says, this traffic "shall be prohibited from and after the first May, 1833,—this is to be construed "shall not be prohibited" on that or any other day but such as the legislature may or may not think proper to designate.

The act of December, 1833, it is said, taxes the sale of these slaves, and therefore this clause is not prohibitory. But this act is merely an amendatory and declaratory statute, passed in pursuance of the auditor's report of November, 1833, to remove "any ambiguity" in the act of 1825. Under the last proviso of the 5th section of the act of 1825, citizens of the state who sold slaves as merchandise, contended that they were not liable to pay the tax. The auditor thought otherwise, and justly so, but to remove all "ambiguity" he recommends the legislature to "*declare the liability* of every person bound to pay the said tax." The three first sections of the amendatory act of December, 1833, merely enforced the collection of the tax authorized by the act of 1825, and both acts would embrace a tax on sales of slaves, provided they had been introduced prior to the first of May, 1833. Now many slaves introduced for sale remained, like all other merchandise, for years unsold; and to enforce the collection of the tax already authorized by the act of 1825, on these *lawful sales*, was the intention of the first three sections of the act of 1833. The fourth section of the act of 1833, if it be a substantive provision, going beyond the act of 1825, applies exclusively to any "citizen of this state." From the construction of our opponents, it would follow, that by this act, the legislature intended to discriminate between residents of the state and non-residents, by imposing upon the former only, and not upon the latter, a tax on the sale of all slaves introduced as merchandise after the date of the act of 1833. Such was not the intention of the legislature. The *fourth section* was declaratory only, and was a legislative construction, not of the constitution of 1832, but of the fifth section of the act of 1825. That section commences as follows: "And whereas it is provided, in the fifth section of the act to which this is an amendment, that nothing in that act shall authorize a tax to be collected on the sale of any slave or slaves, sold by one citizen of this state to another citizen thereof; therefore, and for the *better understanding whereof*,

"Be it enacted, That when any citizen of this state, residing permanently therein, shall bring into this state any slave or slaves," &c. That section, then, upon its face, was enacted solely for the "better understanding" of the 5th section of the act of which it was an amendment, and with the view only to obviate all "ambiguity" as regards that section by a legislative construction, applying the act of 1825 to residents as well as non-residents. There is not one word in the act of 1833, demonstrating that the legislature were placing any construction on the prohibition or prohibitory mandate of the constitution; much less that they were engaged in the unholy purpose of enacting laws repugnant thereto. The declaratory and amendatory act of 1833, can well expend the whole force of all its provisions, in aiding the collection of the tax authorized by the act of 1825, and applicable only to such cases, as those to which that act could well apply, consistently with the provisions of the constitution. No new tax was authorized by the act of 1833, but only more adequate provisions to insure the collection of the tax authorized by the act of 1825, and declaratory enactments for the "better understanding thereof."

This court is asked to repose upon a legislative construction of our constitution; and to do so, they must give a construction to the very enactment in question, never intended by its framers. Construction is to be based upon construction. And not only was this act of 1833 never intended as a construction of the constitution, but only of the act of 1825; but such has been its practical interpretation. The journals of the convention and legislature of Mississippi not being here, I am driven to the printed book of our opponents, consisting of such extracts from journals and messages, as they deem favourable to their cause, but which show that this act of 1833 has never been applied to slaves introduced after the 1st of May, 1833, although it may properly have applied to the cases, comparatively few in number, of slaves introduced for sale prior to the 1st of May, 1833, but sold, as they lawfully might be, in such cases, subsequent to that period. Thus, at page 28 of this pamphlet, is quoted the statement of the auditor.

"Amount received on account of slaves sold as merchandise from the 1st of Jan. 1833, to 3d March, 1833, inclusive, . $1065 17
"Do. do. from 4th March, 1833, to 19th Nov. 1833, . . $2625 13½"

Does this show, that any of these slaves, thus sold, were introduced subsequent to the 1st of May, 1833? The slaves introduced prior to that date, though *sold* afterwards, were clearly liable to the tax; and if the tax continued to be collected on all slaves imported afterwards, why this *decrease* in the revenue from that source, when the sales were *increasing?* Why was $1000 collected in *two* months from these sales prior to the 4th of March, 1833, and but $2625 in nearly *nine* months afterwards? As the importations and sales were increasing so rapidly, why this decreasing revenue? Can any other reason be assigned than this, that no tax was collected on the sales of slaves introduced after the 1st of May, 1833, but only on such sales, after that period, as were made of slaves before introduced? But again, our opponents allege that the principal importations and sales were made in the years 1835 and 1836, and consequently the revenue in those years should have greatly increased from that source. Now, at page 45, of their pamphlet, the auditor's report shows that the amount of tax was as follows:

"Amount received on account of slaves sold as merchandise from 20th Jan. 1835, to 28th Feb. 1835, inclusive, ... $ 20 00
"Do. do. from 18th March, 1835, to 4th Jan. 1836, ... 166 40

$186 40"

Here is a prodigious decrease in the revenue this year, showing, that the tax must have been confined to the few slaves sold within the period abovementioned, introduced prior to the 1st of May, 1833.

On looking at the next year, at page 45 of the pamphlet, we find, by the auditor's report:

"Amount received on account of slaves sold as merchandise from 5th Jan. 1836, to 29th Feb. 1836, inclusive, ...	$68 50
"Do. from 1st March, 1836, to 4th Jan. 1837, ...	82 00
	$150 50"

Thus, we find the tax reduced the last twelve months to $150.50, and the last ten months to $82; thus continually decreasing, when it should have been so vastly augmenting. No reason can be assigned for this, except that the unsold slaves introduced as merchandise, prior to 1st May, 1833, became fewer every year, until, in the last ten months, the sale of four slaves, at less than $1000 each, would have yielded, at the legal rate of tax of 2½ per cent on the sales, more than the whole amount of the whole tax received of $82. Now this was the period within which the plaintiffs *made their sales of these slaves*, the amount of which sales on 20th Dec. 1836, according to the notes sued on, being $14,875, the tax on which sales alone, would at the lawful rate have amounted to $371, being not only more than the whole tax on all the sales in 1836, but more than on all the sales, by our opponents' own showing, from 20th Jan. 1835 to 4th Jan. 1837; the totality of which was, as we have seen, but $347.50, which would show taxes received on but *sixteen slaves* in these two years, rated at less than $1000 each.

Here, by their own book, it is shown that no tax was paid by the plaintiff on the sales in this case, and that their counsel in this court have been greatly deceived in their conjecture to the contrary. From 1st May, 1833, till May 31st, 1837, at least forty thousand slaves were introduced and sold. The average price for working slaves, was then $1000 each, on a credit, and such generally were introduced by the traders; and the total price would thus be forty millions of dollars, the tax on which, under the act of 1833, had it applied, would have been *one million of dollars*, whereas the amount really received, we have seen, as shown by our opponents, was less than four thousand dollars. If then this tax was payable under the act of 1833, the negro traders (for by law *they* were to pay the tax,) have defrauded the state of Mississippi, in four years, of one million of dollars.

From 1830 till 1840, the slaves, by our census, increased 130,000, and as the importation commenced chiefly in 1833, and was prohibited in May, 1837, the tax should have much exceeded one million of dollars. Now is it credible, that if this tax were due under the act of 1833, that it would never have been assessed, and that less than $4000, out of one million, would have been collected? And why was not the prohibition enforced by proper pains and penalties? In 1833 we find the legislature endeavouring to amend the constitution, so as to get clear of this prohibition to a certain extent. The sessions of our legislature are biennial. The next session was in 1834–5, but it failed on account of a disagreement between the two houses, as to the alleged illegal organization of one house, and was prorogued by the governor. The next legislature *did prohibit*, in May, 1837; the meeting in May, 1837, being of the *same legislature* which first assembled in 1836. On the 14th Jan. 1836, the following entry appears on the journal of the house: "The committee of revisal and *unfinished* business, have requested me to report as part of the *unfinished business* of *last* session, the following bills and resolutions namely: 'a bill to be entitled an act to prohibit the introduction of slaves into this state as merchandise.'" Page of Pamphlet, 42. At page 43, (436 of Journal,) Mr. *Gholson* called up this bill, but no final and direct action was then had on it. In January, 1837, the bill was again brought up, and at page 53 of the Pamphlets, (102 of the Journal,) a motion to postpone it indefinitely failed, by ayes 13, noes 56, thus showing a very large majority to be in favour of the bill, although they could not agree on the details until May, 1837, when the present prohibitory statute was passed by the same legislature which convened in 1836. And here, it is worthy of remark, that Mr. *Gholson*, our Federal Judge, who has represented the state with so much ability, both at the capitol of the state, and of the Union, served throughout *all* these successive sessions of the legislature, from 1833 till 1837, and took a leading part in all these bills connected with this subject, at all these periods; namely, the tax bills, the bill to amend the constitution, and the

prohibition bill, repeatedly serving as chairman in all these sessions. Who then more competent to understand all these bills, and to decide with full knowledge of all these questions? Yet this learned judge of our federal court was the first to decide this entire question in our favour, as quoted in the Free Trader Gazette, produced by our opponents. Here then is a practical construction of this question, by a refusal of *all* the authorities of Mississippi to demand or receive any portion of that immense revenue, which might have been derived from these sales, had they been regarded as legal, and it is a construction which embraces both points of the controversy, namely, the absolute character of the prohibition, and the illegality of the sale, as well as of the introduction for sale. Must not all then have known, that by declining to receive these taxes, the state proclaimed the illegality of the sales; and was not the plaintiff when he made the sales in this case, without the payment of any tax, a wilful transgressor of this great constitutional interdict?

But independent of this practical construction in our favour, it is settled that an act passed for "the better understanding" of a previous law, and declaratory of its meaning, must be connected with the previous act of 20th February, 1825, whose true meaning it expounds, and be considered as though inserted in that law, and *at that date*. In this view of the case, the terms "shall bring" need not be construed *shall have brought*, although such construction has been repeatedly given, to prevent a repugnance between a statute and a constitution, or between two statutes, or to obviate injustice or a violation of fundamental principles; but these words "shall bring," in the declaratory 4th section of the act of 1833, must be referred to the 20th February, 1825, the date of the act expounded so as to impose a tax *under that law* on all sales by citizens (as well as non-residents,) of slaves lawfully introduced after that date for sale before the 1st May, 1833, and *not yet sold*, or on which sales *the taxes had not been paid*. This was the obvious intention of the legislature, for they were expounding the meaning of the act of 1825, and not interpreting the constitution. Thus in the case of Pouget, 2 Price, 381, where the act of 53 Geo. 3, c. 33, imposed a duty on hides, of 9*s*. 4*d*., meaning that much per 100 weight, but neglecting to say so, when a subsequent act amendatory of the former law, declared that the duty of 9*s*. 4*d*. SHALL BE CHARGEABLE on every 100 weight of such hides, it was decided that the new declaratory provision must be taken as a part of the former law, and as then passed, and operating from that date.

The court said, "The duty in this instance was, in fact, imposed by the first act; but the gross mistake of the omission of the weight, for which the sum expressed was to have been payable, occasioned the amendment made by the subsequent act; but that had reference to the former statute as soon as it passed, and they must be taken together as if they were one and the same act, and the *first* must be read as *containing in itself, in words, the amendment supplied by the last*." Now let the act of 1825, which really did impose this tax on citizens as well as non-residents, be read as "containing in itself, in words, the amendment supplied for the better understanding thereof," by the 4th section of the act of 1833, and the whole difficulty disappears. Perceiving the difficulty in which they would involve the legislature, by asserting that they had violated their oaths, by passing a law opposed to the prohibition or prohibitory mandate of the constitution, our opponents have suggested that when this tax law passed through the two houses, they believed that their amendment proposed at the preceding session to change this mandate or prohibition into a grant of discretionary power to themselves, had been adopted by the people. If this be so, and the legislature acted under this erroneous impression, how could a law thus passed be regarded as a legislative construction of this clause of the constitution? But if this law did authorize the introduction of slaves for sale after the 1st May, 1833, why had the legislature sought to change the mandate or interdict of the constitution into a mere grant of discretionary power, if as is urged they already possessed that power; and if having failed to effect this change in the constitution, they had nevertheless by this law authorized the introduction of slaves as merchandise, could such an act be called a legislative exposition of the constitution?

The framers of our state constitution have withheld all judicial power from the

legislature. They have declared, "the judicial power of this state shall be vested" in the courts of the state; and that "the powers of the government of the state of Mississippi shall be divided into three *distinct* departments, and *each of them* confided to a *separate* body of magistracy; to wit, those which are *legislative* to one, those which are *judicial* to another, and those which are *executive* to another. No person or collection of persons, being *one of these departments*, shall exercise *any power* belonging to *either* of the others, except in the instances hereinafter expressly directed or permitted." If then, as all admit, to expound a constitution be a judicial power, the legislature was forbidden to exercise it, and so was the executive. It was confided to the judiciary, we have their construction; and an imaginary and conjectural legislative or executive construction is set up in opposition to an exposition of the constitution, by the very tribunal to whom its interpretation was confided by its framers. If then, a construction by the legislature could be quoted, I deny their jurisdiction; and pointing to the constitution of our state, declare that it is there expressly withheld. But an executive construction is relied on by our opponents. *None such exists;* but what think our three distinguished opponents of executive construction? Shall I quote their eloquent denunciations of such abuse of power? No, I will spare them the contrast with their present argument; but I will say, that the government which deliberately supersedes judicial by legislative or executive construction, has already sunk into despotism. It has combined in one department two out of the three great powers of government; the third will assuredly follow; and the centralization of all these powers in the legislature or executive, in the opinion of Mr. Jefferson, in his Notes on Virginia, page 195, "is precisely the definition of a despotic government." We shall see in the progress of this discussion, that, by the highest courts of England, no regard is paid to a construction of the laws by the king, or the king in council. But at one time a British judge declared from the bench, "all power centres in the king," and the laws were overthrown by "twelve men in scarlet," taking "royal auricular opinions" for their guide: but for more than a century, executive construction has had no weight with British judges. I need scarcely appeal to this court to disregard executive construction; nor say to them, that if they do not, the day will have arrived when congressional or presidential construction will trample down the high powers of this tribunal in exercising its great constitutional function of expounding in the last resort the laws and constitution of the Union. The volumes of your decision will be thrown aside, and the exposition of the law and the constitution will be looked for in executive messages and congressional enactments. If then there were a legislative and executive construction on the one side, and that of the highest court of the state on the other, which shall prevail? To whom is the power assigned by the constitution of the state? And this court will not disregard the distribution of powers as therein delegated to the several departments of government.

The next question is, can the contract for the sale of these slaves be maintained, if the clause in question be a prohibition of the introduction for sale? Assuming this as established, the clause in question would prohibit the introduction of slaves as merchandise or for sale. The introduction being thus prohibited, if the sale be sanctioned, the clause would read thus: You shall not introduce slaves into this state as merchandise or for sale, but you, the importer, may make merchandise of them, or sell them to any one as soon as they are landed. Would not such language be strangely repugnant and contradictory? Would it not seem as though the convention had designed to render their own provision inoperative and nugatory? Could the importer sell the thing he was forbidden to introduce for sale? Could he make merchandise of the very thing he was prohibited from introducing as merchandise? The object prohibited was not merely the introduction of slaves, but their introduction *as merchandise or for sale.* Now, was the object prohibited, and yet the sale permitted? To introduce the slaves with intent to sell is criminal, but to carry that criminal intention into effect, is declared to be authorized and invited by the constitution. Can the intent be criminal, and yet the fulfilment of the evil intention perfectly lawful? To maintain this position, is to reverse the rule of law and morals, which always regards the execution of the evil intention, as more

criminal than the intention itself. If the sale crowns and completes the unlawful purpose, if it executes the illegal intention, if it consummates the violation of the law, if it enables the transgressor to obtain the end and object prohibited, and reap the fruits of his transgression, it must be unlawful. To effectuate the object and intention of the law is the great rule in expounding laws and constitutions.

Now the inter-state slave trade, as carried on by traders in slaves as merchandise, was the thing designed to be prohibited. And yet this very prohibited traffic, by a verbal criticism on the words, overlooking the object of the constitution, is in fact encouraged, if the trader may sell the slaves introduced as merchandise. This court have said, that a fraud upon a statute, is a violation of the statute; that an evasion of the constitution, is a violation of the constitution; and is not this construction an evasion by the slave traders of the constitution of Mississippi? Lord Coke, in Heyden's case, 3 Coke, 7, declares, that the true rule in construing statutes is so to interpret as "to suppress inventions and evasions for *continuance of the mischief*, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*." The clauses of a statute are to be construed in their popular signification, and this is more pre-eminently the great rule in regard to a state constitution. Who then but an astute critic, on reading this clause, would doubt as to the object designed to be prohibited? To whom of the people at large would the subtle distinction occur, that slaves could not be introduced as merchandise or for sale, but that the importer was authorized to sell at once these slaves that could not thus be introduced for sale? The terms of the constitution are peculiar and comprehensive. These slaves are not only forbidden to be introduced "for sale," but also "as merchandise." Merchandise means *vendible articles*. These slaves then cannot be imported as *vendible articles*. How then can they be rendered vendible articles within the state, when they cannot be landed as such within its limits? In Brown v. State of Maryland, 12 Wheat. 439, the question was whether a state could impose a tax upon the sale by the importer of articles imported into a state for sale. The court decided that the right of the importer to introduce the goods free of a state tax, did embrace the subsequent right of sale free of such tax by the importer. In delivering the opinion of the court, Chief Justice Marshall says: "There is no difference in effect between a power to prohibit the sale of an article, and the power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported, if none could be sold." The mere prohibition then of the introduction of slaves into a country, would render the subsequent sale invalid, and if so, how much stronger is the inhibition of the sale, when the prohibition is of the introduction for sale. Why prohibit the introduction for sale, if the subsequent sale is authorized? The sale is the avowed object of the introduction in this case, and without the authority to sell, there would be no introduction for sale, and thus the law prohibiting the introduction would be enforced; but by the construction of our opponents, the sale is authorized, and the importation for sale so far encouraged and invited. But no such interpretation must be given as will defeat the object of the law, or tend to prevent its practical operation. 1st Story's Com. 411, and Chief Justice Marshall declares, 6 Cranch, 314, that "The spirit as well as the letter of the statute must be respected, and where the whole context of the law shows a particular intent in the legislature *to effect a certain object*, some degree of implication may be called in to aid that intent." The rule is that "The words of a statute are to be taken in their ordinary signification and import, and regard is to be had to their general and popular sense." Dwaris on Statutes, 702. "The sense and spirit of an act, however its scope and intention, are primarily to be regarded in the construction of statutes, and it matters not that the terms used by the legislature in delivering its commands are not the most apt to express its meaning, provided the *object* is plain and intelligible, and expressed with sufficient distinctness to enable the judges *to collect it from any part of the act*. The *object* once understood, judges are so to construe an act as to suppress the mischief and advance the remedy." Ib. 703, 4, 7, 18. And the author adds: "A statute may be extended by construction to other cases within the same mischief and occasion of the act, though not expressly within the words." If the legalizing of the sale

would encourage the introduction for sale, it is within "the mischief and occasion of the act;" it is within its "spirit," "scope" and "object;" and therefore as much prohibited as though "expressly within the words of the act." "No construction of a given power is to be allowed which plainly defeats or *impairs* its *avowed objects*." Story's Com. 411. "A statute made *pro bono publico* shall be construed in such a manner that it may as far as possible *attain the end proposed*." Dwar. 722. As to a question what was within the prohibition of a certain law, the court say, "It is by no means unusual in construing a remedial statute, to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief." Dwar. 734, Y. and J.'s 196, 215, and the principle is extended to enlarge the policy of a penal statute, not so as to inflict the penalty, but to avoid the contract. Dwar. 752. "Wherever a statute gives or provides any thing, the common law provides all necessary remedies and requisites" Dwar. 662. "Every thing necessary to the making it effectual is given by implication." Dwar. 652. 2 Inst. 306. 12 Rep. 130, 131. "Quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud." Dwar. 663. "Whenever the provision of a statute is general, every thing which is necessary to make such provision effectual is supplied by the common law." Dwar. 663. 1 In. 235. 2 Ib. 222. Bacon, T. Stat. "Whatever enters into the reason of the law, enters into the law itself." Dwar. 665. Ratio est anima legis. "Laws and acts which tend to public utility should receive the most liberal and benign interpretation to effect the object intended or declared, ut res magis valeat quam periat." Bald. Con. Views, 8. Bl. Com. 89. "Courts will look to the provisions of a law to discern its *objects* to meet its intentions at the time it was made; it will be sought in the cause and necessity of making the law; the meaning thus extracted, will be taken to be the law intended, as fully as if expressed in its letter." Ib. 9. 1 Wh. 121. 4 Peters, 432. If then, as is obvious, "the object of the law," namely to prevent the introduction of slaves for sale, will be frustrated by legalizing the sale, the court "will not suffer the law to be defeated" by adopting such a construction, but will so expound the law as to "suppress the mischief and advance the remedy." Ib. 9, 11. Co. 72. 1 Bl. Com. 87.

The clause which prohibited the introduction of slaves for sale, never could have intended to defeat itself, by legalizing the sale of slaves thus unlawfully introduced for sale, and thus encouraging and inviting the violation of the law, by making it profitable to disregard its provisions. But it has been said this prohibition must be strictly construed. Why so? It is not a penal statute, and if it were, it should only be construed strictly when operating on the *offender* in exacting the penalty; but when it acts upon the contract, it must be liberally construed, so as to vacate the contract, if within the mischief designed to be remedied, though not within the letter of the law. Thus, it is declared by Blackstone: "But this difference is here to be taken when the statute acts upon the *offender* and inflicts a penalty, as the pillory or a fine, it is there to be taken strictly, but when the statute acts upon the *offence* by *setting aside* the fraudulent transaction, here it is to be construed liberally." 1 Chitty's Black. 60. In a note it is stated as follows, with a reference to the highest authority: "As the statute against gaming, which enables a loser at play to the amount of ten pounds at one sitting to recover it back within three months; the act also provides a penalty against gaming to the same amount at one sitting. And the court has said in a case where the play was only interrupted by the dinner hour, for the purpose of recovering the money lost, they would hold this to be one sitting, but as against a common informer, suing for the penalty, they would hold it to be two sittings." 1 Chit. Black. 60, note, and 2 Black. Rep. 1226. Here, even in a penal law, the same words are construed strictly when they act on the offender, and liberally when they act on the contract. So in this case, were a penalty even annexed to the prohibition, the law would be construed strictly when the penalty was demanded, but liberally when a contract is sought to be enforced against the spirit or object of the prohibition. But how much stronger is the present case? If the first point be with us, the constitution prohibited the introduction of these slaves for sale or as merchandise, and as no penalty was attached to the prohibition, would not the provision be *entirely inoperative*, if the contract of sale could and must be enforced by the judicial tribunals? The

object of the constitutional prohibition was to render the traffic unlawful, so that no contract could be enforced in violation of the prohibition, but the penal sanctions by fine and imprisonment might well be left to subsequent legislation. In the case of the U. S. Bank v. Owens, 2 Peters, 537, it is expressly decided by this court, that laws must be strictly construed when the penalty is exacted, but liberally in vacating the contract.

The doctrine which repudiates contracts against public policy or good morals, long preceded the common law of England, and was incorporated into that system from the civil law. In the note S. to 1 Fonblanque's Equity, Book I. sec. 4, page 186, it is stated, "Pacta quæ contra leges constitutionesque vel contra bonos mores nullam vim habere, indubitati juris est." Code, lib. 2, tit. 3, 1, 6. This rule of the civil law is drawn from the principles of universal justice; which, aiming at the prevention of wrong, prohibits agreements which would *lead to* or *encourage* it. To introduce, then, slaves into Mississippi for sale, was prohibited by the constitution, and was therefore wrong, unlawful and immoral; and none will deny, that to legalize the contract of sale for slaves thus unlawfully introduced, would encourage the introduction for sale; and if so, upon the authority above quoted, such contract would be void. "Considerations against the policy of the common law, or against the provisions of a statute, or against the policy of justice, or the rules and claims of decency, or the dictates of morality, are void in law and equity." 1b. note Y 189. And here I maintain, that where a contract is against the policy of a state, or against good morals, or detrimental to the public interest, or against the peace, security or welfare of a state, or tending to encourage a violation of the laws or policy of a state, or the prohibition of a statute, it is void; and if it is within the spirit, scope or intention of the act, (though not within its words,) or within the object designed to be promoted or mischief suppressed, it is also void; and the most liberal construction will be given to the law, and every fair implication will be allowed, to prevent a defeat of the full operation of the statute. Thus it is declared by the court, in the leading case of Mitchell v. Smith, 1st Bin. 110, 4th Yates, 84, that contracts are void which "*tend to defeat* the *legislative provisions* for the security and peace of the community, though *not made void by statutes*;" or which tend "*to encourage* unlawful acts or omissions," or which are against principles of sound policy; "so a contract *about* a matter prohibited by statute is unlawful and a void contract, although the act does not expressly say so."—Courts "will not assist an illegal transaction *in any respect*." It is "immoral to violate the laws of a country," and the contract will not be enforced if illegal, though to refuse to enforce it is "contrary to real justice as between the parties;" or if the contract "militate" against the "rights" or "peace" of a state, or if against the policy of "self-preservation," or if "against the maxims of sound policy" though "not against the rules of morality," or if "repugnant to the welfare of the state;"—so if against "political arguments" or "public benefit and convenience." So the court declared that "none of the acts against smuggling transactions declare any of the contracts for goods purchased for the purpose of smuggling, to be void; the decisions are grounded on principles of public policy alone," and, although it be "the case of a just debt as between the parties." 4 Yates, 34. The court decided, that a note given for the sale of land, under the Connecticut title, was void, although the act of 1795 only inflicted a penalty on a *combination* or *conspiracy* to convey or settle lands under such a title, but did not declare the contract void or prohibit the sale, as did the subsequent act of 1802, although the defendant was in the occupancy of the land under the sale, and every argument was urged which has been used in this case. And if the purchase money unpaid by the vendor can be recovered, could not the vendee, on tender of the purchase money on a contract for sale, enforce the delivery to him of the slaves introduced for sale? Surely he could, "for the remedies must be mutual or not at all." 1 Bin. 119. In Seidenbender v. Charles, 4 Serg. and Rawle, 151, a land sale by tickets without blanks was held to be within the policy of the law against lotteries, and a note given for the sale of a lot of ground under such a lottery was held void, although the title to the lot was conceded to be valid, and the justice of the case with the plaintiff, and the sales had not been declared void by the law. In 3d T. R. 17, it was decided, that a promise of a

friend of a bankrupt on his examination to pay all sums he, the bankrupt, had not accounted for, if not examined as to those sums, is void, as against the policy of the bankrupt laws, though not so declared by those laws, nor embraced within their provisions, on the ground that to enforce such contracts would be "contrary to *the spirit* of the bankrupt laws," and that by such enforcement "one of the great *objects* of the bankrupt laws *would be defeated*" by preventing *full* examination of all bankrupts on oath. In Craig v. State of Missouri, 4 Peters, 410, it was decided by this court, that a note given for bills of credit of a state, loaned to the defendant, was void, although the defendant may have realized full value for the bills, the contract being within the prohibitory policy of that clause of the constitution of the United States, which declares that *no state shall emit bills of credit*. There was nothing in this constitutional prohibition declaring such contracts void, nor any thing in words forbidding the loan of such bills; but, as upholding a contract for their loan would encourage their emission by the state, the contract was declared invalid. In delivering the opinion of the court in this case, Chief Justice Marshall asked the following question: "Has the issuing or circulation of certificates of this or any other description been prohibited by a statute of Missouri, could a suit have been maintained in the courts of that state, on a note given in consideration of the prohibited certificate? If it could not, are the prohibitions of the *constitution* to be held *less sacred* than those of a state law?" And if such a clause in the constitution of the Union rendered void a contract for the loan of those certificates, how much stronger the implication against the sale in this case? And here, upon the first branch of the question, let me ask, if the language in a statute of Mississippi "shall be prohibited from and after the 1st of May, 1833," would be a prohibition, are the same terms and words "of the constitution to be held less sacred than those of a state law?"

In the case of Hunt v. Knickerbocker, 5 John. 327, it was decided, that a contract for the sale in New York, of tickets in a public lottery of Connecticut, authorized by the laws of that state, was illegal, and the money not recoverable, though a valuable consideration may have passed to the defendant, because it was against the policy of the law of New York, forbidding *private* lotteries. Here was a case clearly not within the words of the act, but it was regarded against the policy and spirit of the act, "and to legalize the sale would be productive of many of the mischiefs contemplated by the legislature;" and the court also say that "a contract which in *its execution*, contravenes the policy and spirit of a statute, is equally void as if made as against its positive provisions."

In Sharp v. Teese, 4 Halsted, 352, the court held, that "a note given by an insolvent debtor to two of his creditors, in consideration of their withdrawing their opposition to his discharge under the insolvent act, is void, it being against the policy of the insolvent law." In this case the debt for which the note was given, was justly due, and there was not one word in the law declaring such a contract void, as will appear in the reasons given by the court, at page 354. They say the policy of the law favours a full and fair disclosure, and equal division of the property among all the creditors, and add, "any transaction or arrangement which tends to defeat either of these purposes, is inconsistent with the policy of the law. The attempt to contravene *the policy of a public statute*, is illegal. Nor is it necessary [illegible] it so that the statute should contain an *express prohibition of such attempt*. It *always contains an implied prohibition*."

The same court decided that no action can be maintained on a contract which "contravenes the policy of an act of congress." 5 Hal. 89. The court say "many contracts which are *not against morality*, are still void as being against the maxims of sound policy;" that "if the consideration be against the public policy, it is insufficient to support the contract;" "it is a general principle, that all obligations for any matter, operating against the public policy and interests of the nation are void." See also 2 Southard, 756, 763.

In Nichols v. Ruggles, 3 Day, 145, it was decided, that "a contract to reprint any literary work in violation of a copy-right secured to a third person is void: and *the printer who executes such contract*, with a knowledge of the rights of such third person, *can recover nothing for his labour*." The contract between the two

persons in this case, was regarded as repugnant to the policy of the copy-right law of congress, though nothing in that act avoided such a contract. And in Marchant v. Evans, 8 Taunt. 142, it was held, that no recovery can be had for printing a newspaper whose publisher does not first make the affidavit directed by the act, though the act does not avoid the contract. And in Stephens v. Robinson, 2 Crom. and Jer. 209, the court decided under the same statute, that there could be no recovery by the printer, where the affidavit as to the proprietorship was false, either for work and labour done, for money paid, or even "for printing and circulating cards advertising the paper." The court said, if we permitted a recovery, it would *defeat the policy of the law*, by enabling "irresponsible persons to stand forward as publishers," instead of the real proprietors. See Roby v. West, 4 N. Hamp. 285.

In the late case of Spurgeon v. M'Elwain, 6 Ohio Rep. 442, it was decided that "*keeping nine-pin alleys* in a town, by a keeper of a public house, being unlawful, the (carpenter,) builder of such alley cannot recover therefor on general assumpsit." There it was urged, as was the fact, that the carpenter had no interest in the alley, or in its profits, keeping, or use, and there was not a word in the law avoiding the contract, or declaring the *building* such a house unlawful, but only the keeping of it. The court said, "The statute forbids under a penalty, any tavern keeper, or retailer, from keeping or permitting to be kept, a nine-pin alley, in the building occupied for that purpose; can a carpenter, knowing the object, recover the price of erecting it?"

"The principle is of general application, that contracts contrary to sound morals, public policy, or forbidden by law, will not be executed by courts of justice." And upon these principles, and the policy of this statute, the court decided that there could be no recovery, because the plaintiff had *violated the policy of the law* in *building* a nine-pin alley for a third person, *in* a *state* where no such alley could be *kept*, and therefore could not recover:—as here in our case, the plaintiff had violated the policy of the law, in selling these slaves *in a state* where they could not be introduced for sale, and therefore cannot recover. The keeping the slaves for sale in the state is an adherence to the unlawful intention with which they were introduced, and when kept till sold, the very act of sale is a continuation and consummation of the unlawful purpose, and aggravation of the guilt of the offender; yet it is asked to be received as perfectly lawful, and worthy the sanction and encouragement of judicial tribunals. Nor would the pretended misapprehension of the law avail the plaintiff, for in the case of Craig v. U. S. Insurance Company, 1 Peters' C. C. R. 410, Justice Washington of this court, said, in deciding against a contract of insurance on the ground that it was against the policy of the law, "I mean not to impute crime, or even intentional impropriety, to either of these parties. I have no doubt that they acted with the *most perfect innocence*, *mistaking the law*, as *many legal characters* did, at a later period than that when this contract was entered into."

In Billing v. Pitkin, 2 Caines, 146, it was decided that "an action will not lie upon a contract to pay over half the proceeds of an illegal contract, though the money arising from it has been received by the defendant." This was a case of a sale by an agent of land in Pennsylvania under a Connecticut title, which sale we have seen was void, as contrary to the policy of the law. The principal received the money on the sale, and refused to pay the agent the portion he was to receive for effecting the transaction, but a recovery was refused and the defendant permitted to retain the money. The court said: "It is too salutary and well settled a principle to be in any measure infringed, that courts of justice ought not assist an illegal transaction *in any respect*. To sustain the present action would be in some degree *ratifying*, *countenancing*, and *sanctioning* an illegal contract." "If the consideration money for this pretended claim had been paid to *the plaintiff*, neither a court of law, or equity, *would have aided the defendant* in recovering it from him." By this doctrine, even an agent who receives money for a principal on an unlawful sale, can retain the money, the contract to pay the money to the principal being void, as growing out of the unlawful sale, yet such a contract is distinct and independent of the original transaction, and in every respect collateral. In Parsons v.

Thompson, the sale of an office not within the words of the statute, was declared void, though in the language of Lord Loughborough, "*it was the practice*" to sell such offices. 1 Hen. Black. 322, 324. In Bryan v. Lewis, 1 Ryan & Moody, 386, it was stated as a general rule, that where, to sanction the sale of goods, "would be attended with the most mischievous consequences;" such sales will not be upheld by the courts, though no statute declares the sale void. See 7 Mas. 112. In Fennell v. Ridler, 5 Barn. & Cres. 406, it was decided, that a horse dealer could not recover the price of a horse sold by him on Sunday, such sale being contrary to the policy and spirit of the act, declaring that no persons "shall do or exercise any worldly labour, business, or work of their ordinary calling, on the Lord's day." And see 4 Bing. 84. 2 C. & P. 544. 12 Moore, 266. A mercer who sells ribands to a candidate for parliament, if he knew that the candidate intended them as presents for voters, which is forbidden by law, the mercer could not recover the price. Richardson v. Webster, 3 Car. & Payne, 128. There is no statute forbidding such sales to candidates, but as to sanction the sales would encourage candidates to violate the law which prohibits them from making presents to voters, such sales are held void. See 3 Taunt. 6. 1 Ashmead, 68. 9 Vermont, 23, 310. 7 Greenleaf, 113.

In Fales v. Mayberry, 2 Gall. 560, it was decided, "that no action can be maintained against master and part owner of a ship engaged in the slave trade by his partners in the concern; nor against an *agent with the proceeds in his hands;*" nor even by an assignee of the note growing out of such transactions; and "if a ship be sold in a *foreign port*, to evade a forfeiture *incurred in the United States*, no action can be maintained for the proceeds." Here the offence had been committed long before the sale, by the voyage for slaves, from Boston to Georgia, thence to Africa, and thence with the slaves to the West Indies—*after all which*, the ship was sold at St. Bartholomews. The sale was subsequent to the illegal voyage, but as it was a consummation by the plaintiff, as in this case, of the original unlawful purpose, the sale was held to be unlawful, though there was no law declaring it so, and *there could be no forfeiture at St. Bartholomews;* and besides the case did not proceed on a failure of consideration, for the vessel was *delivered and held under the sale*, but upon the *illegality of the voyage preceding the sale.* In Morel v. Legrand, 1 Howard, 150, it was decided, by the high court of Mississippi, that a sale by a settler, of his improvement, made on the public lands, in expectation of a pre-emption, was void, as contrary to the policy of the intrusion act of congress, though nothing in that act declared such sale to be void. The opinion of the court was delivered by Chief Justice Sharkey, the same judge who decided in our favour in this case; and the case is chiefly cited as evidence of the impartiality and independence of the court, for, in giving judgment against the sale of this inchoate prospective pre-emption, the court was pronouncing an opinion against their wishes as citizens, and against a system of sales by settlers, universally and deservedly popular in the state of Mississippi. In Blachford v. Preston, 8 T. R. 89, it was held, that "a sale (by the owner) of the command of a ship employed in the East India Company's service, without the knowledge of the company, is illegal; and the contract of sale cannot be the foundation of an action." Lord Kenyon, Chief Justice, said—"a plaintiff who comes into a court of justice to enforce a contract, must come on legal grounds; and if he have not a legal title, he cannot succeed, whatever the private wishes of the court may be. In this case the plaintiffs have relied on the practice that (as it is said) has so long prevailed of selling the commands of ships; but that practice is in violation of the laws and regulations of the East India Company." Lawrence, Justice, after stating *the sale*, said—"*subsequent* to this, the East India Company came to a resolution, for the purpose of abolishing *the practice* of selling the commands of ships, and of making compensation to some of the officers in their service, who had paid for their commands—but this resolution was not made in approbation of the *practice that had prevailed before;* but feeling that *they were blameable* for not having put a *stop to it sooner*, they came to the resolution of abolishing the *practice that had obtained* in defiance of the by-laws of the company." This case shows how unavailing any practice, however long established and universal, is, to give validity to any contract repugnant to the policy of the law.

Whenever the introduction of any article into a country, generally, or for sale, is prohibited, or its use or manufacture forbidden, or its offer for sale—in all these cases the sale is illegal, although the law does not, in terms, prohibit the sale. We have seen that the maxims applicable to this question were borrowed from the civil law, as principles of universal justice. One of the most distinguished writers on this subject says—"In certo loco merces quædam prohibitæ sunt. Si vendantur *ibi*, contractus est *nullus* verum si merx eadem *alibi* sit vendita ubi non erat *interdicta*, emptor condemnabitur, quia contractus inde ab *initio validus* fuit." Huberus Tit. de Conflictu Legum, Vol. II. page 539: which, as translated, reads —"In a certain place the introduction of some articles is prohibited. If these are sold *there*, the contract is *void*. But if the same articles are sold elsewhere, where their introduction is not interdicted, there the purchaser shall be condemned to pay the price, because the contract was valid from the beginning:" and Lord Mansfield, in 1 Cowper, approves this doctrine, and applies it to render void the sale, *in England*, of goods on which the duties have not been paid.

The same doctrine is laid down in Erskine's Inst. 478, as follows:—"Things, the importation *or* use of which is absolutely prohibited, cannot be the subject of commerce, nor, consequently, of sale. But where the importation of particular goods is only burdened with a duty, a contract may be effectually entered into concerning them; for though the law enacts penalties, if they should not be regularly entered, it allows the use of them to all the community, and so leaves them as a subject of commerce. (Kames, 40.) Yet even in the sale of *run goods*, no action for damages lies against the seller for non-delivery, if the buyer knew that they were run" Home, 34. Ersk. 478. Here the law is distinctly laid down by those two great jurists, Home and Erskine, that where the *importation* or *use* of any article is prohibited, the sale is void.

In 1st Kames' Equity, 357, referring to the Scotch decisions on sales of smuggled goods, he says, "they are not sustained at present, nor, I hope, will be;" in which he has been fully supported by the subsequent decisions in Scotland. In speaking of this subject, this able writer says—"The transgression of a prohibitory statute is a direct contempt of legal authority, and, consequently, a *moral wrong*, which ought to be redressed; and where *no sanction is added*, it must necessarily be the purpose of the legislature to leave the remedy to a court of law:" and the author adds, that in such cases the true mode "of redressing the wrong, is *to void the act*." Here we find this great jurist avowing the true principle, that there is no distinction in the rule for enforcing contracts, between malum prohibitum and malum in se. And if, in a despotic or monarchical government, it be a "*moral wrong*" to violate a prohibitory law, how much more strongly should this principle apply to laws proceeding, not from a monarch's will, but from the free consent of the governed, from the people of a state themselves. To violate such laws is not only a "moral wrong," but an assault upon the sovereignty of the people. We find here, also, a full answer to the difficulty suggested as to the want of any sanction to this clause. The true sanction in all such cases, we here see, "is to void the act."

This subject is discussed with great ability by Mr. Bell, Professor of Law in the University of Edinburgh. Having treated of contraband of war, he then proceeds to consider "contraband of *trade*, or smuggling contracts." 1 Bell's Com. 306. He says—"The contempt and breach of those laws is called *smuggling;* the goods as to which the evasion is attempted, *contraband;* and the great rule is, that no action is maintainable on the contract, or for the *price of the goods purchased* in contempt of those laws. In the one case, 'Potior est conditio possidentis;' in the other, if an action is brought for money, 'Potior est conditio defendentis.'" "When the goods *have come into this country*, the criterion of decision to sustain or dismiss the action, is knowledge of the contraband nature of the goods. The decisions have varied; but it would seem that when the goods are prohibited, no bona fides can justify the contract: that when the goods are not prohibited, but may lawfully be sold, provided the duties have been paid, action is denied where the party knows the duties to be unpaid: that after the goods are in the circulation of this country, the *bona fide purchaser* has action for the delivery, although

smuggled. And he gives it as the settled law, that there can be no action "on bills for the price of contraband goods," the bills "being in the hands of the original parties, or of their trustees." 307. In 3d Brown's Synopsis Scotch Cases, page 1437, it is laid down as the settled law, that although there can be no recovery of the price on a sale "of smuggled goods," "in a question between the *importer* and *purchaser*," yet *other* bona fide vendors can recover "where the goods said to have been smuggled have passed from hand to hand on shore."

Having shown that the law in Scotland and upon the continent of Europe is in our favour, let us now examine the English cases. Law v. Hodgson, 2 Camp. 147, which has been repeatedly recognised in England and America, was an action by a brickmaker for the price of certain brick made and sold by him, and used and retained by defendant, in a house erected by him. The defence was founded solely on the allegation that the bricks were not of the size required by the statute. 17 G. 3, c. 42, sec. 1, vol. 14. The first section of this act declares, that "all bricks which shall be made for sale in any part of England, shall, *when burnt*, be not less than 2½ inches thick and not less than 4 inches wide." The 2d section enacts, "That if any person shall make bricks for sale of less dimensions, he shall forfeit the sum of 20 shillings for every 1000 bricks so made." The defendant contended that the act only prohibited "*the making* of smaller bricks, under a penalty, but did not declare contracts void." That even if liable to the penalty for the offence of making bricks, the subsequent sale was valid. He argued the impossibility of compliance with the statute, "as bricks made in the same mould, shrunk very differently in the burning," and that the "honest intention of the brickmaker was not to be doubted in the present case;" and that the defendant having "himself selected" and *used* the bricks, could not make the objection. Lord Ellenborough said: "The first section of this statute absolutely forbids such bricks to be made for sale. Therefore, the plaintiff *in making the bricks in question*, was guilty of an absolute breach of the law; and he shall not be permitted to maintain an action *for their value*."

On re-argument, the court adhered to its decision, declaring "that the best way to enforce an observance of the statute, was to prevent the violation of it *from being profitable*." There, the offence was the making the bricks for sale, not the sale; and the offence was complete when the bricks were thus made, and the subsequent sale, just as distinct a transaction as in this case. There too, the bricks had been selected and used by the defendant, and constituted part of a house, which was his property, and could be sold by him. It was also a very hard case, which this is not; but, as the making the bricks for sale was illegal, *therefore*, the subsequent sale was avoided, as here the introduction for sale was illegal, therefore the subsequent sale was void, both sales having been made by the offender himself. The additional reason for the decision, was that, "the best way to enforce an observance of the statute, was to prevent the violation of it from being *profitable*."

Brown v. Duncan, 10 B. & Cres. 93, Lord Tenterden says: "These cases (breaches of revenue regulations) are very different from those where the provisions of acts of parliament have had for their object *the protection of the public*. Such are the acts against stock jobbing, and the acts against usury. It is different also, from the case where a sale of bricks required by act of parliament to be of a certain size, was held to be void, because they were under the size. There the act of parliament operated as a *protection to the public*, as well as the revenue, securing to them bricks of the particular dimensions. Here the clauses of the act of parliament had not for their object to protect the public, *but the revenue only*. Neither is this one of that class of cases where an attempt is made to recover the *price of prohibited goods*." Here the case of Law and Hodgson is recognised and distinguished from the class of breaches of revenue regulations, and is classed with those cases, "where an attempt is made to recover the price of prohibited goods." Even then, if the sale of goods imported and on which the duty is not paid, were lawful, because the object in that case only was to guard the revenue, we see it is entirely different from the case of the sale "of prohibited goods," where revenue is not the

object, but the intention is "to protect the public," by forbidding the introduction of such goods, and especially if the introduction for sale is prohibited.

In Little v. Poole, 9 Barn. & Cres. 192, where the law directed in the sale of coals, that "the vendor of coals, by wharf measure, deliver a ticket to the carman employed to cart the coal, and the carter is to deliver it to the purchaser," under a penalty for non-delivery, the sale of the coal was held void; because, such ticket did not accompany the delivery of the coals, although the sale was fair, the coals of the proper quality and measure, and although there was nothing in the act declaring the sale void, and the defendant had received and still retained the coals. Here the coal was property, and retained as such, and yet the sale was avoided; and the case of Law and Hodgson again expressly recognised, and in both cases the sale was avoided by implication only; there was no forfeiture of the property, and nothing in the statute declaring the sale void.

In Forster v. Taylor, 5 Barn. & Adol. 887, the question arose under the act which declared that, "every dairyman and farmer, who shall *pack any butter for sale*, shall pack the same in vessels (marked as prescribed by law,) and shall brand his name on the vessel and butter, upon penalty for every default of five pounds." The court admitted the sale was fair and the weight proper, and the butter sold by the farmer received and retained, yet the sale was declared void; because, the vessel was not marked according to the direction of the statute; and although there was not one word in that statute prohibiting the sale, it was decided, that the act "*indirectly* prohibited" any sale of butter in vessels not properly marked; and the court, after approving Law and Hodgson, and reviewing the cases, and referring to those "arising out of transactions connected with smuggling," declared the "general principle" to be "that where the provisions of an act of parliament have been infringed, no contract can be supported *arising out of it*." The court affirm the doctrine previously laid down, 3 Barn. & Adol. 221, that where the contract "is expressly *or by implication* forbidden by the statute or common law, no court will lend its assistance to give it effect."

In Tyson v. Thomas, 1 M'Lellan & Young, 119, sale of corn by the hobbet, an unlawful measure, was declared void, although the court admitted, "that the statute had not been acted on for nearly a century," and that there was "great inconvenience from enforcing it;" but the court said, "no act of parliament is lost by desuetude;" and the court annulled the contract of sale, although they declared, "There is no doubt these parties dealt *bona fide* with each other in making the contract." And this case, sustained by many others, is also a complete answer to the argument urged on this as well as the first branch of the case, that this prohibition as to slaves, was "inoperative," or had not been enforced, or was a "mooted question" in Mississippi, and that the plaintiff acted in good faith. No one of these statements as to the plaintiff in this case is correct, but were it otherwise, we perceive how unavailing it would be to uphold this contract.

In Billiard v. Hayden, 2 Car. & Payne, 472, it was decided, that "If the importation of certain goods be prohibited, and the plaintiff sell such goods in this country to A., who endorses a bill of exchange to him in payment, the plaintiff cannot recover on that bill against the acceptor, although there was no evidence that the plaintiff was the importer of the prohibited goods." That is a much stronger case than this. It would be the same as if Slaughter, the importer, had left these slaves with some commission or auction house in Mississippi, and they had sold the slaves in their name, and taken the acceptance of some other house for the price, and endorsed it to Slaughter, and the suit had been against the acceptors, as in the above case "by the plaintiff, as endorsee." That case was the sale in England, of silks imported from France, against the prohibition of such importation by the statute 50 Geo. 3, c. 55. The plaintiff contended, "the statute only prohibits the importation of foreign silk, and it does not at all appear, that the silks were imported by the plaintiffs. The statute does not make *the sale of them void;* and as there is no evidence that the plaintiff imported them, they are entitled to recover on the bill." Abbott, Chief Justice: "This transaction arose before the late act, the statute of the 50 Geo. 3, c. 55, prohibits the importation of all foreign silks, and I have no hesitation in saying, that if these were foreign silks, and the

bill was given in payment of them, the plaintiff cannot recover." The reporters, in their note, refer to this "late act," by which the former act, prohibiting the importation of foreign silks, was repealed, and say: "Although this case is thus rendered less important, as to foreign silks, it appears equally to apply *to any other species of goods*, THE IMPORTATION OF WHICH IS PROHIBITED." The court as well as the reporters, place this case upon the sole ground, that if a statute "prohibits the importation" of any article into England, its sale there when imported is void. Here also it was urged, that the importation only was prohibited, and not the sale; but the sale was regarded as impliedly forbidden by the prohibition of the importation.

In Langton v. Hughes, 1 Maule & Selwin, 393; "Where the plaintiff, a druggist, after the 42 Geo. 3, c. 38, but before the 51 Geo. 3, c. 87, sold and delivered ginger and other articles, knowing that they were to be used in brewing beer; held, that he could not recover the price." By the act of 42 Geo. 3, under which the question arose, the brewer is prohibited from "using any thing but malt and hops, in the brewing of beer;" and the act of 51 Geo. 3, c. 87, prohibits the sale of such drugs to brewers. It was contended, that although the sale under the last act would be void, it was not so under the first, as it did not prohibit the sale of the ginger to the brewer, but only *its use by him* in *making beer*. They contended that ginger was an innocent article, and might be *lawfully bought and sold*, and that the improper use subsequently made of it by the defendant, did not avoid the previous sale. But the court held, that as the law was for the protection of the public health, and as to uphold such a sale would be "against the policy of the law," that the sale, though not prohibited expressly, was unlawful, as tending to encourage a violation of the law.

In 3d Vesey, ex parte Mather, it was decided, that in the case of a bill endorsed to a broker, in consideration of money advanced by him, in effecting an illegal insurance, no recovery by the broker can be had against any of the parties to the bill.

The cases of Faickney v. Reynous, and Petrie v. Hannay, so much relied on by the other side, but now so entirely exploded, were cited in this case; but the Lord Chancellor said: "I am perfectly aware of both the cases cited, but I cannot perfectly accede to them. What is called a consent in these cases, is a confederacy to break a positive law. I have often had occasion to think of these cases upon lottery insurances, &c., and it never occurred to me to be possible to state a distinction between them, and a case repeatedly adjudged; if a man is employed to buy smuggled goods, if he paid for the goods, and the goods come to the hands of *the person* who employed him, *that person* shall not pay for the goods." Here, in this case, the broker was not the insurer, he made no illegal contract, but he advanced the money to the man who did make the illegal insurance; and yet he could not recover that money so advanced. That case was two removes from the direct illegality, and yet, as it grew out of it, there could be no recovery. First "the voyage from Ostend to the East Indies," was declared to be illegal; and therefore as a consequence, the insurance of that unlawful voyage was illegal, not as declared so by statute, but as contrary to the policy of the law forbidding such voyages. Then came the contract to pay the broker the money advanced by him, to effect the insurance, the broker having no interest in the voyage or insurance, but being merely a lender of money; but this loan and second contract, being connected with the insurance, was void, and there could be no recovery. Is there not a more direct connection between the act of sale in this case by the original offender, and the unlawful introduction of the slaves for sale, than in the advancing of the money in this case by the broker? and yet it could not be recovered as against the policy of the law.

Here, too, the Chancellor put a case, which he declares has been "repeatedly adjudged" as to smuggled goods, which is directly in point. A. employs B. to buy smuggled goods; B. with his own money, purchases the goods for A., and A. retains them; yet B. cannot compel A. to pay for the goods thus purchased at his instance, and for his benefit, and received, and retained by him. Why is this? The purchase of the smuggled goods is illegal, and therefore the person advancing the purchase money for another, cannot recover the money so advanced, because in

that case, as in this, to sustain such contracts, would be to encourage the smuggling of goods into the country, and would therefore be against the policy of the law.

The ground on which insurance on cargoes illegally exported is void, is stated in 11 East. 502. That was an insurance on naval stores, and the objection was, that under the act of 33 Geo. 3, c. 2, naval stores were forbidden to be exported, but the act did "not avoid the contract of insurance." The court said, "the statute having made the exportation of and trade in naval stores contrary to the king's proclamation illegal, *impliedly* avoids all contracts made for protecting the stores so exported."

In Bensly v. Bignold, 5 Barn & Ald. 335, where the act directed every printer of every book or paper to affix his name to it, under a penalty of £20 for every default, it was decided that the printer who had not complied with the law, could not recover for the labour furnished or for the paper used in printing the book. It was urged, as was the fact, that the law contained "no prohibitory clause whatever, but merely a particular regulating clause protected by a penalty;" and upon the ground of a distinction, also, "between a prohibition and a penal enactment," as well as upon the ground that the act was not malum in se, and "that there was no clause whatever making the contract illegal;" it was contended, that they were entitled to recover. It was especially urged, that they could recover for "the paper provided by them for printing." But the claim was overruled both as to the labour and materials. The court said, as to statutes, "if there be an omision to do the thing required, it is not any excuse that the party did not intend to commit a fraud." "The public have an interest *that the thing shall not be done*, and the objection in this case must prevail, not for the sake of the defendant, but for that of the public." Now the prohibitory clause in the constitution of Mississippi, is inserted "for public purposes;" the framers of that instrument considered "that the public have an interest that the thing shall not be done;" that is, that slaves should not be introduced as merchandise or for sale; and if so introduced and sold by the importer, must not the objection to the sale prevail, not for the sake of the defendant, but for that "of the public?" And it is the strongest possible case when the contract is against the prohibitory policy of the *constitution of a state*. The court also declared that "the distinction between mala prohibita and malum in se, has been long since exploded. It was not founded upon any sound principle, for it is equally unfit, that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited because it is against good morals, or whether it be prohibited because it is *against the interest of the state*."

If, then, the introduction of slaves into Mississippi from another state, as merchandise and for sale, would be malum in se, none will maintain that the sale of the slaves by the guilty transgressor would be valid, and yet it is just as valid where the importation is *malum prohibitum*, as where it is *malum in se*. It has been decided in England, that no action can be maintained for the copy-right, or for the loss or destruction of the book by another, or for the sale or for the profits of the sale, in whole or in part, or for the printing or labour furnished in printing any book of an indecent or immoral or libellous character, or "injurious to the government of the state," or "slanderous," or for caricature prints or pictures of a similar character, 2 Car & Payne, 136 to 171 and notes; also, 198 to 201; 2 Mer. 437; 7 Ves. 1; 4 Esp. 97; 2 Camp. 29; 7 D. & R. 625; 5 B. & C. 173. There was no prohibitory statute in these cases, but all such contracts were held void as against the policy of the law.

In Wheeler v. Russell, 17 Mass. 258, it was decided, that "no action lies on a promissory note, the consideration whereof was the sale of shingles, not of the size prescribed by the statute." "The statute provided, that no shingles under certain dimensions shall be *offered for sale*, in any town in this commonwealth." The act was passed in 1783, and had remained "inoperative" until 1821, the date of this decision. It was contended for the plaintiff, that there might be "an offer to sell," by which alone the penalty was incurred, and "yet no sale be made;" "the offer to sell must *precede* the sale, and is a distinct and separate act. The sale might follow or might not. Why then, should the previous commission

of the offence, by which the penalty is incurred, vitiate the subsequent sale?" The arguments in that case are the same now urged, that the introduction for sale must "precede the sale;" that is, the thing forbidden and that the "previous commission of this offence" does not "vitiate the subsequent sale," which is "a distinct and separate act." An actual sale is no more within the words "*offer to sell*," than it is within the words "introduce as merchandise and for sale;" and in both cases the offence, in a technical sense, may be completed, and no sale take place; but, although such technicalities and adherence to the letter against the spirit of the act, may be the rule on indictments for the penalty or offence, yet we have seen it is far otherwise, when the court acts upon the contract, which is always void, though not within the letter, if against the policy of the act.

And here let me examine the case on which the counsel rely on the other side of Toler v. Armstrong, 11 Wheat. 258. The facts were, that Toler, the plaintiff in the court below, paid a sum of money, for which the suit was brought, for Armstrong, namely, the appraised value of certain goods of Armstrong, in which, or the importation of which, Toler had no interest or concern, and which goods were condemned to the United States as illegally imported in time of war, by a pretended and collusive capture, and Toler paid the appraised value of the goods thus condemned, and other charges, and the expenses of the prosecution, for Armstrong. When the goods were libelled by the United States, they were delivered up by them to the claimant, De Koven, on a bond for the appraised value, Toler becoming responsible for the appraised value in case of condemnation; and they were delivered afterwards to Armstrong, on his agreeing to pay Toler such sums as he would be compelled to pay for Armstrong. By a reference to the Appendix to 2 Wheat. 51, it will be seen, that this sale for the appraised value on such bond as was given in this case is made by the marshal, and is the legal and proper method.

Now, if a man is the owner of certain goods illegally imported, is that any reason why a just and legal contract, to be refunded the money which he might have legally advanced on account of *other* goods of *another* person under a lawful contract, should not be fulfilled? Surely not; for the offence of Toler, *as to his goods*, was a distinct offence, and unconnected with the other offence committed by Armstrong in importing *his goods*, and with which latter offence, as the jury found, Toler had no connection whatever, direct or indirect. The case, then, was reduced simply to this; that A. illegally imports goods, and they are libelled by the United States, to whom B., at the request of A., pays the appraised value, and other charges and costs incident to the prosecution, having agreed to do so at the request of B. before the condemnation, and become liable to do so in the event of the condemnation. This was the contract to recover these advances, on which the court decided, and nothing more. The contract made by Toler "with the government," under which he paid the money, was, in the language of the court, "a substantive independent contract, entirely distinct from the unlawful importation;" "it is the payment of a debt due in good faith to the government;" and "if it may not constitute the consideration of a promise to repay it, the reason must be, that two persons, who are *separately* engaged in an unlawful trade, can make *no contract* with each other." "This would be to connect distinct and independent transactions which have no connection with each other." The court say—"It is laid down with great clearness, that if the importation was the result of a scheme between the plaintiff and defendant, or if the plaintiff *had any interest* in the goods, or if they were *consigned to him with his privity*, that he might protect and defend them for the owner, a bond or promise given to repay any advance made in pursuance of such understanding or agreement would be utterly void." The court add—"The point of law decided is, that a subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation, although such illegal importation was known to Toler when the contract was made; provided *he was not interested in the goods*, and had no *previous concern in their importation*." "*Provided* HE WAS NOT INTERESTED IN THE GOODS." A subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation." Had the plaintiff in this case no interest in these slaves? Why

he was the owner of them. Had he "no previous concern in their importation?" Why he was the guilty importer himself, and for a guilty purpose, which is to be consummated only by allowing the sale. And here let it be observed, that the whole charge of the court below was not reviewed by this court, but only that part quoted by the court in 11 Wheat. pages 268 and 269. The obiter dictum in arguendo by the court below, as to the validity of certain sales by an importer, had no necessary connection with the facts of the case, and could have no influence on the decision, and was not reviewed by this court, it not being necessary, as the court said, that all the arguments of the court below, in arriving at their conclusions, should be correct, but that "to entitle the plaintiff in error to a judgment of reversal, he must show that some one of these principles (of the charge) is erroneous *to his prejudice;*" and the court declared that it was "unnecessary to review" the charge further than was done in the case.

Now as to the obiter dictum in this case in 4 Wash. 297, found in the charge to the jury in the hurry of a trial at nisi prius and not affirmed by this tribunal, that dictum is: "So far as the rule operates to discourage the perpetration of an immoral or illegal act, it is founded in the strongest reason; but it cannot safely be pushed farther. If, for example, the man who imports goods for another, by means of a violation of the laws of his country, is disqualified from founding any action upon such illegal transaction for the value or freight of the goods, or for other advances made on them, he is justly punished for the immorality of the act, and a powerful discouragement from the perpetration of it is provided by the rule. But after the act is accomplished no new contract ought to be affected by it. It ought not to vitiate the contract of the retail merchant, who buys these goods from the importer; that of the tailor, who purchases from the merchant; or for the customers of the former, amongst whom the goods are distributed in clothing, although the illegality of the original act was known to each of those persons at the time he contracted." Now if the court designed to say that *upon the facts of that case* the importer, except under his subsequent repurchase from the United States at the appraised value, could recover on his contract of sale of goods imported as were these goods during war and against the war policy by a collusive capture, it is against the well established law of the land. These goods were "condemned to the United States upon the ground of a collusive capture by the Fly." They were then confiscable and confiscated goods, because "shipped at St. Johns," a town in a British colony, "in December, 1813," during the war with England, and shipped for this country for "the defendant," and attempted to be illegally introduced by a collusive capture. From the moment then of their importation, being property from an enemy's port, they were forfeited by the laws of war to the United States, and no sale of these goods by the importer, without a repurchase from the United States, would be valid. One case only I will cite on this subject, a decision of Justice Story, subsequently affirmed by this court. In the case of the Rapid, 1 Gallison, 295, in the case of the property of a "native citizen of the United States" owned by him previous to the war, and then in New Brunswick, and for which he sent, *immediately* after the war commenced, an *American* vessel to bring home for him to Boston, it was declared that even this was a trading with the enemy, and that the property on its way on the 7th July, 1812, to Boston, in an American vessel, was confiscated as being imported against the laws of war. The court said: "The contamination of *forfeiture is consummate* the moment that the property becomes the *medium*, or the object of illegal intercourse." In confirming this decision in 8th Cranch, 163, this court said: "We are aware that there may exist considerable hardship in this case; the owners both of vessel and cargo may have been *unconscious* that they were violating the duties which a state of war imposed on them." Nevertheless the property was forfeited. To speak then in the case of Toler and Armstrong of a valid sale by the importer of the goods in regard to which "the contamination of forfeiture was consummate," preceding any sale in Boston, never could have been the intention of Judge Washington, for he was one of the judges who concurred in the opinion of this court in the above cited case of the Rapid. But if we look at the facts of this case, and apply them to the sale by the *importer of the goods in this case*, we will see why such sale of these goods

might be valid. They were, as is stated, "delivered to De Koven, the owner and commander of the Fly, who brought in the George (and these goods as part of her cargo) upon *admiralty stipulations* given by De Koven," and it was *after this* that De Koven, the importer, sold and delivered the goods for $5000 to Armstrong.

These admiralty stipulations are known to every admiralty lawyer, and described in the note quoted from 2d Wheaton, by which the claimant (DeKoven) receives the goods from the United States, to whom they are claimed to be forfeited, and with a right to sell them upon giving bonds with adequate security to the government, for the appraised value, in case of a decision against the claimant. But in any other case than this waiver and repurchase from the government, I call for the production of a single case in which a sale by the importer of prohibited goods has been held valid. And here I will state that our chancellor, Mr. Buckner, though a very able and upright judge, never has, I believe, tried or heard the trial of a single case in admiralty, and it is evident from a reference to his opinion as to the validity of this sale, that he was misled by the general phraseology of Judge Washington in this case as to the sale by De Koven, the importer in that case, without reflecting that this sale, thus held valid, was, after the importer had paid the penalty by his bond, and repurchased at the appraised value from the government.

The court say in regard to the rule which avoids the contract as unlawful, that "so far as the rule operates to discourage the perpetration of an immoral or illegal act, it is founded in the strongest reason." Now if the importer cannot sell the slaves, and in the language of Chief Justice Marshall, in 12 Wheat. 439, "no (slaves) would be imported if none could be sold" by the importer, would it not then "discourage the perpetration of the immoral or illegal act" of importation for sale? Would such a construction "extend the sale beyond the policy which introduced it?" Would it "lead to the most inconvenient consequences?" What inconvenience is it except to the violator of the law, that he cannot recover the price of the slaves unlawfully introduced for sale. Judge Washington admits that the contract cannot be enforced where it "grows immediately out of, and is connected with an illegal or immoral act;" so also he says "if the contract be IN PART only connected with the illegal act, and growing immediately out of it, *though it be in fact a new contract*, it is equally tainted by it." Now, does the subsequent sale grow out of the importation for sale, or has it no connection with it? Chief Justice Marshall, in 12 Wheat. 447, says: "*Sale* is the object of importation, and it is an *essential ingredient* of that *intercourse* of which importation constitutes A PART. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself." Now, if the right of sale constitutes a part of the right of importation for sale, and is an essential ingredient of that right, how can it be said that the sale had no connection with the illegal introduction for sale, for though the sale *by the importer* "be in fact a new contract, it is equally tainted" by the unlawful importation *by him* for sale. And recollect, that Chief Justice Marshall was speaking in the case cited, of the introduction of foreign goods *for sale* by the *importer*, and that the decision was confined *to him only;* it being declared that the right of sale by the *importer* was considered "as a component part" of the right of importation. We may then safely consider it an established rule that wherever "sale is the object of importation," it is essentially connected with and grows immediately out of the importation; and that as a consequence, wherever the introduction for sale is prohibited, the sale by the importer will be unlawful.

In the case ex parte Bell, 1 Maule and Selw. 751, it was decided, that money advanced by S. to B. one of several partners, out of the partnership funds, on account of payments to be made (on unlawful insurances) in pursuance of a previous agreement between them to become sharers in profit and loss on such policies, was held not provable under the commission of S., who became bankupt, by the surviving partners of B., "although the surviving partners were ignorant of the illegal character of the advances." In this case it was strongly contended that this was a contract collateral to and independent of the original transaction." But the court decided that there could be no recovery, and established the principle that "money advanced for the purpose of carrying on a smuggling transaction or any other illegal traffic," could

not be recovered. And see 8 T. R. 715; 6 T. R. 432; and Sullivan v. Graves, 1 Park's Insu. 8.

In Mitchell v. Cockburne, 2 H. Black. 336, the court decided that, where A. and B. are engaged in a partnership in insuring ships, &c., which is carried on in the name of A., and A. pays the whole of the losses, such a partnership being illegal, A. cannot maintain an action against B. to recover a share of the money that has been so paid. The alleged illegality of the partnership was founded on the beforementioned statute, forbidding insurances by partnerships; but it was alleged that this only extended to public partnerships, and that the collateral contract might be valid by one partner to pay over to his co-partner his share of the profits recovered. The court said: "The cases which have been cited, were one step removed from the illegal contract itself, and did not arise immediately out of it." "Thus in Faikney v. Reynous, the bond was given to secure the repayment by a third person, of his proportion of the money paid by the plaintiff, in stock-jobbing; and in *Petrie v. Hannay*, the money had been paid to the broker by *Keeble*, and the action was brought to reimburse his executors for the defendant's share. In that case indeed, *Lord Kenyon* seemed to be of opinion that the action could not be maintained, and it was decided expressly on the authority of Faikney v. Reynous. But, perhaps, it would have been better if it had been decided otherwise; for when the principle of a case is doubtful, I think it *better to overrule it at once*, than build upon it at all. But be that as it may, it is sufficient now to say, that those cases are one step short of the direct illegal transaction, but that the present case arises immediately out of it."

"*Heath, J.*, I am of the same opinion. It seems to me that the *object of the statute would be totally defeated*, if it were to extend only to those policies in which the names of all the partners were inserted."

"With respect to the case of *Petrie v. Hannay*, one judge there, (Ashhurst,) hinted that his opinion might have been different, if the question had been *res integra*, and Lord Kenyon dissented."

But, if this case of Petrie v. Hannay, were the law, it would only establish the principle, that an *innocent third person*, from whom a loan is made, to pay a debt in which he had no connection or participation, arising out of an illegal transaction, that this third person can recover, even although the borrowed money is applied by the borrower to pay a debt arising out of such unlawful transaction. There, the party whose right was upheld, had no participation in the illegal transaction; here, the plaintiff is the guilty transgressor: there, the person, Portis, through whose rights the recovery was had, in the language of Justice Ashhurst, "was not concerned in the use which the other made of the money, it was a fair and honest transaction, as between those parties." And Faikney v. Reynous, proceeds on the same principle. Was this a fair and honest transaction on the part of the plaintiff? Was it fair and honest for the slave trader in this case, with intent to sell, to introduce the slaves, in defiance of law, and consummate that unlawful intention by the sale? The case, then, of Petrie and Hannay would prove nothing against us, but as it has been repeatedly disregarded, and the distinction between malum prohibitum and malum in se, exploded in England and America, the decision in such a case against the plaintiff, would go far beyond the present; for, if a broker, who, at the winding up of a partnership, paid debts due third persons, arising out of illegal transactions, in which he had no participation, interest, or concern, could not recover the money thus advanced after the conclusion of all these unlawful transactions, on the subsequent, new, distinct, and independent contract, on the part of an innocent third person, what hope could the slave trader plaintiff have of a recovery in this case? And yet the English law is now settled, that such third person could not recover.

In the case of Booth v. Hodgson, 6 T. R. 409, it was expressly conceded, that under no case, not even that of Faikney v. Reynous, was it ever supposed "that one delinquent can maintain an action against another."

Difficulties arose as to the pleadings on the bond in the case of Faikney v. Reynous, upon the ground that the defence was not properly before the court, and therefore, in Petrie v. Hannay, Lord Kenyon, did not expressly overrule this case

of Faikney v. Reynous, but if not determined on the form of the plea, he did most expressly dissent from it, especially the distinction between malum prohibitum and malum in se, saying, "if one of two partners advance money in a smuggling transaction, he cannot recover his proportion of it against his partner, because the transaction is prohibited; and yet smuggling is not *malum in se* as contradistinguished from *malum prohibitum*." The rest of the court who did not think Faikney and Reynous was decided on the pleadings, said, in that case, "Lord Mansfield and the whole court proceeded on the ground, that as it was not MALUM IN SE, but only *malum prohibitum*, and as the plaintiff was not concerned in the use which the other made of the money, it was a fair and honest transaction, as between those parties." 3 T. R. 422.

Now, if the distinction between malum prohibitum and malum in se, be now entirely exploded, as these two cases of Faikney and Petrie proceeded on that distinction, they must both fall to the ground.

In Aubert v. Maze, 2 Bos. & Pul. 370, it was decided, that "money paid by one of two parties for the other on account of losses incurred by them in partnership insurances, cannot be recovered in an action brought by him against the other partner. And, if this, with other causes of dispute be referred to an arbitrator, who awards a sum due from one to the other for money so paid, the court will set aside that part of the award." In deciding this case, Lord Eldon, Chief Justice, said: "Some of the cases on this subject, especially that of Petrie v. Hannay, have proceeded on a distinction, the soundness of which I very much doubt." Referring again to the two cases of Faikney v. Reynous and Petrie v. Hannay, Lord Eldon, after quoting the statement of C. J. Eyre, in Mitchell v. Cockburne, that "it would have been better if they had been decided otherwise," adds as his own opinion, "Indeed it seems to me, that if the principle of those cases is to be supported, *the act of parliament will be of very little use.*" After giving it as his opinion that the cases of Booth v. Hodgson, and Mitchell v. Cockburne, were opposed to those of Faikney v. Reynous, and Petrie v. Hannay, he states: "In addition to this, the cases of Steers v. Lashley, and Brown v. Turner, 7 T. R. 630, stand in opposition to Petrie v. Hannay, Faikney v. Reynous, and Watts v. Brooks. With respect to Petrie v. Hannay, very great weight is due to the opinion of Lord Kenyon, who dissented from the rest of the court."

Heath, Justice, concurred and disapproved the distinction between *malum in se* and *malum prohibitum*.

Yorke, Justice, said: "I perfectly agree with my brother, Heath, in reprobating any distinction between *malum prohibitum* and *malum in se*, and consider it pregnant with mischief. Every moral man is as much bound to obey the civil law of the land as the law of nature."

Chambre, Justice, concurred and expressed his dissent from the cases of Faikney and of Petrie. See 3d East, 222.

In Steers v. Lashley, 6 T. R. 61, "A. being employed as a broker for B. in stock-jobbing transactions, paid the differences for him; a dispute arising between them as to the amount of A's. demand, the matter was referred to C. who awarded £300 to be due; on which, A. drew on B. for £100, part of the above, and endorsed the bill to C. after B. had accepted it held, that C. could not recover on the bill." Lord Kenyon, being of opinion, that as "the bill *grew out of a stock-jobbing transaction*, which was known to the plaintiff, he could not recover." It was urged on the authority of Petrie v. Hannay, that "as the broker had actually paid the differences for his employer, the bill in question, which was to secure him *repayment* of what he had paid, was not vitiated by the *original transaction* between the *defendant* and *those with whom he dealt.*" It was said, that "This is not an action to recover the differences of the stock-jobbing, nor is it brought by *either of the parties to those transactions;* but by an innocent person on a bill of exchange, drawn by the broker on his principal, for sums of money actually paid by the broker, and for the balance of his account;" but the plaintiff was not permitted to recover. Here, the broker had no interest in the stock-jobbing transactions, but simply advanced the differences arising out of these transactions as due by the defendant, for which advances he received from the defendant the bill in question. In Brown v. Turner,

7 T. R. 626, it was ruled, that "if a broker draw on his employer for differences paid for him in stock-jobbing transactions, and the employer accept the bill, and then the broker endorse it to a third person after it is due, the latter cannot recover on the bill."

In Cannon v. Bryce, 3 Barn. & Alderson, 179; it was adjudged, that "*money lent* and applied by the *borrower*, for the express purpose of settling losses or illegal stock-jobbing transactions, to which *the lender was no party*, cannot be recovered back by him." In this case A., who was not a broker, and not *concerned in any of the illegal transactions*, after all these transactions *were closed*, loaned money to B., to enable him to pay the losses which he had sustained in those transactions, and B. gave his bond for repayment, and yet it was ruled that no recovery could be had on the bond. We had seen it decided in Langton v. Hughes, which is affirmed here, that however it may be as to sales *abroad*, where the parties know that the goods are bought with a view to evade the revenue laws of *another country*, which the courts decline to notice, yet that sales made *in England* of an innocent article, such as ginger to a brewer, to be used in making beer, against a prohibition of the use of ginger by brewers in making beer, is void. And here we find that money loaned by an innocent third person, to enable another to pay losses which he had sustained in illegal transactions, cannot be recovered. Here, when the money was loaned, the offence of stock-jobbing had been committed; the loan of the money to pay the losses was a new, subsequent, distinct, and independent contract, and yet even such contract was void, as against the policy of the law. The court said, "On the part of the plaintiff, it was contended, that, as he was not a party to the illegal transaction, the loan was not illegal." "The authorities principally *in favour of the plaintiff*, are those of Faikney v. Reynous, and Petrie v. Hannay. The propriety, however, of these decisions, has been questioned in the several subsequent cases, that were quoted on the part of the defendant; and the distinction taken in the former of them, between malum prohibitum and malum in se, was expressly disallowed in the case of Aubert v. Maze. Indeed, we think no such distiction can be allowed in a court of law: the court is bound in the administration of the law, to consider every act to be unlawful, which the law has prohibited to be done;" and the bond for the money loaned, was held void. It was not pretended that the statute in this case declared loans, or notes, or bonds for money loaned, to pay the losses in this case, unlawful, or that it inflicted any penalty on such loans, or that such lender could be fined or punished in any way; but to engage in such stock-jobbing transactions was illegal, and therefore to prevent the violation of the statute, even the lender could not recover money loaned to pay losses arising out of such transactions, even after these losses had all been incurred.

The case arising out of a bankruptcy, I have transposed the words, *plaintiff* and *defendant*, in the text, to avoid a periphrasis. And now since this case, decided in 1819, I call upon the opposing counsel to show a single case, in which the authority of either of these decisions of Faikney v. Petrie, have been recognised.

In Cambden v. Anderson, 6 T. R. 723, 1 Bos. & Pul. 271, it was adjudged that "the exclusive right of trading to the E. Indies, granted to the E. I. Company, by 9, 10 W. 3, has never been put an end to, and any infringement of it is a public wrong. Though such parts of that act as inflicted penalties, &c., were repealed by 33 G. 3, c. 52, and though the latter act says, that no acts or parts of acts thereby repealed, shall be pleaded or set up in bar of any action, &c., it is competent to underwriters who have subscribed policies on ships trading to the E. Indies in contravention of 9, 10 W. 3, to avail themselves of the illegality of such trading, in an action on the policies." The court in that case said these plaintiffs, "may still insist that the exclusive trade of the company is no more than their private right, the infringement of which may perhaps give a right of action to the company, as for a civil injury over and above the several parliamentary provisions which have been made for securing it, but can have no other effect, and particularly cannot taint with illegality, *transactions and contracts which are collateral to it*." "When this point was suggested in the course of the argument, Mr. Rous answered, that the exclusive trade of the company was a *public regulation* of the *national commerce*, and this was a very good general answer, but I will enter a little further

into the discussion of it. The exclusive trade of the E. I. Company, is now so interwoven with the general interests of the state, that it is no longer to be considered as the private right of a corporation, but is become a great national concern, and the infringement of it a *public mischief*, and as such is prohibited by the *common law*. The principle and the effect of that prohibition, as applied to the present case, may be collected from the case of a bond given to the sheriff, to indemnify him against the voluntary escape of his prisoner, which is pronounced to be void by the *common law*." Here then it was contended that the law "cannot taint with illegality, transactions and contracts which are collateral to it;" and the court deemed Rous's answer to this position good, that even the collateral contract was illegal "where it concerned a public regulation of the national commerce." Was not this "a public regulation," by the constitution itself of the *traffic in slaves?* But again, the court considered the collateral contract void, where it arose out of a prohibited traffic, and also that the infringement of the statute was "a public mischief and a public wrong." And was not the slave trade, as prohibited by the framers of the constitution of Mississippi, considered by them "a public mischief, and a public wrong," endangering, as they conceived, the welfare and security of the people of Mississippi: and if so, was the transgressor of such a fundamental law on such a subject permitted to say that the contract was collateral? The court add in this case, "If we find an action brought upon a contract for a few bags of tea, or a few tubs of foreign spirits, *bought* or *sold* in the course of a contraband trade, we say without hesitation, this is a contract against law, and no action can be maintained upon it." And in Farmer's case, Chief Justice Eyre went still further, and declared "that violating a prohibition of a species of commerce in which the interest of the country was concerned, was not merely *malum prohibitum*, but *malum in se*." Apply that principle to this case.

The high court of errors and appeals of our state, have said in regard to the case above cited, as to the inter-state slave trade, as follows: "The convention deemed that the time had arrived, when the traffic in this species of property as merchandise, should cease. They had seen and deplored the evils connected with it. The barbarities, the frauds, the scenes so shocking in many instances to our feelings of humanity, and the sensibilities of our nature, which generally grow out of it; they therefore determined to prohibit it in future Another alarming evil grew out of it, which was highly dangerous to the moral and orderly condition of our own slaves, and that was the introduction of slaves from abroad of depraved character, which were imposed upon our unsuspecting citizens, by the artful and too often unscrupulous negro-trader. This was intended to be suppressed. Perhaps another object was to prevent a too rapid increase of the slave population in our state. The cardinal policy of the state was then to suppress this trade; and this is what is prohibited." And who will deny the truth of this statement? Did not the entire South, with perfect unanimity, unite with the North, in making the African slave trade PIRACY, and punishing those engaged in that trade with *death?* And this inter-state slave trade is prohibited as *highly criminal* by the slave holding states; and in Georgia the guilty transgressors of the law must take their place for years with felons in the cells of a penitentiary.

These traders have filled many of the states with insurgents and malefactors, and who will deny the "barbarities," "the frauds," the "shocking scenes," "the alarming evils," which grew out of this traffic? who will deny that the disproportionate augmentation of the slave over the white population, so rapidly progressing prior to this prohibition, was, if not arrested, endangering the lives of many of our citizens, and that to arrest this traffic, was "the cardinal policy of the state?" If then, the slave traders subjected the state to all these dangers, why was not this traffic malum in se? and if so, no collateral contract arising out of such a traffic shall be maintained by the guilty offender, much less the very contract of sale by the slave trader of the slaves thus illegally introduced for sale. If, as a consequence of the prosecution of this traffic, the scenes of Southampton had been re-enacted within our limits, would not the blood of every innocent victim have crimsoned the hands and stained the soul of the trader, whose prosecution of this prohibited traffic

had produced these dreadful consequences. And, if the vigilance of the state and final enforcement of the prohibition have prevented these consequences, the trader was no more free from crime, than is he who throws the torch of insurrection among us, because it has not yet exploded any of the combustible materials within our limits. These traders have offended against the majesty of the laws and the sovereignty of the people of Mississippi; they have put in jeopardy the lives of our citizens, disregarded our cardinal policy, and trampled under their feet the sacred prohibitory enactments of the constitution. And shall such offenders come into a court of justice, and through its decrees, reap the fruits of their transgressions?

In Wilkinson v. Lousondack, 3 Maule & Sel. 117, it was decided, that "The stat. 47, G. 3. which repeals so much of the statute of Ann, as vests in the South Sea Company the exclusive privilege of trading to parts within certain limits, extends only to such places within those limits, as were at the time of passing the act, or at any time since, in the possession of, or under the dominion of his majesty; and therefore, an action was held not to lie against the defendant for not safely stowing and conveying goods of the plaintiff from London to Buenos Ayres, which place was captured by his majesty's forces, but afterwards recaptured before the passing of the act, and the shipment of the goods; although the goods were shipped *under the sanction of an order in council purporting to authorize the voyage*, and the recapture was unknown when the goods were shipped and the voyage commenced." The case states, that the goods were shipped at London, October 26, 1806, and the freight there paid, for transportation to Buenos Ayres, to which port the ship sailed. Buenos Ayres was recaptured from the British "by the Spaniards in August, 1806; but that fact was not known in England at the time of the shipment of the goods and commencement of the voyage." It was agreed "that his majesty's order in council, dated Sept. 17, 1806, purporting to legalize the trade, should be read as part of the case by either party." This order in council is given in the case, and reciting that Buenos Ayres had been conquered by the British, and "*was then in his majesty's possession*," authorized full and free trade there by the plaintiff and all others. Immediately after the order, and with a view to legalize it, the stat. 47 Geo. 3, c. 23, was passed, repealing after the date of the order in council, (17th Sept. 1806,) as was conceded, every thing in that of Ann, making voyages illegal to all places to which it was heretofore forbidden, "which now are, or at any time hereafter shall, or may be belonging to, or in possession of his majesty." The intention of parliament was to confirm the order, the act going into effect at the date of the order. But the king in council were mistaken, and the parliament was mistaken, and the parties were mistaken, when they entered as was admitted bona fide into this contract; for in August, 1806, Buenos Ayres had been most unexpectedly taken by the Spaniards, and therefore the words of the act of parliament did not reach the case. Yet, the counsel in that case, did not venture to contend that even the royal mandate by the king in council could render nugatory a preceding prohibition of an act of parliament, as it seems to be urged upon the court in this case, and that the supposed tax law may render inoperative a provision of our constitution; but they did contend that the language of the act of parliament, of 47 G. 3, reciting, as it did, the very date of the order in council, and to go into effect from that date, did legalize and adopt that order. The plaintiff also contended, that the case arising out of a "collateral damage" to the goods by the negligence and improper conduct of the defendant, by having been "torn and perforated by iron bolts, and otherwise damaged and spoiled," that the illegality of the voyage, even were it illegal, did not affect this collateral claim, which was distinct and independent. But the court decided that the plaintiff did well to admit that an order of the king in council could not render inoperative a preceding act of parliament; that the claim for the damages to the injury of the goods grew out of the contract of freight; and that the contract was invalid, because it related to a voyage that was illegal. The court said: "The only remaining argument in favour of the plaintiff was, that there had been no *wilful* contravention of the law; *both parties thought they were acting legally;* but their misapprehension *of the fact*,

or *the law* cannot alter the character of the contract, which the court is called upon by this action to enforce."

In the case of Griswold v. Waddington, 15 John. 37; 16 John. 438, it was decided, that where there was a partnership existing before the late war with England, one partner residing here and the other in England, and where a balance arose in a partnership account on bills upon England, remitted there from this country during the war, there could be no recovery, even after the peace, on such account; all trading between our citizens and British citizens being contrary to the war policy of the country, and although it was distinctly proved as part of the case, that such remittances were impliedly sanctioned by the executive branch of the government of the Union; that they were innocent in intention, being remittances not of money or specie, but of bills, and the government itself having remitted during the war bills drawn on England. But the practice or sanction of the executive, nor the innocence of the intention of the parties would avail, even after peace was declared, to induce the court to give validity to any contract, express or implied, repugnant to the policy of the law.

In deciding this case, Chancellor Kent said:

"An objection to the perfidious character of the defence is not to be endured." Lord Hardwicke disregarded it in the case in 7 Vesey, 317. "Several cases," says he, "at common law and in equity, have gone upon this, that if the *contract relates to an illicit subject*, the court will not so encourage an action as to give a remedy. Nor is it any answer, that the defendant knew of this illegality, for this answer would serve in all these cases." "The plaintiff must recover upon *his own merits;* and if he has none, or if he discloses a case *founded upon illegal dealing*, and *founded on an intercourse prohibited by law*, he ought not to be heard, whatever the demerits of the defendant may be. There is, to my mind, something monstrous in the proposition, that a court of law ought to carry into effect a contract founded upon a breach of law. It is *encouraging disobedience*, and *giving to disloyalty its unhallowed fruits*."

If the contract "arise from a transgression of a positive law of the country," or if it relates "*to an illicit subject*," to allow a recovery would be "encouraging disobedience" and giving it "its unhallowed fruits." And in these two cases there was no doubt of the sanction of the contracts by the king in council, in the one case, and the executive department of the government of the Union in the other; but all this, nor "any misapprehension of the fact or law" could avail to maintain the contract.

In the case of the Bank of the U. States v. Owens, 2 Peters, 527, it was decided by this court, that as the bank charter "forbids the taking a greater interest than 6 per cent.," but does not declare the contract void; "such a contract is void upon general principles;" and there could be no recovery, not merely of the usurious excess of interest, or of six per cent. interest, but also no recovery of any part of the principal of the money loaned. In this case most of the authorities as to illegal contracts are reviewed by the court, and they settle the principle, that when the construction of a statute regards the policy of the law as to the validity of contracts, the statute is to receive a liberal construction so as to uphold the policy of the law; and that reserving interest beyond six per cent. may be considered as embraced within the spirit of a law rendering it illegal "to take more than six per cent. interest." They say "courts are instituted to carry into effect the law of a country, how, then, can they become auxiliary to the CONSUMMATION *of violations of law*." Is not this sale by the importer of the slave that he could not introduce for sale, a "*consummation* of the violation of the law?" They thus recognise the great case of Aubert and Maze, exploding the distinction between malum prohibitum and malum in se. "In the case of Aubert v. Maze, it is expressly affirmed, that there is no distinction, as to vitiating the contract, between malum in se and malum prohibitum. And that case is a strong one to this point, since the contract there *arose collaterally* out of transactions prohibited by statute." "And so in another case of great hardships, 3 B. and P. 35, where the insurance was upon a trading in the East Indies prohibited by an *obsolete statute*, the plaintiff could not even recover his premium, although admitted that the *risk never commenced*, because the policy was void in its inception on the ground of illegality," and the court say,

the principle extends to any other contract where the prohibition arises by the common statute or maritime law; and they add, "nor is the rule applicable only to contracts expressly forbidden, for it is extended to such as are *calculated to affect the general interest and policy* of the country." See also 1 Peters, 37, 4 Ib. 184.

In Thomson v. Thomson, 7 Vesey, 470, 473, it was held, that "a contract for the sale of the command of an East India ship is illegal, and therefore cannot be enforced by suit upon the equity, against the fund paid by the company as a compensation, under the regulation of 1796, to restrain *the practice in future.*" The court said, "the defence is very dishonest; but in all illegal contracts it is against good faith, as between the individuals, to take advantage of that. *A man procures smuggled goods and keeps them, and refuses to pay for them;* so in the underwriters' case, an insurance contrary to Act of Parliament, the brokers had received the money and refused to pay it over, and it could not be recovered." Here the illegality of a sale of *smuggled* goods retained by the vendee is recognised. In Amay v. Meryweather, 4 Dow. & Ry. 86; 2 B. and Cres. 573, it was ruled, that where W. as agent for defendant, voluntarily paid £500 to compound differences, that to secure to W. *repayment* of that sum, defendant gave his note to W., which W. endorsed to plaintiff after due, that on threat of suit by the plaintiff, defendant gave his bond in lieu of the note to plaintiff; held there could be no recovery on the bond, as it grew out of an illegal transaction. Here the doctrine of Faikney v. Reynous is overruled in form and substance, this being the case of a bond given to an innocent person wholly unconnected with the original transaction. It was decided, in the St. Iago de Cuba, 9 Wheat. 409, that no wages could be recovered by seamen, nor money for supplies by material men, when they knew that the voyage of the ship was unlawful. And the principle was extended in the case of a vessel engaged in the slave trade, to supplies furnished after her return to Baltimore, by those who knew of the illegal voyage, and that she was remaining in port under false colours.

We have then numerous cases here cited, declaring the distinction between *malum in se* and *malum prohibitum*, exploded; and such also is the opinion of all the elementary writers. 1 Leigh's Nisi Prius, 6, 7; Collyer on Partnerships, 28; Chitty on Contracts, 231; Paley on Agency, ch. 2, sec. 2, p. 103, 104; 1 Kaimes, 355: and Chancellor Kent says: "The distinction between statutory offences which are *mala prohibita* only, or *mala in se*, is now exploded, and a breach of the statute law in either case, is equally unlawful and equally a breach of duty." 1 Kent's Com. 467, 468. See 7 Wendall, 276, 280. Mather's Case, 3 Vesey, 372, has been before quoted, in which this distinction was denounced, and the cases of Faikney and of Petrie overruled; and subsequently, in the case ex parte Daniels, 14 Vesey, 192, Lord Chancellor Eldon "expressed his disapprobation of the doctrine of Faikney v. Reynous, and Petrie v. Hannay." Such is the law of the continent of Europe, of Scotland, of England, and of America, on this subject, and the decisions in Ireland are to the same effect. In Ottley v. Brown, 1 Bal. and Beatty, 360, the chancellor decided that a "bill by a banker for an account of shares held *in trust for him* in a mercantile establishment" could not be maintained, because the statute 29 Geo. 3d, c. 16, "prohibited bankers from being traders," though the statute does not avoid the contract, nor does it extend in terms to a trust; yet a recovery was refused, because to permit it would be against the policy of the law. In referring to the case of Petrie v. Hannay, he expressed his concurrence in the views of Lord Kenyon in that case and against the case itself; and also declared the strongest disapprobation of the case of Faikney v. Reynous, remarking that "Lord Kenyon, Lord Roslyn and Lord Ellenborough, all differ from Lord Mansfield, and I am quite satisfied with the principles laid down in ex parte Mather." To these he might have added Lord Loughborough, Lord Eldon, Chief Justice Eyre and many other distinguished British judges before quoted by me, as overruling these cases and disapproving the distinction between malum prohibitum and malum in se. In this case of Ottley v. Brown, the chancellor expressly declared that whether the illegal contract was the original transaction, or only collateral and resulting from it, was equally void "on principles of policy." And in Knowles v. Haughton, 11 Vesey, 168, the court refused proof of any items in an account grow-

ing out of an illegal partnership, and overruled Watts v. Brooks; and in Roth v. Jackson, 6 Vesey, 30, 35, even when no guilt attached to plaintiff or defendant, the court declared that no contract could be enforced contrary to "considerations of general policy." The distinction between malum prohibitum and malum in se, is denounced by Emerigon, vol. 1, pages 210, 542, sec. 5 and 31. He says this doctrine of distinguishing between breaches of the law "is reproved by St. Paul in his Epistle to the Romans. *It is necessary, says the Apostle, to obey the laws; not merely through fear of punishment, but also as a duty of conscience.* A christian obeys the laws from a conscientious obligation and as an indispensable duty of religion." And as concurring with him he cites Pothier, Denisart, Burlamaqui, Wolffs, Vattell, Grotius, Guidon de la Mer; and Denisart denounces the introduction of articles into a country against its laws as a CRIME. Tom. 1, page 714. If it be then a *crime* as now recognised in England, and Ireland, and Scotland, and upon the continent of Europe, to introduce prohibited articles into a country, who can contend that the guilty criminal shall obtain for his offence the sanction and encouragement of courts of justice, by enabling him through its decrees, to sell the very article it is a crime for him to introduce for sale?

Our opponents have cited the following sentence from Chitty on Contracts, 217: "A doubtful matter of public policy is not sufficient to invalidate a contract. An agreement is not void on *this ground*, unless it *expressly* and unquestionably contravene public policy and be injurious beyond all doubt to the interests of the state." Now Mr. Chitty was here speaking, as the very preceding sentence shows, "of contracts void at *common law as affecting public policy*," and not of contracts repugnant to the policy of a statutory or constitutional provision. We have seen in the numerous cases already cited, where the question is whether a contract is repugnant to the policy of the statute, that so far from the rule being that the agreement must expressly contravene the statute, it must receive the most liberal construction to prevent a defeat of the policy of the statute, and that if it be within the spirit or scope, intention or object of the law, by implication or otherwise, the agreement is void. Did Mr. Chitty also mean to say that the contract must be "injurious *beyond all doubt* to the *interests of the state*," in order to declare it void, when the question arose upon a statute? Why, if the statute by any fair and just construction avoided the contract, we have seen the courts in repeated instances, some of which have been cited, declare the contract invalid as contrary to the policy of a statute, whilst at the same time they announced their disapprobation of the policy of the statutes, and declared that in their judgments the contract was not injurious to the interests of the state. It is then when in the absence of a statute or constitutional provision, a court, *upon its own judgment*, is refusing its aid to a contract upon the ground that it is against the public policy, and injurious to the interest of the state, that it must be a clear case, and not "a doubtful matter of public policy." That such was Mr. Chitty's meaning, is evident from the fact that in this chapter, which is headed "of contracts void at common law, as affecting public policy," he enumerates only cases void at *common law* as injurious to the public interest, and not cases depending upon the construction of a statute; and then in a separate chapter he speaks "of contracts void by statute," and enumerates many instances under which contracts not within the words of the statute, are declared void, as repugnant to its intention, scope and spirit. In his notes to this chapter he refers to a treatise on the same subject, in the third volume of his commercial law, page 83, from which I quote: "But a distinction has been introduced into our law books, under the two several denominations of *mala prohibita* and *mala in se*." He denies and denounces this distinction; and then says, where "an act is prohibited generally by statute, the punishment which the law annexes to the offence is in general by indictment, and this is that species of *crime* which our law writers usually understand by the term *malum in se*." "And the circumstance of both parties being ignorant of the law, and being innocent of any intention to violate, will not constitute any distinction." "And the illegality affects all contracts calculated to violate the law; and therefore, where a voyage has been declared illegal, a person cannot be sued for carelessly stowing goods to proceed upon it." The authority then of Chitty is in our favour on all the contested points. Here Mr.

Chitty says, when the introduction of slaves for sale, (to specify the case) is "prohibited generally by a statute," and not the implied prohibition by a penalty, "this is that species of CRIME which our law writers usually understand by the term *malum in se*." The words here then are "the introduction of slaves as merchandise or for sale shall be prohibited from and after the first day of May, 1833." The prohibition then being general after the day fixed, and without a penalty, the introduction of the slaves in this case for sale was a *crime*, it was *malum in se*, it was punishable by indictment, with fine and imprisonment; and all the argument that has been made to show that this is not a prohibition, but merely directory to the legislature, because there is no penalty, falls to the ground. And now then I approach the grave subject really referred to in the quotation made by our opponents from Chitty, and that is, whether the introduction of these slaves for sale, and the subsequent sale, would be so clearly repugnant to the true policy of the state, and so injurious to its interests, that such a contract of sale would be void on general principles, had there been no provision on the subject in the constitution or statutes of Mississippi. The power and duty of the court to declare such contracts void in clear cases of repugnance to the policy or interest of a state, even where there is no statutory or constitutional enactment, is admitted in the clause quoted by our opponents from Chitty; and upon reading that chapter, numerous instances of the application of the principle will be found, in cases less clear in my judgment than the present, and to these cases I refer the court.

The same doctrine is thus laid down by Lord Mansfield, in 1st Cowper, 39: "It is admitted by the counsel for the defendant, that the contract is against no positive law. It is admitted, too, that there is no case to be found which says it is illegal: but it is argued, and rightly, that notwithstanding it is not prohibited by any positive law, nor adjudged illegal by any precedents, yet it may be decided to be so upon principles; and the law of England would be a strange science indeed, if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law, enacted by statute, depends upon principles; and these principles run through all the cases, according as the particular circumstances of each have been found to fall within the one or other of them. The question then is, whether this wager is against *principles?* If it be contrary to any, it must be contrary either to principles of *morality;* for the law of England prohibits every thing which is *contra bonos mores;* or it must be against principles of sound policy; for many contracts which are *not against morality*, are still void as being against the maxims of sound policy." This doctrine has been repeatedly recognised as the law in England and America, and this very principle *is quoted* and recognised by the supreme court of New Jersey in 5th Halsted, 91, and by the supreme court of Pennsylvania in 1st Binney, 123; and in the concluding opinion in that case, as to a sale of lands, the court say—"Exercising jurisdiction, the state is bound to preserve the peace and aid contracts, but not such as militate against her own rights. It would be unnatural and against reason, which is a ground of the common law. It is against public policy. Self-preservation forbids it. So that, *independent of any act of the legislature*, I must hold the transfer illegal, and the obligation, given under such consideration, void." Does it then in this case, independently of any constitutional or statutory enactment, clearly appear to the court, that at the date of this contract, the introduction and sale of slaves, as merchandise, was against the true policy, was dangerous to "the peace" of the state, or "injurious to its interests," it was the duty of the court not to maintain the action on the contract. No court is called upon to lend its assistance to contracts encouraging a traffic detrimental to the interests, or repugnant to the policy, or dangerous to the peace of the state. It is true that this is a power of judicial tribunals, where they act merely on general principles without precedents, which must be exercised only in clear cases; but where the case is clear, it is a great protective and conservative power, which no court can refuse to exercise, without a gross dereliction of duty. Is this a clear case?

The views of our highest court, of the dreadful consequences of this traffic, have been already quoted; and if they are correct, as no reasonable man can doubt, then

is there not strong ground upon which to contend that this contract was void on general principles, in the absence of all provisions in the constitution or statutes of the state? But suppose it not to be, merely on general principles, a case sufficiently clear for the court to refuse its aid by enforcing the contract, who can doubt what was their duty, when there was a constitutional mandate on the subject, supposing it only to be a command of the constitution, that on the 1st of May, 1833, the traffic shall be prohibited, was it not the declared policy of the state that the traffic should cease on that day; was it not the will of the convention, as announced in the fundamental law, that it should then cease; and was the court, in defiance of this annunciation, in defiance of the mandate of the convention, in defiance of the will of the people declared in convention, and again at the polls in 1833, by refusing to change this mandate into a grant of discretionary power to the legislature, to maintain contracts repugnant to that policy, because the legislature had not acted on the subject? We have seen that, in clear cases, it *is the duty* of a court to refuse its aid to contracts repugnant to the policy or interest of the state, or dangerous to its peace even in the absence of all legisiative or constitutional prohibitions; but where there is a mandate of the constitution on the subject announcing the will, or, if you please, merely the opinion of the people of the state, that the traffic shall be prohibited on a day certain, must not all doubt cease, and the duty of the court become clear and obvious?

But, if this clause of the constitution does not of itself render the sale unlawful, it is insisted that it does so when taken in connection with the preceding act of the legislature, of the 18th June, 1822, Rev. Code, 369. It is declared by the 1st section of that act, "That all persons lawfully held to service for life, and the descendants of the females of them, within this state, and such persons and their descendants, as hereafter may be brought into this state, pursuant to law, being held to service for life, by the laws of the state or territory from whence they were removed, and no other person or persons whatever, shall henceforth be deemed slaves."

Now, if this clause of the constitution prohibits the introduction for sale, would these slaves have been introduced "pursuant to law?" That will not be contended. Then this section declares that they shall not "be deemed slaves;" that is, they shall not be deemed so in Mississippi for the purpose of lawful sale there by the importer, because the subsequent sections of this act explain its meaning, by imposing a penalty on the sale or purchase of all slaves not imported pursuant to law; and it will not be denied, that a penalty on the sale implies a prohibition of the sale, and renders that sale unlawful. Dwaris on Stat. 678; Carth. 251; 1 Bin. 118; 3 Chit. C. L. 84. For the purposes then of a lawful sale by the importer, negroes not "brought into the state pursuant to law" cannot "be deemed slaves," and if so, the sale must be unlawful. What then, it is asked, becomes of these slaves? In reply, I answer, what became of the slaves introduced against the provisions of the act of 1808 or 1822, and what becomes of the slaves unlawfully introduced since the act of 1837? In all these cases it is conceded that the sale is invalid by the importer, although no further provision is made in any of these cases in regard to the future condition of the slaves. In all these cases, however, *as in this*, the sale by the importer was invalid, and *for that purpose* they could not "be deemed slaves." So in the numerous cases cited in this argument, the land in Pennsylvania, the ginger sold to make beer, the butter, corn, and coal vended by unlawful measures, the ribbands bought as presents for voters, the vessels transferred contrary to the policy of the navigation or registry laws, the horses purchased on Sunday; in all these cases the property remained property, and a subject of lawful traffic, but *the sale by the violator of the law* was held invalid. Now, this first section of the act of 1822, was in full force at the date of the framing of the constitution of 1832, and the 4th section of the schedule of that instrument declares, "All laws now in force in this state, not repugnant to this constitution, *shall continue to operate* until they shall expire by their own limitation, or be altered or repealed by the legislature." Now this constitution prohibits the introduction of slaves as merchandise or for sale, and this section of the act of 1822, declares, that such slaves as shall be unlawfully introduced hereafter, shall not "be

deemed slaves," for the purpose of a lawful sale by the importer. There is no repugnance whatever in the law to this constitutional prohibition; on the contrary, it is, if not clearly implied in the prohibition itself, certainly not *repugnant to it*, and conformable to its expressed object. This section then, of that act, so far from being repealed, was re-enacted and continued in operation by the 4th section of the schedule of the constitution of 1832, and must be construed in conjunction with that instrument. This section then, of the act, must be regarded as within the view of the framers of the constitution of 1832; for it was then continued in operation by them; and that section having rendered illegal the sale by the importer of *all slaves* that should thereafter be unlawfully introduced, rendered it unnecessary for the convention to declare the sale illegal. This also is a strong argument to show that this clause of the constitution was a prohibition, when we see that this section of the act of 1822, was thus, by that instrument, connected with, and made a part, and continued in operation thereby: and, even if this were regarded as a new and distinct prohibition from that of the acts of 1808 and 1822, but only so far differing as this, that by these laws the prohibition of this traffic was special and partial, and here it was general and total, would it not be a most extraordinary construction to suppose, that whilst the convention substituted a total for a partial prohibition, it should intend to depart from the policy of a quarter of a century, by which, under the acts of 1808 and 1822, wherever the *importation* was illegal, the *sale* also by the importer was void?

Perceiving the force of these arguments, our opponents meet them by asking, would you emancipate all these slaves introduced from 1833 until 1837? Were they emancipated under the act of 1808, of 1822, and of 1837, when unlawfully imported? and if not, the question presents no difficulty. Under the early acts of congress prohibiting the introduction of slaves from Africa, they were not emancipated; yet the sale by the importer was absolutely void. Laws in pari materia are to be construed together, and as one code; and when a code of laws has been compiled by the legislature, and by an amendment of the constitution, that instrument, whilst it expressly continues in force every portion of that law not repugnant to the constitution, introduces any new provision or modification of the pre-existing system, the whole is to be construed together; and the new provision or modification is to be regarded as incorporated in the former system, as constituting a part of it, and as substituted for any particular section of that system to which the new provision may be repugnant, or in which it may affect a change. Now, this act of 1822 before cited, was a complete code of laws in regard to slaves, consisting of eighty-six sections, nearly every one of which is now in undisputed operation. Every section of that law which is repugnant to the constitution of 1832, is thereby repealed, and the new provision substituted in place of the repealed clauses as a part of the system. The doctrine is thus laid down in Dwaris, 699–700, and is sustained by numerous authorities. "As one part of a statute is properly called in, to help the construction of another part, and is fitly so expounded as to *support* and *give effect*, if possible, *to the whole*, so is the comparison of one law with other laws made by the same legislature, or upon the same subject, or relating expressly to the same point, enjoined for the same reason, and attended with a like advantage. In applying the maxims of interpretation, the object is throughout, first, to ascertain, and next to carry into effect, the intentions of the framer. It is to be inferred, that a *code of statutes* relating to *one subject* was governed by *one spirit and policy*, and was intended to be *consistent* and *harmonious* in its several parts and provisions. It is therefore an established rule of law, that all acts in pari materia are to be taken together, as if they were *one law;* and they are directed to be compared in the construction of statutes, because they are considered as framed upon *one system*, and having *one object* in view. If one statute *prohibit the doing of a thing*, and another statute be *afterwards* made, whereby a *forfeiture is inflicted* upon the person doing that thing, both are considered *as one statute*. When an action founded upon *one* statute, is given by a *subsequent* statute in a *new case*, every thing annexed to the action by the first statute is likewise given. Indeed, the LATTER act may be considered as *incorporated with the* FORMER."

Here, it is expressly declared that the latter provision is considered as "incor-

porated with the former." Now, in place of the 2d, 4th, and 5th sections of this act of 1822, read, as a part of that act, the provision of the constitution of 1832, declaring that, "the introduction of slaves as merchandise or for sale, shall be prohibited from and after the 1st of May, 1833." And then, by the 1st section of the act, no such negroes thus introduced shall, for the purposes of lawful sale, by the importer, be "deemed slaves," and this is enough to decide this question. But this is not all, for I contend, that as this provision was thus incorporated by the new constitution, in place of sections 2, 4 and 5, as part of the act of 1822, the other provisions remaining in force, then the penalties attaching upon the sale of slaves imported as merchandise, contrary to the provisions of the law under the 6th section of the act of 1822 would apply. That section was not repugnant to the clause in question of the constitution, but remained in force, and *in aid thereof*, until the legislature attached other penalties. This we have seen is the principle cited, that all acts in *pari materia* are to be taken together, "*as if they were one law.*" Thus, "if one statute prohibits the doing a thing, and another statute be *afterwards* made, whereby a forfeiture is inflicted on the person doing that thing, both are considered as one statute." Thus, a new forfeiture attaches to an old prohibition as part of it; so "when an action *founded upon one statute*, is given by a *subsequent* statute in a *new case*, every thing annexed to the action by the first statute is likewise given. Indeed, the *latter* act may be considered as *incorporated with the former.*"

Here, then, was a penalty on the sale of slaves unlawfully introduced as merchandise; a subsequent act of sovereign legislation extends this provision by forbidding the introduction of all slaves as merchandise; does not the penalty under the old law clearly attach under the new provision, especially when every thing not repugnant to that provision in the former law is expressly continued in force by the last enactment? If this were a second supplemental act, there could be no doubt; and is it not more important to apply the principle to modifications of the former system introduced by a prohibitory provision of a new constitution?

It has been decided that "if a statute *prohibit contraband goods* under a *penalty*, a subsequent statute declaring goods contraband, will draw the penalty after it." "The statute of Anne, c. 7, s. 17, imposing a penalty of treble the value on the importation of foreign goods prohibited to be imported into this country, extends to all such goods as have been or may be prohibited *subsequently* to that statute, as much as if they had been prohibited at the time of making that statute." "Dwaris on Stat. 706, 743, 744; Atty. Genl. v. Saggers, 1 Price, 182. Thus, by the 8th Anne, c. 7, certain penalties are imposed on the importation of such goods as were prohibited, foreign gloves not being among the articles then prohibited. The 6th of G. 3, c. 3, an independent, not a supplemental act, passed several years subsequently, prohibited the importation of foreign gloves, and inflicted penalties on the concealment of them. The stat. of Anne inflicted a different penalty on persons knowingly having possession of such goods as were then prohibited. And the question was, whether the double penalties under both statutes could be recovered. The court decided that they could. They say, "the two statutes may well stand together. The one requires merely a possession of the goods, with a knowledge of their prohibition; the other, a possession with intent to conceal from forfeiture or seizure." And both penalties were enforced, though these gloves were "not prohibited by the first act." This is a much stronger case than the present, where only one penalty would be exacted; but the principle applies, that where certain classes of goods (or slaves) are prohibited to be imported under a penalty, and by subsequent legislation the prohibition is extended to another class of goods (or slaves), the penalty under the first act attaches to the goods (or slaves) enumerated in the second, although it be not a supplemental act, and not referred to in the second act. And Lord Mansfield upholds the same principle of considering as one act, statutes in *pari materia*, although the first act is "*not referred to*" in the last statute: and in aid of the construction of a late statute, he declares it a proper rule "to look into the policy of a former act in pari materia, although that act may have expired." Dwaris, 700, 701; 1 Bur. 449; Bac. Ab. T. Stat. 1, 3; 1 Vent. 246; Wallis v. Hudson, Chan. Rep.

276. And it is even competent to call in aid a "repealed statute," to assist in the construction of another statute in pari materia.

Now, if under the strict construction given to penal statutes, the penalty of the first statute on the importation of certain prohibited goods, will be inflicted as to other goods prohibited by a second statute, and even double penalties will be exacted, can there be a doubt that where the same acts are most liberally expounded, when the penalty is not demanded, but the act is only asked to operate so as to render the contract unlawful, that the 1st section of the act of 1822, which had that effect on the sale of all slaves that should not "hereafter be brought into this state pursuant to law," must expressly apply to such slaves as were prohibited to be introduced by the constitution? And is it not incredible, that when the constitution of 1832 prohibited the introduction of slaves as merchandise, it was intended to change the settled policy of the state for a quarter of a century, by which, under all acts in pari materia, the *sale* was *always* made unlawful *whenever the importation was forbidden?* This act, then, of 1822, is a part of this provision of the constitution of 1832, expressly continued in force thereby, and demonstrates that this was a prohibition; for why, by implication, is this clause to be rendered merely directory for future legislation, when there was already legislation full and complete upon the subject, and expressly continued in force by the constitution?

I have before quoted the decision in our favour of the highest court of our state; and here I contend, that the decision of the highest court of a state, expounding its constitution, is obligatory on this court in all cases when that construction involves no repugnance to the constitution of the United States. Could congress give to this court an appeal from the decisions of state tribunals in questions not involving a repugnance to the constitution of the United States? Surely not. And because it has jurisdiction, not on account of the *question*, but of the *parties*, between citizens of different states, shall it therefore assume the power of disregarding the construction of their own constitution, and of their own statutes by the highest courts of a state? If so, and it possesses this power in one case and in one state, it possesses the same power in every state and in all cases, and may overrule any number of decisions upon all their statutes and all their constitutions by all their courts; and thus establish two rules of property under the same state statute or state constitution, and both to be enforced within the state, the one by the state, and the other by the federal tribunals. Let us take the case of Maryland, and suppose, that under their laws, their courts not only invalidate the sale of slaves introduced for sale, but declare the negro free. If, in a case between citizens of different states, this court should give a different construction to the laws of Maryland, and declare the sale valid, and the negro a slave, what would be the result? Why, whilst the slave trader of another state, aided by this court, should collect the money for the sale of the slave, that same slave might be declared, upon his petition, a freeman, by the courts of Maryland; and no one pretends that from that decision there could be any appeal to this court. And to reverse the picture, whilst the state courts held the sale valid and the negro a slave, as between their citizens in expounding their laws, this court, in a case in which a citizen of another state was a party, might pronounce such sales invalid and the negro free, and thus *emancipate the slaves of a state against her will.*

This is but one case out of a thousand, of conflicting decisions that would constantly occur, bringing the state courts and state officers into constant conflict; often as to the same money or property, real or personal, and yet neither bound to acquiesce in the decision of the other, and of course resulting in contests of force or anarchy. Under our form of government there must be some tribunal, in the last resort, to expound laws and constitutions. That tribunal, in cases involving the construction of the constitution of the Union, is this court; and in all other cases involving only a construction of a state constitution, the highest court of the state is the expounding powor, to whose decisions all must submit, or two opposite and contradictory constructions and rules of property must prevail and be enforced in the same state. No powers are retained by any state, if this court in all cases, though not involving a construction of the constitution of the Union, may demand obedience in every state and from all their courts, to all their decisions upon ques-

tions merely local, and embracing only an exposition of state laws and state constitutions. Over these local questions, it is conceded, that this *government* has no control. The constitution itself declares that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." These local questions upon which congress cannot legislate, are conceded to be cases of power reserved to the states, and not delegated to the United States. And yet, upon all these local questions, over which the governments of the states have exclusive power, and this *government* has no power, it may, upon this principle, nay, it must sweep them all within the controlling sway of one of the departments of this government. Especially over slavery, or any other local question, the states would have no power, and it would all be concentrated in one of the departments of this government.

If, in construing in the last resort, the constitution of a state, this tribunal may decide that upon their construction of that instrument, all the slaves within the limits of the state are free men, in vain may all the state tribunals have decided differently; in vain may we urge, and the opposing counsel concede, that no power over the "question," was delegated by the constitution of the Union to this government, that it is a power admitted to be exclusively reserved to the states; but if the question arises on the construction of a state constitution, in a case between citizens of different states, and comes into this court, its construction of that constitution, (if the state interpretation be not binding,) is to be the supreme law of the land, and obligatory on the same question on all the state tribunals. There is no escape from these consequences, but in the concession, that the state tribunals are not bound by the construction placed on local questions arising under state laws, and state constitutions. And is there to be no final and peaceful arbiter of any such questions? Must the conflicting decisions of the state and federal courts, both be executed without the power of appeal from either tribunal, and force decide between the marshal on the one hand, and the sheriff on the other, in carrying into effect these contradictory decrees? Such a system would be the reign of anarchy and civil war. Are we to be told, change your state constitutions, and we will expound them differently? So you will *the constitution as changed;* but that will not recall or change the past decree as made, whether for emancipation or any other purpose under the old constitution. Besides, it is no easy matter to change the constitution of a state. In most of the states a majority of at least two-thirds is required to effect this change. In some states, for instance, in Maryland, as to slavery, it requires the unanimous consent of both branches of the legislature; and in many cases the proposed remedy of changing our state constitutions, might prove quite ineffectual, and in no case could it recall the past, or obliterate the rights accrued under your construction of the old constitution.

In the case of the Bank of Hamilton v. Dudley, 2 Peters, 492, the question was, whether the court of common pleas of Ohio had authority, as a court of probate under the *constitution of that state*, to order the probate sale of certain property. The case was argued at one term; but the court hearing that the same question was "depending before the highest judicial tribunal of the state," Chief Justice Marshall announced that "the case was held under advisement," to receive that opinion. The counsel opposed to the Ohio decision, contended, that "this court will never follow the law as decided by the local tribunals, unless it be settled by *a series of decisions*, and is acquiesced in by the profession. But it is asked in this case, to yield implicit obedience to an *isolated case*, in the decision of which the *court was divided;* a decision, too, as it is solemnly believed, fraught with the most pernicious and ruinous consequences; and which, unless the learning and justice of the profession are greatly mistaken, will never meet its approbation." The same counsel also contended, that the order of the court of common pleas, to sell the property, must be considered res judicata and conclusive, till reversed, and not to be reversed in a collateral issue. In reply to this last position, as to the order of this *inferior court* of common pleas, the court regarded it as to "be treated with great respect, but not as conclusive authority." In regard, however, to the decision of the highest court of the state, expounding their state constitution, Chief Justice Marshall thus announced the opinion of this court: "It is also contended, that the

jurisdiction of the court of common pleas in testamentary matters, is established by the constitution; and that the *exclusive power* of the state courts, to construe legislative acts, does not extend to *the paramount law*, so as to enable them to give efficacy to an act which is contrary to the constitution. *We cannot admit* this distinction. The judicial department of *any government*, is the *rightful expositor* of its laws; and EMPHATICALLY *of its supreme law*. If in a case depending before any court, a legislative act shall conflict with the constitution, it is admitted that the court must exercise its judgment on both, and that the constitution must control the act. The court must determine whether a repugnancy does or does not exist, and in making this determination, must construe both instruments. That its construction of the one is authority, while its construction of the other is to be disregarded, is a proposition for which the court can perceive no reason." Such was the view of this court, of a decision of the highest court of a state expounding its state constitution; not a series of decisions, but a *single* decision *just pronounced* by a *divided* court. It was regarded as *conclusive*, because the final construction of its state laws was a question within "the exclusive power of the state courts;" they were "the rightful expositor of its laws, *and emphatically of its supreme law*."

In Coates v. Mus[illegible], 1 Brock. 539, 543, in a case overruling a decree for money, not land, growing out of a construction of a state statute, Chief Justice Marshall said: "It is always with much reluctance that I break the way in expounding the statute of a state, for the exposition of the acts of *every legislature* is, I think, *the peculiar* and *appropriate duty* of the tribunals created by that legislature."

In Gardner v. Collins, 2 Peters, 89, this court say, in regard to the construction of an act of the legislature of Rhode Island, that "If this question had been settled by *any* JUDICIAL *decision* in the state where the land lies, we should, upon the uniform principles adopted by this court, recognise that decision as part of the local law."

In the case of the United States v. Morrison, 4 Peters, 124, where the question arose on the construction of a statute of a state, in regard to the interpretation of which it was admitted by the court, that "different opinions seem to have been entertained at different times;" under which state of the facts, the circuit court of the United States, for the east district of Virginia, made a decision and construction one way, (Chief Justice Marshall presiding,) subsequently to this, the same question was decided differently by the highest court of Virginia; and the case not yet reported, was quoted in manuscript, when this court, Chief Justice Marshall pronouncing the opinion, reversed his own judgment below, upon this single decision just made by the state court, on a construction of their statute in regard to which much difference of opinion had before prevailed. In delivering the opinion of the court, Chief Justice Marshall, after referring to the decision by the circuit court, said: "A case was soon afterwards decided in the court of appeals, in which this question on the *execution law of the state* was elaborately argued, and deliberately decided. That decision is, that the right to take out an elegit is not suspended by suing out a writ of fieri facias, and consequently that the lien of the judgment continues pending the proceedings on that writ. This court, according to its uniform course, adopts that construction of the act which is made by the highest court of the state."

In Green v. Neal, 6 Peters, 291, when this court had twice decided in a certain manner the construction of a law of Tennessee, and the highest court of that state, by a single decision, ruled the same point differently, this court, in 1832, overruled its own two former decisions of this question, and adopted the last and recent decision of the supreme court of Tennessee. The very question raised was whether the state decision was merely entitled to high consideration or was conclusive; and the court expressly decided that "where a question arises under a local law, the decision of this question by the highest judicial tribunal of a state should be considered *as final* by this court." This was a strong case, especially as the state decision adopted in that case, was a single decision and of recent date, and opposed to previous and contrary decisions of the same question by the same state tribunals. But the court recognised the obligatory character of the state decision, even in a case "where the state tribunals should change the construction,"

although in such a case of contradictory decisions by the same state court of the same question, they might possibly not consider a "single adjudication" as conclusive. In such a case, we have seen Chief Justice Marshall's course was to wait, if possible, for further proceedings in the state courts; but where, as in the cases in 4th and 2d Peters, there was a single decision on the construction of a state law by the highest court of a state, (conflicting with no previous adjudication of the same tribunal) and a decision just made and in one case not yet reported, and contrary to a previous decision of the same question by the Chief Justice himself, he at once adopted these single decisions of a state court, and one of them made by a divided court, *as settling* the law of the state, and as conclusive and obligatory, and "emphatically" so, as regards a construction by the highest court of a state of its state constitution. And here I would urge respectfully, although it is unnecessary to go so far in this case, is not the last decision of the supreme court of a state expounding a state law, absolutely obligatory, even although it may conflict with a previous decision of the same tribunal? The court in the above case say: "Are not the injurious effects on the interests of the citizens of a state, as great in refusing to adopt the *change of construction*, as in refusing to adopt the first construction. A refusal in the one case, as well as in the other, has the effect to establish in the state *two rules of property*. Would not a change in the construction of a law of the United States, by this tribunal, be obligatory on the state courts? The statute, as *last expounded*, would be the law of the Union; and why may not the same effect be given to the last exposition of a local law by the state court?" Chief Justice Marshall, in 10 Wheat. 159, says: "This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be *universally recognised*, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, *no court in the universe*, which *professed to be governed by principle*, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had *misunderstood their own statutes*, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves *no more at liberty to depart from that construction*, than to depart from the words of the statute. On this principle, the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and on *the same principle* the construction given by the courts of the several states to the legislative acts of those states, *is received as true*, unless they come in conflict with the constitution, laws, or treaties of the United States." Why then should this court presume that the highest judicial tribunal of our state "had misunderstood" their own constitution, and therefore that this court "should correct that misunderstanding." Is this court more familiar than the highest court of our state with the policy of the state as regards the introduction of slaves as merchandise; are they as likely to know the true intention of the framers of the constitution of our state as regards the clause in controversy as the distinguished judge who delivered the opinion of the court in our favour in this case, and who may be said to have framed and moulded into its present form that very clause as a member of the convention which framed the constitution, and as chairman of the very committee to whom the clause was confided? Chief Justice Marshall did not feel himself "at liberty to depart" from the construction of the state courts, and surely that truly great man has never been accused of endeavouring to press too far the powers of the state authorities. Here too is a complete answer to the position that the federal court has jurisdiction of the case between citizens of different states, and therefore may disregard the state decisions; and have not the tribunals of all the states of the Union jurisdiction in the same manner where a contract made in one state, is sued on in another state, or even in another country, if the defendant or his property can be found there; yet in all these cases it is conceded that the construction of the state law or constitution, by the state court, is conclusive in all other state courts or courts of other nations. This, says Chief Justice Marshall, is an universal principle; and it

is known to extend to all cases whether involving controversies as to real or only as to personal property; and Judge Marshall considers it as more "EMPHATICALLY" the rule in all cases of the construction of a state constitution. But if there be any one case more than all others in which the rule should be rigidly applied, it is in *local questions as to slavery*, a question in itself so peculiarly local, so entirely dependent upon state laws, and in regard to which to establish "two rules of property" in the same state, the one by this court and the other by the state tribunals, would be attended with such fatal consequences. See 6 Wheat. 127; 5 Peters, 280. And now for the first time, after the lapse of more than half a century, is a different rule asked to be applied to the highest judicial tribunal of Mississippi, and the state itself to be humiliated by a discrimination so odious and unjust.

But the decision upon which we rely is said to be extra-judicial. Is not this, as regards this case, a mere formal distinction? The chancellor, in the case cited by our opponents, and sent up to the supreme court, gave "briefly" his views on *this question*, for the express and important purpose as he declared, "to put it in train for ultimate decision." Such was his desire, such the wish of the profession, and the true interest of all parties, that an "ultimate decision" should be made by the highest court of the state, so as to settle the law upon the question. The court expressly declare, in their opinion, that this question was involved in that case, and presented by it "for their consideration." They did *hear*, *consider*, and *determine* it; and now such a decision is called extra-judicial! It is called so because the question arose in a case in chancery, and not at law, and one of the judges who delivered the opinion permitted the slave trader to reap the fruits of his unlawful contract, because the defence was not made at law; but he decided that it was a good defence at law. Chief Justice Sharkey pronounced it a good defence both in law and equity, as certified in this very case under the seal of the court; and so far then as he was concerned, his opinion was both in form and substance a decision of the very question, and against the trader both as a question of law and equity. Call it by what name you may, it is a solemn and deliberate exposition, unanimously made, upon the fullest consideration, by the highest court of the state, of this very clause of our constitution, for the express purpose of settling the law upon the question; and it has so settled it in Mississippi.

Chief Justice Marshall, in the case in Brockenbrough, expressed his deep regret that he was compelled from necessity to construe a state statute in advance of a state construction. In the case in 4th Peters, he revoked his own decision a few months after it was delivered, upon a single unreported case, decided in the meantime by the highest court of a state, expounding their own statute upon a monied and not a landed controversy. What said he in the case in 10th Wheaton, of the impropriety of accusing the judicial tribunals of a state of misunderstanding and misconstruing their own state laws? What said he in the case from 2 Peters? Hearing that the question in that case, of the construction of a clause of the constitution of Ohio was pending before the highest court of that state, he *waited for a year* to hear that decision; and then conformed to it, though delivered by a divided court. What would he do in this case? conform to the exposition of their own constitution by the highest court of the state. Desiring, as he did, not a formal, but an actual and bona fide compliance with the exposition of their own constitution by its rightful expositors, the highest court of the state, would he, in the face of so solemn and deliberate a decision, rush headlong, now, at this term, without a moment's delay, into certain conflict with the highest courts of a state, upon a question regarding the construction of their own constitution? And, if this great man, with all his learning, experience, and unsurpassed intellectual power, would make no such experiments, and enter into no such conflicts, what other judge will venture?

——Quis pereat; ubi non dux erit Achilles.

I approach now the final question raised by our opponents in their printed brief, as follows: "But, assuming that the constitution of Mississippi does contain a clear and incontestable prohibition of the introduction of slaves as merchandise

within its limits; then there remains, in the last place, to be considered fourthly, a grave and important question, which this court will have to decide; and that is, whether it is competent to any state in the Union, by its separate authority, either in its constitution or its laws, to regulate commerce among the several states, by enacting and enforcing such a prohibition? The constitution of the United States vests in congress the power 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' That power must be regarded as exclusively possessed by congress. The municipal laws of a state may, perhaps, decide what shall be the subjects of property; but when they have so decided, when they have stamped the character of property on any particular movables, they cannot interdict the removal of similar movables as merchandise from any other state, whose laws also recognise them as property. Such an interdiction would be a regulation of commerce among the states; and if a state can make it, it may prohibit the introduction of any produce from another state. South Carolina may prohibit the introduction of live stock from Kentucky, and Kentucky may prohibit the introduction within her limits, of the cotton or rice of South Carolina. It is not intended to argue that a state, which does not tolerate slavery, is bound to admit the introduction of slaves, to be held as property, within its limits; and the reason for excluding them is, that, by the laws of the free states, slaves cannot be held in bondage. The case before the court is, that of the transportation of slaves from one slave state to another slave state."

I concur with our opponents, that this is indeed, "*a grave and important question;*" the most so in my judgment which has ever been brought up for the determination of this court. The power to regulate commerce among the states is "supreme and exclusive," it is vested in congress alone; and if under it congress may forbid or authorize the transportation of slaves from state to state, in defiance of state authority, then indeed, we shall have reached a crisis in the abolition controversy, most alarming and momentous.

In their petitions to congress by the abolitionists, they assert the power here claimed, and call upon that body to exercise it by legislative enactments, in regard to the sale and transportation of slaves from state to state. These petitions have been repeatedly rejected or laid on the table, as seeking an object beyond the constitutional power of congress, by overwhelming majorities of both houses; but if this court, as the interpreter of the constitution of the Union, in the last resort, now inform congress that this power is vested in congress alone, no one can predict the consequences. Let it be observed, also, that whilst all these laws of all the slave-holding states on this subject are asked to be pronounced unconstitutional, the laws on the same subject, of the "free states," as they are designated by our opponents, are sought to be placed above the power of congress on this question. A distinction is thus directly made, by our opponents, between the "free states" and the "slave states," as contradistinguished in their brief on this question; and the "free states" are asked to be regarded as sovereign, and the "slave states" as subject states, upon all the points involved in this controversy. Thus it follows, that the contract sought to be enforced in this case, could not be enforced if made in Massachusetts, because prohibited by her constitution; but that the same identical contract can be enforced if made in the state of Mississippi, although expressly prohibited by the constitution of that state. Massachusetts, then, possesses sovereign and absolute power over this subject, and Mississippi no power whatever.

The constitution is then not to have the same uniform effect throughout all the states, as regards the supreme and exclusive power of congress to regulate commerce among the states; but this power is to range undisturbed throughout all the "slave states," striking down all their laws and constitutions on this subject, whilst the same power is arrested at the limits of each one of the "free states" of this Union. Such is the degrading attitude in which every slave-holding state is placed by this position. But, let me ask, is not the admission of our opponents, that this power of congress cannot enter the limits of the "free states," conclusive? The history of the constitution of the Union shows that the want of *uniformity*, as regards regulations of commerce, was the great motive leading to the formation of

that instrument. It was the sole cause assigned in the resolutions of Virginia (of Mr. Madison) of 1785 and 1786, as a consequence of which was assembled the convention which framed the constitution of the Union. 9 Wheat. 225. To Mr. Madison and to Virginia belong the undisputed honour of assembling that convention; and the *sole object* avowed in the Virginia resolutions was, by the adoption of the constitution, to procure for all the states "*uniformity in their commercial regulations.*" Virginia had endeavoured, prior to the adoption of the constitution, to regulate commerce between her ports and those of other states and nations, but she found that these regulations only drove this commerce to the rival ports of Maryland. She negotiated with Maryland to adopt similar regulations; but Maryland ascertained that she could not adopt them without driving her commerce to Pennsylvania, nor Pennsylvania without New York, nor New York without New England. Absolute and perfect uniformity was required to give due effect to regulations of commerce among *all the states;* and hence the call of the convention which formed the constitution of the Union, at the instance of Virginia, to establish this uniformity. If, then, this power to regulate commerce among all the states upon the principle of perfect uniformity, cannot, as regards the transportation and sale of slaves, have the same uniform effect in all the states, but can be exerted in and between some states only, and not in others, it is a conclusive argument, that as regards this local and peculiar question of slaves, and their sale and transportation from state to state, was never designed to be embraced under the authority of congress to regulate commerce among the states. The power to regulate commerce among the states, is a power to regulate commerce among all the states; and by regulations of perfect uniformity, applying to all, and exempting none. But Massachusetts, it is conceded, may, as regards the transportation into, and sale of slaves in that state, exempt herself from the operation of the power of congress to regulate commerce, and from all laws of congress on that subject. Yet this power is not only to operate with perfect uniformity, but is declared by our opponents to be "supreme and exclusive." And may this power be thus struck down as regards a single state, by the operation of state laws and state authority? Does any one state possess the authority to exempt herself from a power vested in congress alone, and prohibited to the states? Is this the tenure, at the will of a state, by which congress holds its powers, and especially those which are "supreme and exclusive."

It is said, Massachusetts may exempt herself from the operation of this power, by declaring slaves not to be property within her limits. But is there *any way* in which a state may exempt itself from the operation of a power vested in congress alone; or does this exempting power depend *on the mode* in which it is exercised by a state? But Massachusetts, it is said, may exempt herself from the operation of this power of congress, by declaring slaves not to be property within her limits; and if so, may not Mississippi exempt herself in a similar manner, by declaring, as she has done, that the slaves of other states shall not be *merchandise* within her limits. Cannot the state say, you may take back these slaves from our limits, but they shall not be an article of merchandise here; or may she not say, your slaves in other states shall not be introduced for sale here, or if so, our laws will emancipate them; or as Maryland now does, send them to Africa, if they will go, and if not, continue them as slaves in the state, but annul the sale by the importer? And must the state have previously emancipated all negroes who had been slaves within her limits, in order that she may be permitted to emancipate or forbid the sale of other negroes introduced as slaves from other states? A certain number of negroes are now slaves in Mississippi, and articles of merchandise by virtue of state laws and state power, within her limits. Now it is conceded, that the state may declare all these not to be slaves, or not to be merchandise, within her limits. Yet it is contended she may not make the same declaration as to the negroes of other states when introduced into the state.

A state may, it is conceded, establish or abolish slavery within her limits; she may do it immediately, or gradually and prospectively; she may confine slavery to the slaves then born and living in the state, or to them and their descendants, or to those slaves in the state, and those introduced by emigrants, and not for sale,

or to those to be introduced within a certain date. All these are exercises of the unquestionable power of a state, and over which congress has no control or supervision. Or may congress supervise the state laws in this respect, and say to Massachusetts, and the other six states, who with her have abolished slavery, slaves from other states shall not against your laws be sold within your limits; but in all the remaining nineteen states where slavery does still exist, your laws against the sale of slaves from other states, shall be nugatory. Or may congress again, as between these nineteen states, say to New Jersey, Pennsylvania, &c., you have confined slavery to the slaves already within your limits, and make all born after a certain date free; slaves from other states shall not therefore be sold in your states, but in all the other states, where the existing slaves, as well as their offspring, are held in bondage, all other slaves may be sold within your limits, from other states; if this be not so, slaves from other states may be sold in Pennsylvania, Connecticut, Rhode Island, and New Jersey. Negro men who are held as slaves elsewhere, cannot be imported and sold as slaves in these states; because although negro men now there, are held and may be sold as slaves, yet the descendants of the female slaves, if there be any born hereafter, are to be free. And can it be seriously contended that this is so, and that upon an examination of the various conflicting provisions of state laws in this respect, as to slavery within their limits, shall depend the question whether congress, against the consent of the states, shall force upon some states, and not upon others, the sale of slaves within their limits, under a general comprehensive, uniform, supreme, and exclusive power to regulate commerce among all the states. The power to declare whether men shall be held in slavery in a state, and whether those only of a certain colour, who are already there, shall be held in slavery, or be articles of merchandise, and none others, or whether others introduced from other states shall also be held in slavery, or be articles of merchandise within her limits is exclusively a state power, over which it never was designed by the constitution, that congress should have the slightest control, to increase or decrease the number who should be held as slaves within their limits, or to retard or postpone, or influence in any way, directly or indirectly, the question of abolition. Such a power in all its effects and consequences, is a power, not to regulate commerce among the states, but *to regulate slavery*, both in and among the states. It is abolition in its most dangerous form, under the mask of a power to regulate commerce. It is clearly a power in congress to add to the number of slaves in a state against her will, to increase, and to increase indefinitely, slavery and the number of slaves in a state, against her authority. And if congress possess the power to *increase* slavery in a state, why not also the power to *decrease* it, and to regulate it at pleasure? Now it is a power as conceded to *increase* slavery against the will of a state, within its limits, whence it would follow, that if a state desires more slaves, congress, under the same power, may forbid the transportation of slaves from any state to any other state, and thus decrease slavery as regards any state, against her will and pleasure. The truth is, if congress possess this power to "regulate" the transportation and sale of slaves, from state to state, as it may all other articles of commerce, and slaves are to be placed on the same basis, under this supreme and exclusive power to regulate commerce, authority over the whole subject of slavery between and in the states, would be delegated to congress. And yet how strangely inconsistent are the arguments of the abolitionists: they say men are not property, and cannot be property by virtue of any laws of congress or of the states; and yet that as such, *commerce* in them among the states may be regulated by congress, and by congress alone. We say, the charscter of merchandise, or property, is attached to negroes, not by any grant of power in the constitution of the United States, but by virtue of the positive law of the states in which they are found; and with these states alone rests the power to legislate over the whole subject, and to give to them, or take from them, either the whole or from any part or number of them, those already there, or those that may be introduced thereafter, in whole or in part, the character of merchandise or property, at their pleasure, and over all which state regulations congress has not the slightest power whetever.

That this is so, follows from the admission, that a state can abolish slavery, and

make all the slaves within her limits cease to be property. Massachusetts, it is said, may do this; and may, when done, prevent the sale of slaves within her limits. But may she therefore declare that horses, or cattle, or cotton, or any other usual article of commerce, shall not be property within her limits, and thereby prevent the sale by the importer of similar articles, introduced from abroad, or from any state in the Union within her limits? Not unless she can abolish property and commerce, so far as she is concerned with all foreign nations, and with all her sister states, or regulate it at her pleasure, or prescribe the articles in regard to which it shall exist.

As to those universal articles of commerce, known and recognised in all the states, and bought and sold in all the states, and the importation or exportation of which could be prohibited by no state; it was right and proper that the power of congress to regulate commerce among the states should apply, operating as such regulations would, with perfect equality, and uniformity upon all. But as regards slavery, which was a local matter, existing only in some states, and not in others, regarded as property in some states, and not in others, it would have been most unjust, that that very majority which did not recognise slaves as property in their own states, should by acts of congress regulate the transfer of them, and sale in and among other states, which did regard them to a certain extent as property.

That the very states which refused within their limits to recognise slaves as property, should claim the power by their votes in congress, to regulate their transportation and sale in other states, is preposterous. They claim the power first to exempt themselves from the alleged power of congress, to authorize or forbid commerce in slaves, and then assume the authority to apply this very power to other states, which prohibit the traffic, because they have not emancipated all other slaves already within their limits. Nay, the claim is still more preposterous; it is, that this power may be thus applied, by these states in congress, in Mississippi, but negro male slaves shall not be imported or sold in Pennsylvania, or New Jersey, Connecticut, and Rhode Island, because although the negro male slaves already there are continued as slaves, and may be sold as such, yet the descendants, should there be any of the female slaves, are emancipated. Slavery exists, as shall be shown, and slaves are property and may be sold in these and other states, that are called "free states;" and if the law of Mississippi, prohibiting the introduction and sale of slaves from other states is void, so is a similar law in all the states above enumerated, and slaves may now be lawfully imported and sold there. Mississippi has said these slaves shall not be merchandise within her limits. Can congress say they shall be merchandise? Can congress create in any state, the relation of master and slave, not only in cases in which it does not exist, but in cases forbidden by the laws of the states? Can it make more masters and more slaves, than the state desires to have within her limits? And if it can create the relation of master and slave in a state, *in cases* forbidden by the state laws, why not in the same cases forbid the creation of the relation, or dissolve it, when it already exist? If congress can increase and extend slavery in a state, against its wishes, why not limit it or abolish it; or can it *create*, and not *destroy*, *enlarge*, but not diminish? The commerce to be regulated, was that universal commerce in articles of merchandise, regarded as such in all the states, and throughout the nation, and which existed in every state, and which commerce was not to be created or abolished by state laws, but was subject between all the states to the supreme, exclusive, and uniform regulation of congress. It was commerce in merchandise, and regarded as such by all the states, and not commerce in persons, that was thus designed to be regulated by congress. Commerce, if it may be so called, in persons, was not the thing intended to be regulated by congress, for it was local and peculiar, and not national; but commerce in the broad and comprehensive sense of that term, embracing all the states by uniform regulations, and designed not to depend on state laws, but to be as eternal as the existence of the Union, and coextensive with the operation of the constitution, which embraced in all its power the whole Union, and all its parts.

This power as to commerce being "supreme and exclusive," it could recognise no conflicting or concurrent state legislation, and being a power to authorize and

enforce this commerce in and among all the states, and from state to state, it could *compel*, as this court have decided, *every state* to permit the sale by the importer of all these articles of commerce within her limits. If slaves are articles of commerce, in view of this power, congress can force their sale by the importer in every state; for no state, if these be articles of commerce in view of this power, can remove them from this list, by declaring them not to be property within her limits. And if a state may so defeat this clause of the constitution, as to one class of articles embraced within the commercial power, by declaring them not to be property within her limits, she may make the same declaration as to any or all other articles embraced by this power of the constitution; forbid their importation or sale within her limits, and thus regulate at her pleasure, or annihilate the commerce between that state and all the other states. It follows then as a consequence, either that each state at its pleasure may, as to that state, annihilate the whole commercial power of congress, by declaring what shall or shall not be property within her limits, or that slaves were designated by the constitution as "persons," and as such, never designed to be embraced in the power of congress to regulate commerce among the states. The commerce to be regulated was among the several states. Among what states? Was it among all, or only some of the states? Was it a national or sectional commercial code, which congress was to adopt? Was it to operate between Virginia and Mississippi, but not between Virginia and Massachusetts? Was it a regulation that would operate only between two states; but not as between one of these states, and another remote or adjacent state? Was it a regulation confined to particular states, and to be changed by those states, as from time to time they might change their policy upon any local question, and was it a local or a general commerce? Could it regulate by compulsory enactments an inter-state commerce in particular articles between certain states, because those states permit *internal commerce* in similar articles; but be authorized to extend no similar regulations to other states forbidding such internal commerce? If so, congress must look to *state laws* to see what articles are vendible in a state, or what *internal commerce* is authorized by it within its limits, before it can apply a general regulation of commerce to that state. Or does the authority of congress to regulate the external or internal state commerce, depend upon the manner in which a state exercises its own power of regulating its internal commerce? If so, and this be the rule as to slaves as embraced in the commercial power, it must be the same as to all other articles embraced in the same power; and the power of congress in regulating commerce among the states will depend upon the permission of each state in regulating its internal commerce. But not only was this uniformity in regulations of commerce required by the nature and national object of the grant; but the constitution, in the same article in which the power is given to congress to regulate commerce among the states, expressly declares, that "*No* preference shall be given by *any regulation of commerce* or revenue, to the ports of one state over those of another." Now, if Massachusetts and Mississippi both forbid by law the introduction of slaves as merchandise, and congress enact a law, or this court make a decree, by virtue of which, slaves are forced into the ports of Mississippi for sale, but cannot be forced for the same purpose of sale into the ports of Massachusetts, a direct preference is given by a "regulation of commerce," to the ports of one state over those of another. *It is a preference*, if one state may be permitted to exclude from introduction for sale within her ports, what another state is compelled to receive for sale. It is a preference which is asked in this case, to follow as a "regulation of commerce," by virtue of this very provision in the constitution itself, and in the absence of all congressional enactments, as if the constitution created these very preferences as to commerce, which it was the very object of that instrument to prohibit.

As, then, it is conceded by our opponents, that the laws of Massachusetts do prohibit the introduction of slaves in her ports, and are constitutional, the same admission must follow as to the laws of Mississippi, forbidding the introduction of slaves in her ports; or a preference will be given by the constitution

itself, by "a regulation of commerce," to the "ports of one state over those of another."

But these state laws are not regulations of commerce, but of slavery. They relate to the social relations which exist in a state; the relation of master and slave; they define the "persons" to whom that relation shall be extended, and how and under what circumstances it shall be further introduced into the state."

Each state has exclusive power over the social relations which shall exist, or be introduced within her limits, and upon what terms and conditions, and what persons or number of persons shall be embraced with all these regulations. The condition of master and slave is a relation; it is universally designated as the relation of master and slave; and whether this relation shall be confined to the slaves already within the limits of the state, or be extended to others to be introduced in future, is a matter exclusively within the power of each state. The relation of master and slave, of master and apprentice, of owner and redemptioner, of purchaser and convict sold, of guardian and ward, husband and wife, parent and child, are all relations depending exclusively on the municipal regulations of each state; and over which, to create or abolish, limit or extend, introduce or exclude, or regulate in any manner whatever, congress has no authority; and congress can no more say that a state shall have forced upon her more slaves than she desires, because there are slaves there, than that a state shall have more apprentices than she desires, because there are apprentices within her limits. I speak as a question of law, and not as instituting any moral comparison between slaves and apprentices; for from the ranks of the latter have risen some of the greatest and best men, and purest patriots. The master has the right, not created by the constitution of the United States, or to be regulated by it, but created and regulated by state laws, to the services of the slave for life, *the time prescribed by the laws of the state.* The master has the right to the services of the apprentice for the time prescribed by the laws of the state; and both, if the state permits, may assign to others their right to these services under the directions of state laws. Can therefore the right to the services of an apprentice, assignable in one state, be assigned in another state against her will, with the introduction of the apprentice there, because the services of other apprentices already there are assignable in that state?

Under the laws introduced into at least two of the free states of this Union, malefactors might have been sold for a term as long as life, and their services might be assignable for life by the *purchaser* at public sale, to any third person whatever; these malefactors, in the language of the constitution of the Union in regard to slaves, were "persons bound to service" for life, and their services for life assignable by their masters; and yet could these malefactors, thus assignable, be introduced into and be lawfully transferred in any other state, against her laws, because other malefactors already there were there assignable; yet, a malefactor *bound to service for life*, purchased by his *master* at public *sale*, and liable to be sold by his *owner*, is as much *his property* in contemplation of law, as the slave can be of his master. He is in fact a slave, having forfeited his liberty, and subjected himself to perpetual services by his crimes; a manner in which the most rigid moralists admit that servitude may be justifiably established. Yet such slaves cannot be transported and sold from state to state; though by the very constitution of Ohio and other of the free states, "SLAVERY" is expressly authorized therein, "for the punishment of crimes." It does not exist in Mississippi as in the free states, only as a "punishment for crimes," but from a state necessity, equally strong and powerful; the necessity of self-government, and of self-protection, and as best for the security and welfare of both races.

Slavery in Mississippi is a relation of perpetual pupilage and minority, and of contented dependence on the one hand, and of guardian care and patriarchal power on the other, a power essential for the welfare of both parties. With us the slaves greatly preponderate in numbers, and it is simply a question whether they shall govern us, or we shall govern them; whether there shall be an African or Anglo-American government in the state; or whether there shall be a government of intelligent white free men, or of ignorant negro slaves, to emancipate whom

would not be to endow them with the moral or intellectual power to govern themselves or others, but to sink into the same debasement and misery which marks their truly unhappy condition in the crowded and pestilent alleys of the great cities of the north, where they are *called free*, but they are in fact a degraded caste, subjected to the worst of servitude, the bondage of vice, of ignorance, of want and misery. And if such be their condition where they are few in number and surrounded by their sympathising friends, how would it be where there are hundreds of thousands of them, and how in states where they greatly preponderate in number? Their emancipation, where such is the condition of the country, would be to them the darkest abyss of debasement, misery, vice and anarchy. And yet to produce this very result, is the grand object of that party in the north that demands of congress to regulate the slave trade among the states, not really with the view to prohibit that traffic, for it is prohibited by the slave-holding states, but with an ultimate view to emancipation as an incidental consequence from the action of congress over this subject. And here let me observe, that an adherence by the south to the policy in which they are now united, in abolishing as states the inter-state slave trade, and the support of that power and of that policy on the part of the states, by the decree of this court, and the denial of the power of congress, will do much to secure the continuance of that policy and to silence the most powerful of the batteries of abolition.

Another great mistake, maintained in the north by this party, is the ground now assumed in claiming this regulating commercial power of congress, that by the law of the slave-holding states, slaves are merely chattels and not persons, and therefore are subjected to the power of congress to regulate commerce among the states.

If it be intended to convey the idea that slaves are designed to be deprived by the laws of the south of the qualities and character of persons, and of the rights of human beings, and to degrade them in all things to the level of chattels, of inanimate matter, or of the brutes that perish, it is a radical error, and one that has been too long circulated uncontradicted by the abolitionists. In some of the states, they are designated as *real*, as *immovable* property. Is it therefore designed to deprive them of the power of locomotion, or to convert them into a part of the land or soil of a state? Far otherwise. Nor does their designation as personal property convert them into mere chattels, and deprive them of the character of human beings. In the South this is well understood, and no such meaning is attached to these terms, but in the North they are seized on and perverted, as if slaves were regarded and treated by us as inanimate matter. No, they are, in every thing essential to their real welfare, regarded as *persons;* as such they are responsible and punishable for crimes; as such to kill them in cold blood is murder; to treat them with cruelty or refuse them comfortable clothing and food, is a highly penal offence; as such they are nursed in sickness and infancy, and even in old age, with care and tenderness, when the season of labour is past. To call them chattels or real estate, no more makes them in reality land or merely inanimate matter, than to call the blacks of the north freemen, makes them so in fact. When the constitution of Mississippi, and laws made in pursuance thereof, require that slaves *shall* be treated with humanity, commands that they shall be well clothed and fed, and that unreasonable labour shall not be exacted, are these provisions applicable to a mere chattel, which the owner may mutilate or destroy at pleasure? No. The master has no right to the flesh and blood, the bones and sinews of any man under the laws of the south; this is an abolition slander, and the right is to the services of the slave, so declared expressly in the laws of the south, and so recognised in the constitution of the United States, where slaves are described as "persons bound to service or labour," and so unanimously decided by the highest court of our state. Jones' Case, Walker's Miss. Rep. 83. The right of the master is to the services of the slave, a right accruing only by virtue of the law of the state, and upon the terms therein prescribed. The rights of the master and slave are *reciprocal* under the law of the south; the right of the master is to the services of the slave for life, and the right of the slave as secured by law, to humane and proper treatment, to comfortable lodging, food and clothing, and to proper care in

infancy, sickness's and old age. These are the *wages* paid, and that must be paid by the master; and if the doctrine of the abolitionists be correct, that slave labour is dearer than free labour, then higher wages are thus paid in the south than in the north for the same amount of labour; and that it is much higher wages than is paid to the toiling and starving millions of Europe, no candid man will deny. Let me be accused of making no comparison between slaves and my countrymen, the free white labourers of all the states. No; they are fitted morally and intellectually for self-government, and the slaves are not so fitted; and therefore, even for their own benefit, must be controlled by others.

In truth, then, slavery is a condition of things; it is ... lation, the relation of master and slave, the *status* servi of the Roman and Grecia... w, so designated and recognised as a relation in the days of the Jewish Theocrac... ...ll as under the Christian dispensation. By all these laws it was designated as a relation, and as such we have seen it is expressly recognised in the constitution of the United States, where slaves are called "*persons* held to service or labour." How far they shall be so bound is exclusively a question of state authority, and over which the congress of the Union possesses not the slightest authority. The states and the states only can say what persons shall be so bound to service, and when they shall be released, and to what persons this relation shall be extended, and whether it shall be confined to those slaves already within the limits of a state, or be enlarged so as to include all others who may be introduced within their limits; and it is the abolitionists who must wholly deprive the slaves of the character of persons, and reduce them in all respects to the level of merchandise, before they can apply to them the pow... of congress to regulate commerce among the states.

If a state or states chose to degrade not malefactors only, but a large portion of the present white or coloured race to the name and condition of slaves, could they therefore force them as slaves upon other states of the Union, under the power of congress to regulate commerce? Has congress any right to say slavery shall or shall not exist within the limits of the state of Mississippi; that slaves from other states shall or shall not be introduced within her limits? Has Virginia, or Pennsylvania, or any other state, a right to say slavery shall be abolished or established within the limits of Mississippi, and slaves shall or shall not be imported by her citizens for sale within her limits? Each state must legislate for itself alone on this subject, nor has congress nor any other state a right to interfere in any manner whatever. And if Virginia can call upon congress, or upon this court, to compel Mississippi to receive or reject any or all of her slaves for sale, the states of Rhode Island, Connecticut, Pennsylvania, New Jersey, Delaware, Indiana and Illinois, can compel the state to receive all their slaves, still amounting under the last census to many thousands, notwithstanding they may all have been indoctrinated for years on the principles of abolition, surrounded with its teachers and disciples, and driven by force into our state, would come there prepared by theory and stimulated by revenge, to diffuse their emancipating creed among our slave population; to render them forever dangerous, worthless, sullen and discontented, and to excite successive insurrections from time to time within our limits. And yet by the argument of our opponents, the state possesses no power to guard her citizens against these evils, for if we cannot exclude at our pleasure the slaves of all the states, we can exclude the slaves of no one of the states, and are deprived of the power of self-preservation. And, let me ask, are not the slaves whom the doctrines and principles of abolition have now reached, upon those counties of Maryland, Virginia and Kentucky, bordering for more than a thousand miles upon the adjacent states of Pennsylvania, Ohio, Indiana and Illinois, unfit for a residence as slaves in Mississippi; and would it not be most dangerous to permit slave traders to drive them also in any number within our limit? Would they not contaminate our slave population, and diffuse among them the same doctrines and principles, which, from these bordering counties, have already peopled Canada with a colony of thousands of runaway slaves. In every point of view, the power to prohibit this traffic, is vital to the security and welfare of the people of Mississippi, and cannot be abandoned without surrendering the right of self-preservation. And yet to deprive the state of this authority has been called by our opponents a great con-

servative power of the constitution. Conservative of what? Of the power of the traders in slaves to drive thousands and hundreds of thousands of dangerous and discontented slaves, from any or all of these states, as merchandise, within our limits. And what must follow? Who will dare predict the result, or write the prophetic history of that drama which would soon be enacted within our borders.

The only clauses under which congress can legislate as to slaves, are the 2d clause of 9 sect., 1 art. of the constitution, 2 sect. 4 art., and the taxing power; in each of which they are spoken of, not as merchandise, but as *persons*. It is as *persons* they are enumerated under the census, and as such taxation and representation apportioned according to three-fifths of their *numbers*, not their *value*. In that section they are described as "three-fifths of all other persons;" in the 9th section, they are designated only as "persons;" and in the 2d section of the 4th article, they are described as "persons held to service or labour in one state under the laws thereof." Yes, "*under the laws thereof;*" and not by virtue of any authority of congress to force them within the limits of a state. If slaves are merchandise merely, under the power of the constitution of the Union, why is it that merchandise taken, or horses or cattle escaping from any one state into any other state, cannot be surrendered under the laws of congress upon the "claim" of the owner? Are articles of merchandise persons, or persons articles of merchandise, in view of any of the powers granted to congress in these provisions? It is as "persons" they are surrendered in one state when fugitives from another; and it is as "persons" they are enumerated for apportioning taxation and representation. If the constitution had slaves in view, when power was granted to regulate commerce among the states, how is it that in none of the debates on that clause, either in the convention which framed the constitution of the Union, or in the state conventions which ratified it, is there the slightest allusion to the existence of any such power? The journal of the convention shows that this clause, to regulate commerce with foreign nations and among the states, was proposed by Charles Pinckney of South Carolina, and that it was adopted as proposed by him, with the addition of the words, as to *the Indian Tribes*. Did South Carolina, and did Mr. Pinckney, intend to give thereby this supreme and exclusive power under this article to congress as to slaves? No! The votes of Mr. Pinckney and of South Carolina in that convention, show conclusively that, that state and Mr. Pinckney were opposed to granting to congress *any power*, even over the African slave trade, even under specified and limited provisions on that subject in a different article. Fortunately, Mr. Pinckney has lived to declare his meaning, and that of the convention, in a speech made by him in congress on the Missouri question, in 1820, and reported in 18th vol. Niles' Register, p. 352; when, as a surviving witness of the views and deliberations of the convention in which he had acted so prominent a part, he bears testimony, specifically, to this very point, that under no clause of the constitution was any such power granted to congress. He says: "I have, sir, smiled at the idea of some gentlemen in supposing that congress possessed the power to insert the amendment, from that which is given in the constitution *to regulate commerce between several states;* and some have asserted that, under it, they not only have the power to inhibit slavery in Missouri, but even *to prevent the migration of slaves from one state to another*—from *Maryland* to *Virginia*. The true and peculiarly ludicrous manner in which a gentleman from that state lately treated this part of the subject, will, no doubt, induce an abandonment of this *pretended right;* nor shall I stop to answer it, until gentlemen can convince me that migration does not mean change of residence from one country or climate to another; and that the United States are not one country, one nation, or one people: if the word does mean, as I contend, and we are one people, I will then ask, how is it possible to migrate from one part of a country to another part of the same country? Surely, sir, when such straws as these are caught at to support a right, the hopes of doing so must be slender indeed."

We have then, here, at least one positive and uncontradicted witness in our favour, and that the very man who proposed this clause in regard to this power of congress to regulate commerce. Did South Carolina intend, in proposing this power, to give

to congress *immediate* authority to prevent the transportation of slaves from all other states to that state, when she was then even opposed to the specific and prospective power to be exercised, at the end of twenty years, as to slaves from Africa? South Carolina has *always* viewed such a power as is now claimed for congress in regard to slaves, with absolute abhorrence; yet, by a new interpretation, this power is given by implication from that very clause in the constitution of the Union, which was proposed in the convention by South Carolina, and adopted on her motion. The source from which the power emanated, independent of the uncontradicted testimony of Mr. Pinckney, who proposed this clause, ought to be conclusive with every unprejudiced mind, that no such authority was designed to be thereby vested in congress. No one can believe that South Carolina, or the other slave-holding states, would ever have consented to the constitution, if by that instrument this supreme and exclusive power had been therein granted to congress; and it would be a fraud on those states, a fraud upon the constitution, a fraud in morals as well as law, now to interpolate by a new construction, at the end of half a century, a power which we all know would never have been granted by at least six out of the twelve states which formed the constitution.

In 9 Wheat. 194, Chief Justice Marshall declares: "That commerce, as the word is used in the constitution, is a unit;" but it is a cipher, if dependent on state regulations as to *internal commerce*, or state regulations as to what is property or merchandise; or if not a cipher, and different regulations as to the same articles, or operating differently in the several states can be made by congress, it is not a *unit*, but separated into as many fractions as there are states or sections. Chief Justice Marshall tells us: That the commerce designed to be regulated by congress, extends to all "those internal concerns which affect the states *generally*," 9 Wheat. 195; but as viewed by our opponents, it is not confined to that commerce which affects the states generally, but extends to that which affects only particular states or sections, and not the states generally, and might extend only to two states out of twenty-six, if there were but two slave-holding states in the Union. But again, at page 196 of 9 Wheaton, Chief Justice Marshall expressly declares the power to regulate commerce among the states, to apply to the one state in which the voyage by land or water begins, through any other state, and into still another state, in which the voyage terminates; and he instances the regulation of transportation between Baltimore and Providence "by land," which must pass into and through at least seven states, and that the power, he says, is to *enforce* this passage of these articles of commerce *through all these states*. What then follows? That a trader in slaves purchased at Baltimore to be sold in Wheeling, Virginia, may transport them in chains through Pennsylvania, the only practicable route by land, to Wheeling, and no law of Pennsylvania can forbid it. Again, a trader in slaves, purchased in Wheeling, Virginia, for Missouri, may drive them through Ohio, Indiana, and Illinois; or from Maryland for Missouri, by taking them through New York and the Lake route across to that state; or he might take them by sea, from Baltimore for Missouri, to Boston, then to pass them through Massachusetts, by the rail road to Buffalo, for the western route. The slave trader might, in this way, if slaves are embraced in the commercial power, encamp them in chains at Boston, Lexington, Concord or Bunker Hill, and drive them on to their destined market, and no state law can prevent it; and this *can be done now*, without any act of congress, and the state could not prevent it. This the abolitionists would regard with horror and dismay; but to all this they subject their own states, nay, as will be shown, they establish not only the slave trade but slavery there, in their efforts to force their doctrines upon the southern states.

At page 196, 9th Wheaton, Chief Justice Marshall says: This power in congress as to commerce, is "supreme and exclusive;" and that the power to *regulate* "is to prescribe the rule by which commerce is to be governed." At page 197, he says the power to regulate "commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a *single government*." So far as regards then this commercial power, the court distinctly declare, that the government of the Union is to be viewed as a *single government;* that state bounda-

ries, and state jurisdiction, and the states themselves disappear, so far as this power is concerned, and that so far, the nation is a "Unit."

The authority then of Massachusetts disappears as regards the exercise of this commercial power by this single government. She ceases to exist as a separate state, so far as this power is concerned, and stands *so far as regards the power* towards this single government, in the same relation in which a county stands towards a state. Such is the decision of the court in the very case upon which our opponents rely. As then the power to regulate the sale and transportation of slaves from state to state is insisted by our opponents to be a commercial power, the states, by this decision, so far cease to exist as states; their separate state jurisdiction and boundaries so far disappear; the states become a "Unit," and this power operates in and among all the states, as much as if the state governments had ceased to exist. What then becomes of the law of Massachusetts prohibiting the slave trade there, or the introduction from other states of slaves for sale there as merchandise, when brought in conflict with this commercial power? Why, not only would the sale be valid, and transportation through the state valid, by authority of an act of congress; but *now*, at *this moment*, on the principle contended for by our opponents, and heretofore adopted by this court, that, that commerce which congress leaves free and unforbidden, it authorizes as much as by an express law; the statutes of Massachusetts are unconstitutional, and slaves can now be transported from any state into Massachusetts, and sold there, or carried through there, for sale in some other state to which they are destined, these laws of the state being expressly declared by Chief Justice Marshall to be void, *if the commercial power extends to this case;* because the state "is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do." 9 Wheat. 199—200. And at page 209, the court say: "To regulate, implies in its nature, full power over the thing to be regulated; it excludes, necessarily, the action of all others, that would perform the same operation, on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a *uniform whole*, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated."

The exercise of this power then, as well as the failure to exercise it, by leaving free what is not regulated, "produces a *uniform whole*," which the state law cannot disturb; and yet this uniformity, thus required in all the states by the mere absence of congressional legislation, is completely subverted as regards these slaves, which are embraced, it is said, in the commercial power, and that commerce in them, which congress alone could regulate, and which it does regulate by leaving free as to all the states where it does not legislate, is in point of fact regulated at its pleasure by each state of the Union, and is dependent entirely on state laws. This power, we are told, is not now asked to be called forth to oppress the slave-holding states of the Union; but the authority once established, it will recoil upon the free states with a force and power which was little dreamed of by the abolitionists; and will avail to establish slavery and the sale of slaves from other states in every state, and the traffic in slaves in and through all the states by the mere inaction of congress. Nay, if the argument of our opponents be correct, it is established and exists at this moment.

At page 224, 9th Wheaton, the court declare, that the constitution originated in the Virginia resolutions, which they say were intended to produce among the states "an uniform system in the commercial regulations;" and Mr. Madison's resolutions, which led to that measure, declare the object to be, as regards all the states, "to require uniformity in the commercial regulations," and prevent the states adopting "partial and separate regulations." These regulations then must be uniform; this was the very object in granting the power, and the total impossibility of such uniformity as to slaves, shows that the power was never intended to extend to them; and surely Virginia never designed to include them in the commercial power.

By the constitution, the rights that were delegated to congress, were delegated

by *all* the states; the rights that were prohibited to the states, were prohibited to *all* the states; and the rights that were not delegated or prohibited, were reserved to *all* the states: but by the position of our opponents, the right to regulate the transportation and sale of slaves from state to state, was granted to congress only by the slave-holding states; the prohibition to that regulation by a state, was a prohibition only to the slave-holding states, and the reserved power over the regulation, was a power reserved by the non-slave-holding and not by the slave-holding states: and yet they all entered the confederacy as equals, and sovereigns, in every respect; and all granted, surrendered, and retained the same power. Upon these terms only of perfect equality, and of subjection, or exemption of all the states from the national power, was the constitution framed; and to maintain the distinction now assumed between the slave-holding and non-slave-holding states, by which the last are sovereign, and the first are subject states on this question, is to place the former in an attitude of degradation, to which no one of these states ever would have assented in forming the constitution. No! The constitution of the Union was one constitution, with one uniform operation and construction in all the states, and all its powers were to be enforced in all or none of the states; and not two constitutions, with two constructions, one for the North, and the other for the South, changing with geographical limits, lines, and sections. If it be a constitution to be enforced by the Northern against the Southern states, rendering nugatory their laws upon this question, unless they will abandon their local institutions, and conform their policy in this respect to the will of the North, whilst the same powers of the government are to have no operation within the limits of the Northern states; the constitution would be a memorial of fraud and treachery, and would soon be broken into as many fragments as there are states or sections of the Union.

The whole power as to regulations of commerce being granted by each and every state, and vested by them exclusively in congress; no state can legislate or exercise any authority over the subject; and there can be no discrimination between the relative powers in this respect of the several states or sections of the Union.

At page 227, 9 Wheaton, the court say, that this provision as to commerce "carries the *whole* power and leaves *nothing* for the state to act on;" that it is "the *same* power which *previously* existed within the *states*," which included the power of prohibition; that it is an authority as to commerce, "to limit or restrain it at pleasure." They expressly declared, that it extended to an "embargo," which they had previously defined to be a "prohibition," and as a "branch of the commercial power." If then this power extends to this case, this very decision so much relied on by our opponents, proves that if congress may *regulate*, it may "limit or restrain at pleasure," "embargo," or "prohibit" this traffic; this being the same power pre-existing in the states, and wholly taken from them, and vested exclusively in the nation as a "single government." How then can any state exempt herself from the operation of this power, by declaring such "subjects of commerce" as were within this clause of the constitution, and traffic in which was left free by the only power which can regulate it, shall not be subjects of commerce within her limits, and shall not be imported or sold therein?

At page 228, 9 Wheaton, the court say, speaking of acts of congress on this subject: "Were every law on the subject of commerce repealed to-morrow, all commerce would be lawful;" and there being no act of congress declaring this traffic unlawful, from the argument of our opponents, it follows, that this commerce in slaves between the states is now lawful in *all the states of the Union.* It follows also, that there being no power either in the government of the states of the Union to prohibit this slave trade between the states, it is consecrated and perpetuated by the constitution.

The whole difficulty is solved by Mr. Madison, who tells us in the 54th number of the Federalist, page 236, that the case of slaves under the constitution was "a peculiar one;" and that the constitution "regards them as *inhabitants*, but as debased by servitude below the equal level of free inhabitants."

Did then the constitution of the United States design to give to congress power to regulate commerce in "inhabitants," in and between the states? To *regulate*, this court said, means "to prescribe the rules by which commerce is to be governed," and that "to regulate implies *full power* over the thing to be regulated." Then the framers of the constitution, although a majority were said to have been so much opposed to slavery, that they would not and did not put the word slave in that instrument, yet, by the position on which our opponents rely, congress was to prescribe the rules and the only rules by which commerce in slaves between the states should be regulated; that they were to authorize and direct this traffic, and that they were to keep open the markets in all the slave-holding states against their consent for this traffic; or, in other words, that congress was to perpetuate the slave trade between the states, and render it eternal in all the slave-holding states of the Union. That congress were ever intended to take the charge, much less the exclusive charge of the slave trade between the states, and regulate it at their pleasure, was a power never intended to be granted in the constitution. But if it be a power to *perpetuate*, it must be a power to *destroy*, and if not to destroy, at least to prescribe all the rules upon which the trade is to be conducted. Who is to judge of these rules? Congress, and congress only, by the argument of our opponents, have the full, supreme, and exclusive power. They may then say, how and by whom slaves shall be taken from state to state, and in what numbers, and of what age and sex, and how and to whom they shall be sold by the importer, and on what conditions, and in fact regulate every thing that relates to the transportation and sale. The power, if it exists at all, is plenary; and in the language of this court, in 12 Wheaton, "The power does not depend on the degree to which it may be exercised, if it may be exercised at all, it must be at the will of those who held it." Who then shall set bounds to this unlimited power, who shall restrain it—the states? Why, we have seen that they have surrendered all power over the subject, and that it is vested as completely in congress as if this were a "*single government.*"

We are then a single government, by the argument of our opponents, as regards the slave trade between the states, and every vestige of state authority is abolished. On the 9th of January, 1838, our able and distinguished opponent (Mr. Clay), read in his place in the senate, and sustained by a speech, the following, among other resolutions: "Resolved, that no power is delegated by the constitution to congress, to prohibit, in or between the states tolerating slavery, the sale and removal of such persons as are held in slavery by the laws of those states."—Nat. Intelligencer, 18, January 7, 1838. Here it is conceded that this government cannot prohibit this traffic. But why not, upon the case so much relied on by our opponents? It is true congress can impose no tax on exports from any state, but this the court say, is an exception from the *taxing* power, and that the power to tax imports is entirely distinct from that to regulate commerce. Although then congress, may not tax exports from the states, by the authority of this case, they may prohibit without a tax. What is an embargo, but a prohibition, not a tax: and in this case the court say, that an embargo is an "universally acknowledged power" of congress; and they expressly declare, that it is a commercial power. As then the prohibition to tax exports from any state, is a limitation only on the taxing power, and affects and limits, as the court expressly declares, in no way the power to regulate commerce among the states, congress may, if the position of our opponents be sound, and this is a case within the commercial power, lay an embargo on this slave trade between the states, or in other words prohibit it altogether. Grant but the first position of our opponents, and the case on which they rely, and that the commercial power extends to the sale and transfer of slaves from state to state, and all the consequences above stated must follow. But if neither the governments of the states, nor of the Union, possess this power to prohibit this trade, the power must be annihilated, and this without any grant of the power to congress, or prohition to the states, and although it is admitted to have existed in every state, before the adoption of the constitution. But the concession that congress cannot prohibit this trade, admits the whole case, by conceding that it is not within the meaning of the clause, which authorizes congress to regulate commerce. Why

then may not the states exercise this power? They are no where prohibited to exercise it in any clause of the constitution, unless it be as an inference from the authority of congress to regulate commerce. Now, if that inference follows, it would be because, in the language of this court, 9 Wheat. 199, "the state is exercising the *very power* that is granted to congress;" but if this prohibition of the importation of slaves be neither the "very power" that is granted to congress, nor included in that power, how is the state prohibited from exercising it? It is not *prohibited to the state*, unless included in the commercial power of congress; it is not delegated to congress, unless in that clause; hence, then, being a power neither delegated to congress, nor prohibited to the states, it is by the constitution expressly reserved to the state in which it pre-existed before the constitution was framed.

But again, this power to regulate commerce is an active power, a power "to prescribe the rules" by which that commerce may be conducted, and to enforce those rules; but here it is said no rule can be prescribed by congress on this subject, or enforced, no law can be passed by congress, to regulate this trade, but nevertheless, that the states cannot regulate nor prohibit this trade, because congress has the exclusive power. This is a strange contradiction, congress cannot legislate as to this case, although it may as to all other commerce among the states; but, notwithstanding, the state law is void, because the power is vested in congress. The power is vested in congress, but nevertheless it has no power to pass any law on the subject. But who is it that has the power? The constitution says congress shall have the power to regulate; and yet it is contended congress have no power to regulate this trade, but nevertheless the state law is void, in the absence of all power in congress to legislate on the subject. It is rendered then a *judicial* power, to be put in force by this court, and not by legislation, and yet have the judiciary any power to regulate commerce among the states? It is a sullen, dog in the manger power, that can neither act itself, nor permit action by any other authority. In the 32d number of the Federalist, Mr. Hamilton, who was the boldest opponent of state power, tells us there are but three cases under the constitution, in which a state cannot exercise a power, "where the constitution in *express terms* granted an *exclusive* authority to the Union. Where it granted in one instance an authority to the Union, and in another, prohibited the states from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant*." It is conceded that there is no *express* grant of *exclusive* power to congress, or *express* prohibition to the states; but it is contended that the prohibition of the state power follows in this case, because its exercise would be the exercise of the same power granted exclusively to congress; and, therefore, the possession of such a power by the state would be "absolutely and totally contradictory and repugnant" to the possession of the same power by congress.

This is the argument in favour of this implied prohibition on state authority; but how is the power of a state to prohibit this traffic, "absolutely and totally contradictory and repugnant" to the possession of the same power by congress, when congress can make no such prohibition? Congress cannot prohibit, then there is no repugnance in a state prohibition. It is conceded the power existed in each state, prior to the adoption of the constitution; that instrument, it is admitted, grants no such prohibitory authority to congress; it prohibits the power no where to the states; how then have the states lost or alienated the power? The power to prohibit, or limit, or restrain the admission of slaves into any state, is conceded not to be vested in congress, then it must be vested in the states, or the power is annihilated; not by a grant of the power to congress, not by a prohibition to the states, but by some new rule of interpretation, under which, by a conjectural implication, the power has disappeared, without a grant, or without a prohibition. But these are the only modes by which a pre-existing state power can be annihilated.

By the 10th article, Amendments of the Constitution, "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." This power then never having been either delegated to the United States, or prohibited to the states, is one of the reserved powers of the states, unless this amendment can be rendered a dead

letter, by a broader construction than any heretofore maintained, even by the boldest adversaries of state authority, and the most latitudinous interpreters of the constitution. Nor was there any necessity or propriety, that congress should have this power to regulate the sale and transportation of slaves from state to state. It was not one of the difficulties which Mr. Madison or Virginia had in view, when they proposed calling the convention to create this government, for the express and only purpose of adopting uniform regulations of commerce, operating alike in all the states. No one complained of the want of such a power as to slaves, as a reason for adopting the constitution; and no such uniform regulations on that subject, as between the states, were ever anticipated or proposed. The convention was called at the instance of a slave-holding state, Virginia, under Mr. Madison's resolution, for the only express purpose of giving to congress power to adopt "uniform regulations" as to commerce; and the power in question was inserted in the constitution, on the motion of South Carolina. But did either of those states, or any other state, complain of the non-existence of such a power as to slaves, or desire that it should be granted to the general government? The power which Virginia and South Carolina, and all the states desired to be vested in congress, concerned only that universal commerce, extending to foreign nations, and among all the states, and effecting all that Virginia and South Carolina, or any other state desired to be regulated by the general government, and not the local and delicate subject of slavery; and neither in the debates or proceedings and resolutions of the various states, when delegates were chosen to form their constitution, nor in the resolutions, proceedings and debates of the congress of the old confederacy, on the same subject, nor in the general convention which framed, or the various state conventions which ratified it, nor in the contemporaneous commentaries of the great men who expounded it at the period of its adoption, is there one word showing that the sale or transportation of slaves from state to state, was one of the grievances to be remedied by the convention, or that any power over that subject was to be delegated to congress. Nor is it less remarkable, that in the various publications of the day, and arguments in and out of the various conventions which ratified it, did any one of its able opponents imagine that such a power was conferred by this clause on congress. Where was the Argus-eyed vigilance of Patrick Henry, and George Mason of Virginia, who so ably opposed the adoption of the constitution? Where the watchfulness of the other great statesmen of the south, so many of whom, as well as George Mason, Luther Martin, and others, had been members of the convention which framed the constitution, and opposed its adoption, by so many arguments in the state conventions which ratified it, that they never discovered, that under this power, congress might regulate or prohibit the transportation and sale of slaves from state to state, and that all state power over that subject was annihilated? It is true some of them did fear that for want of a bill of rights, similar to that subsequently adopted by the ten amendments to the constitution, and especially the tenth, that implied powers might be exercised under the general welfare and other clauses, but all which apprehensions were forever removed afterwards by the adoption of these amendments, the want of which was the cause of their opposition.

We are asked to admit the following propositions—1st, that congress was vested with power supreme and exclusive, to authorize and enforce the slave trade among the states, against their prohibition. 2d, that congress was denied all power to prohibit the slave trade among the states. 3d, that the states themselves were prohibited from arresting or regulating this trade. If this be so, it follows as a consequence, that the framers of the constitution intended to perpetuate under their authority the slave trade among the states, and to annihilate all power, either in the states, or in the general government, to arrest this traffic. To prohibit the slave trade among the states, by the authority of congress, would be most dangerous; but how infinitely more dangerous is the power now claimed for congress, by our opponents, to force all the slaves of eight or ten states into two or three states, as merchandise, against the consent of those states, and thus accumulate the disproportion in those states, between the whites and the slaves, and thus force upon those states revolt and insurrection on the one hand, or emancipation upon

the other, extorted by the superiority of numbers. Who believes that the framers of the constitution ever intended to force such an alternative upon any of the states of the Union; or that all, or any of the states, would ever have consented to the vesting of such powers in the government of the Union?

It may be contended, however, that this power to regulate the transportation of slaves from state to state, arises by implication, under the 9th section of the 1st article of the constitution. That section is in these words: "Sec. 9. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

Now, if this section be only an exception to the power of congress to regulate commerce, and I have shown that that power does not apply to this case; then this section would have no operation whatever upon the present question. As, however, it is impossible for me to anticipate the views of the court in regard to this section, it is my duty to consider it, which shall be done in the only two aspects in which it could apply. First, as a substantive power; and secondly, as an exception to the power of congress to regulate commerce. This section has never received a construction from this court, although there are some obiter dicta in which it is regarded as an exception to the power to regulate commerce. Now, although it may not be material to the determination of this question, and probably will not be so considered by the court; yet I do regard this clause of the 9th section as a substantive power, and not an exception to a power already granted. Exceptions to granted powers are usually inserted in a proviso to the grant of those powers. When a power is delegated, and the grantors desire to reserve from those powers something by way of exception, that otherwise would follow from the grant, it is done by a proviso, designating the exception, and declaring that it shall not be included in the granted power. If this is not done by a proviso, it is done by language to the same effect, following immediately the words of the granted power, and designating the exception to it; and we might as well look to a subsequent section of a constitution to find an enlargement of a granted power, as exceptions to it. When the power is granted, there is the appropriate place to enlarge or diminish the sphere of its operation, and not in a different section of the constitution. Now, this clause is wholly unconnected with the granted power to regulate commerce. It is in a different section of the constitution, entirely separated from the clause or section in relation to commerce, and disconnected from it, not only by position, but by no less than fourteen distinct and substantive grants of power, wholly unconnected with the authority to regulate commerce. Such is the separation in position of these two powers in the constitution; but when we look beyond that instrument, to the journal of the convention which formed the constitution, and the debates in that body, we will find the same separation in the order of time, when these two sections were adopted.

At page 746, volume 2d, of the Madison papers, we will find this commercial power first proposed in the following words: "To regulate commerce with all nations and among the several states." This clause was afterwards modified by inserting "foreign nations," instead of "all nations," and by enlarging the power by the addition of the words "and with the Indian tribes." Here then was the place and the time when the convention was modifying and enlarging this power, to designate the exceptions to it. The date of this original proposition in regard to the commercial power, was the 29th of May, 1787. I find that on the 6th of August, following, pages 1226, 1232, 1233, 1234, of the same book, that this commercial power was again proposed by the committee of detail, in the following words, in the 1st section of the 7th article of the constitution. "To regulate commerce with foreign nations, and among the several states." The 3d section fixes the proportions, in which "taxation shall be regulated," and the 4th section, which follows, is in the following words: Section 4. "No tax or duty shall be laid on articles exported from any state; nor on the migration or importation of such persons as the several states shall think proper to admit; nor shall such migration or importation be prohibited." Here, this clause first appears, in a

distinct section, in relation to the *taxing power*, and with a declaratory proviso to that power.

On the 15th of August, 1787, (page 1343) we find the convention adopting *unanimously*, the clause for regulating commerce as before quoted. Now, if the power to prohibit the importation of slaves, had been considered as included in the power to regulate commerce, we know, and no one denies, that at least two states, instead of voting for this clause as they did, would have opposed it, as they did all power to prohibit this importation; finally yielding to a compromise, by which the importation should not be prohibited until 1808. Is it not then inconceivable, that this prohibition thus opposed by at least two states, should have been regarded as included in the clause to regulate commerce, thus *unanimously* adopted; when, if such a prohibition had been supposed to be included, these two states had declared that they could not become parties to the constitution. Mr. Pinckney of South Carolina, had proposed this very clause to regulate commerce, and he, and his state, and all the states we have seen voted for it; but, at page 1389, we find, Mr. Pinckney declaring, "South Carolina can never receive the plan, if it prohibits the slave trade;" in which he was joined by Georgia. Yet, Georgia and South Carolina had both voted for this very commercial power, which is now asked to be regarded as including by implication a prohibition to which they could not assent.

On the 21st of August, this section as to migration and importation as before quoted, was taken up, (page 1382) and it was discussed at length, in connexion with the taxing power.

At page 1388, "Mr. L. Martin proposed to vary article 7, section 4, so as to allow a "prohibition or tax on the importation of slaves." Mr. Ellsworth of Con. opposed it; he said, "Let every state import what it pleases." Mr. Pinckney and Mr. Rutledge of South Carolina, opposed it; Mr. Sherman opposed it, and Gen. Pinckney, Mr. Baldwin, Mr. Gerry, Mr. Williamson. Here, very many of the states opposed it; two states declared that such a prohibition would prevent their becoming parties to the constitution; and yet all had voted for this very clause as to commerce, from which the prohibitory power is now asked to follow by implication. Such is the history of this matter as now furnished by Mr. Madison, and it appears to me conclusive on the question.

We have seen the order in which this clause stood in the constitution as reported by the committee of detail; and after undergoing various modifications, we have seen the order in which it now stands in that instrument. Separated as it was by the committee from the clause in relation to commerce, why, in the transposition which took place afterwards, was it not connected with that clause as a proviso, or in some other manner, if it was adopted by the convention as an exception to the commercial power? But there are other reasons still stronger against this position. The clause in question, gives to congress power to tax the importation of negroes, not exceeding ten dollars for each person. Now, is this a modification of, or exception to the commercial power?

In 9 Wheaton, 200-201, Chief Justice Marshall, in delivering the opinion of this court, declares, that duties or taxes on importation, are branches of the *taxing* power, and wholly distinct and separate from the commercial power; and he expressly declares, that exceptions from or modifications of this power of imposing duties or taxes on importation and exportation, are exceptions to or modifications of the taxing, and not of the commercial power. But again, the whole of this clause applies to *persons;* and this court have decided, that in contemplation of the constitution of the Union, *persons* "are not the subject of commerce," so as to be included in the construction of a power given to congress, to regulate "commerce." 11 Peters, 136-137. Now this clause speaks of persons, and of persons only; and it includes negro freemen, as well as negro slaves, as is expressly declared by Chief Justice Marshall, in 9 Wheaton, 216-217; the term migration embracing the free, and the term importation, the slaves; and upon this principle, congress has legislated on the subject. However, then, it may have been disputed whether slaves as articles of commerce were embraced in the commercial power; no one can pretend that free negroes were articles of sale or commerce, and em-

braced in the commercial power. This appears to me conclusive against the position that this clause is an exception from the power of congress to regulate commerce. If then this clause be a substantive power, does it confer the authority claimed in this case to prohibit the transportation of slaves from state to state? It is conceded that the term *importation* applies only to slaves introduced from abroad; but it has been contended that the term *migration* does apply to the transportation of slaves from state to state. Now this is against the opinion of Chief Justice Marshall, on the point last quoted—upon the ground that migration applies to free negroes, and to voluntary removal, or change of residence by them, and therefore can have no application to slaves. But independent of this decision, is it not clear that the term migration applies to persons coming from abroad, and not a removal from state to state? This is the true grammatical meaning of the term, but there is still higher authority not heretofore referred to.

In the Declaration of American Independence, we find the following clause: "He has endeavoured to prevent the population of these states; for that purpose, obstructing the laws for naturalization of foreigners; refusing to pass others to encourage *their migration hither;* and raising the conditions of new appropriations of lands."

Here the term migration, in its true American sense as applicable to our peculiar position as states and as a nation, is used as embracing only persons coming from abroad, and no other. Now, when we reflect, that many of the persons who signed the Declaration of Independence, were also members of the convention which framed the constitution of the United States, did these same distinguished statesmen use the term in one instrument as applicable only to persons coming from abroad, and in the other as only applicable to persons passing from state to state: thus using the same term to express a totally different thing in the two cases? But when the great statesmen of that day designed to designate a passing or removing from state to state, they used very different and appropriate terms to express that object.

In the articles of confederation they say: "The people of each state shall have free ingress and regress to and from any other state." Here, where they intend to designate a passing or removing from state to state, the terms "ingress and regress" are used, and not the term migration. Now, very many of those who framed the articles of confederation, were also framers of the Declaration of Independence, and of the constitution of the United States; and is it conceivable that had they designed to regulate the ingress or regress from state to state, they would not have used the language of the articles of confederation, and not a word to which they had given a very different meaning in the Declaration of Independence. When looking beyond the words themselves, to the debates in the convention which framed the constitution, we find the construction universally confined to persons from abroad, and Gouverneur Morris and Col. Mason, both stated without contradiction in the convention the fact, that the clause extended to "freemen," and no one suggested the possibility of its being extended to the transportation of slaves from state to state. If, then, this clause be a substantive grant of power, and not an exception to the commercial power, and if, as we have seen, it does not extend to the transportation of slaves from state to state, there is an end to the question; for here, if any where, the power would have been given. But, suppose it to have been an exception or proviso to the commercial power, is it any thing more than a declaratory proviso to prevent by a provision, added to this power, ex abundanti cautela, any construction, by which congress could prohibit the migration or importation of certain persons? This was the form in which it was first introduced, and the designation of the year 1808, as well as the *taxing* authority, were added by subsequent amendments.

The convention grant to congress the commercial and taxing powers; but to prevent these powers being construed to extend to an authority to prohibit the introduction of certain persons, such a proviso is proposed, which, by a compromise as to time and taxation, is made to assume its present shape; and this is all that was intended by the obiter dicta before referred to, in which this clause is spoken of as an exception to the commercial power. Such language cannot imply that

the powers granted in this clause would have been included in the commercial power; for we have seen that this power did not embrace an authority to lay duties or taxes on importation, nor extend to *persons* of any description, much less to freemen as articles of commerce. But, even if this clause, as an exception to the commercial power, would, but for this proviso have been embraced in that power, then the extent of the power as thus indicated by implication, would not go beyond the exception itself; and this, we have seen, did not embrace the transportation of slaves from state to state. Such being the case, what would be the extraordinary implication to which we are asked to resort? Why, that although the clause in question does not extend to the transportation of slaves from state to state; yet, as it does extend after a certain date to the importation of slaves from abroad, and as but for this exception, congress, even prior to that date, would have possessed this power as to such importation from abroad under the authority to regulate commerce, therefore, congress always possessed the authority under the commercial power to prohibit the transportation of slaves from state to state. Hence, it would follow, that by this construction, congress, immediately on the adoption of the constitution, without waiting till 1808, could at once prohibit the introduction of slaves from state to state, and yet a power so tremendous, now extracted by implication, was never even alluded to in the convention, nor would the constitution ever have been formed, if such a power had been asked to be vested in congress. Would the slave-holding states have consented that congress should forbid the importation or exportation of slaves from state to state, and that congress alone should regulate their policy in this respect? Especially would Georgia and South Carolina, that would not join the Union unless the African slave trade were kept open from 1787 to 1808, ever have agreed to a constitution, by which, *immediately* on its adoption, they could not introduce either for sale or use slaves from an adjoining state; no, not even when acquired by gift, devise, or inheritance? And, now let be observed, that, as it is shown, the power to prohibit the transportation of slaves from state to state does not follow from this 9th section, and to commence in 1808; that if it existed at all, it was as an inference from the commercial power which went into effect immediately. No one then can believe that any such power was ever designed to be vested in congress. It never could have been directly granted, and now to interpolate it by implication would be a fraud on the parties to the constitution.

But there is another reason why this clause is not a mere exception to the commercial power. That power this court have declared is vested exclusively in congress, and no portion of it can be exercised by any state even though congress may not have legislated on the subject. Now, this clause of the 9th section was admitted in the convention to extend to the prohibition of the admission of *convicts* from abroad. Madison Papers, 1430, 1436. Yet this court have declared, that the states do possess the power to prohibit the introduction of foreign convicts. 11 Peters, 148, 149. If, then, the states possess this power, and it is also vested in the general government, it must be a case of concurrent powers, and of course is not embraced in the commercial power, which we have seen is not the case of a concurrent authority, but of an authority denied altogether to the states and vested in congress alone. When the constitution was formed we became as to all powers conferred exclusively on congress by that instrument, as this court have decided, one country; especially as regards this commercial power, we were in the strong language of this court, "a single government," recognising as regarding this power no state boundaries. And yet, in relation to this very power, migrate, which means a removal from one country to another country, is asked to be construed to mean a removal from one part of a country to another part of the same country; and that too, when, as to this clause considered as an exception to the commercial power, the whole country in that respect was as this court have declared, a "unit," a "single government," knowing no separate state jurisdiction or boundaries.

It has been shown that this law is not embraced within the power of congress to regulate commerce; and this would be sufficient, but I will go further, and prove that it is a power reserved to the states. The reserved powers of the states, com-

prise all those not delegated to the general government, or prohibited to the states. The states were the fountain springs of all the powers vested in congress, and this is a case, which goes to the source of all power, and never was, and perhaps never could be abandoned, without a total surrender of all sovereignty. It is the power of self-preservation; it is a matter of the police of a state, regarding its internal policy; a municipal regulation, to preserve the tranquillity, or promote the prosperity of the state, and guard the lives of its inhabitants. It is similar in principle to the quarantine and health laws of a state, its pauper and inspection laws, and many others of a similar character. It is a local provision for the internal peace and security of the state, growing out of the inherent and inalienable right of self-preservation, and operating exclusively within the limits of the state. It is a power to guard the state, "*against domestic violence*," which not only was reserved to the state, but to the state exclusively, unless upon its "application" for aid to the government of the United States. The 4th sec. 4th art. of the constitution, declares: "The United States shall guaranty to every state in this Union a republican form of government, and shall protect each of them against invasion, and on *application of the legislature*, or of the executive, (when the legislature cannot be convened,) against *domestic violence*." It is then within the clearly reserved power of a state to "protect" itself, "against domestic violence;" and it may do so by the means of the state itself; or congress, upon the application of the state, and *not otherwise*, may come to its aid in such an emergency. In the state then alone resides the power to pass all laws, designed to protect its people against domestic violence. It is not to wait until the apprehension of domestic violence shall have been realized, it is not to wait until that violence shall have assumed the form of an "insurrection," but looking forward to the possibility of such an event, it may enact all laws calculated to prevent such a catastrophe. It is true that congress, under the 8th section of the 1st article of the constitution, have power "to provide for calling forth the militia to execute the laws *of the Union*, suppress insurrections, and repel invasions." But this clause has no application to this case, and even if it had, could not interfere with the state law upon this subject. But what is this power of congress in this section? It is peculiar and specific—1st, it relates wholly to insurrections to subvert "the laws of the Union," an insurrection against the government and authority of the United States, and not a case of "*domestic* violence," which applies peculiarly to a movement against the laws and government of a state. 2d, it is a power only to call forth the militia, and the purpose is to "suppress" the insurrection. But it will not be contended that this power applies to a case of "domestic violence," confined to the limits of a state, and conflicting only with its own laws, and its own authority. Each state then possesses the sole power of protecting its citizens, "against domestic violence;" the general government protects a state against *invasion from abroad*, without waiting for any application from the state. But desirable as such protection might be, in case of domestic violence, the states were not willing that in such a case the government of the Union should act, except upon the "*application*" of the state. What then is a case of domestic violence? Can any one doubt, that a rising of the slaves to assume the government of a state, or to take the lives of its citizens, or oppose or subvert its laws, would be a case of "domestic violence," to guard against which before it occurred, as well as to suppress it afterwards, is one of the powers clearly reserved by every state. Now may not a state, as a means of accomplishing this object, prevent the introduction of dangerous, or convict, or insurgent slaves, whose importation might produce domestic violence? This court determined upon a construction cotemporaneous with the formation of the constitution, that a state may prevent the introduction of malefactors, 11 Peters, 148. This is permitted as a measure of internal police, to guard the peace of the state, and promote the tranquillity and happiness of its people. This, all the slave states have ever done, and in pursuance of such a policy and to effectuate the same object, might they not prevent the introduction of wicked or dangerous slaves, although not yet condemned as convicts by the tribunals of a sister state? Suppose insurgent slaves had been reserved as informers, and never tried or condemned within the limits of a sister state,

none can doubt the power of any state to prevent their introduction, and especially as slaves within their limits. In carrying out the same policy of self-preservation, might not a state have said after the Southampton massacre, that no slaves from that region, whether witnesses or participators in that transaction, should be brought within their limits; or if particular classes of persons importing slaves for sale, had been in the habit of introducing into a state, wicked or dangerous, insurgent or convict slaves, might not a state prohibit the introduction of slaves for sale, by such person altogether, especially if the state had endeavoured, (as we have seen Mississippi had done for years,) to prevent, by various requisitions, the introduction, by negro traders, of slaves of this description, all which had proved unavailing; might not the state, as the most or the only effectual remedy, exclude the introduction of slaves, by such traders or classes of persons altogether, embracing thus, in the exclusion, all slaves introduced as merchandise? Engaged as these traders were in this inhuman traffic; transporting these slaves in chains from state to state, for the sole purpose of a sale for profit; desirous of increasing this profit by purchasing the cheapest slaves, which would always be the most wicked and dangerous, reckless of the moral qualities and character of the slaves whom they bought, not for their own use, but to sell for speculation; tempted to buy the most wicked slaves, because always to be purchased at the lowest price, and sold in a distant state at the highest price, to those who would be ignorant of their dangerous character; inured as these traders were to scenes of wretchedness and cruelty, and entirely regardless of the means by which they reaped a profit from this traffic, why might we not, as a means of self-protection, arrest this traffic by forbidding the introduction of slaves as merchandise? Especially when a state had tried all other means to arrest the introduction of dangerous slaves, and had found the state, notwithstanding her previous restrictions, inundated by these traders with the wicked and abandoned slaves, the insurgents and malefactors, the sweepings of the jails of other states, might they not wholly exclude the traffic, as the only effectual means of self-preservation?

If experience had demonstrated that it was unsafe to trust with slave traders the introduction for sale of slaves, why might not the state arrest the importation by them of slaves as merchandise? But even if they could repose for the character of the slaves upon the traders, there was that in the very mode and purpose of introduction which rendered nearly all such slaves most dangerous to the tranquillity of the state. The very manner in which these slaves were forced from one state and driven into another, would introduce them with hearts overflowing with bitterness, and stimulated to revenge the most deadly, against the seller and the purchaser. Such slaves would seek for vengeance, not only by their own deeds, but they would endeavour to inflame the passions of all other slaves in the state, who but for their contaminating influence would have remained useful and contented. Who can deny that there was danger arising from such transactions? *The legislation of all the slave-holding states demonstrates that it is so;* and our own courts have so declared the fact; and did the state possess no adequate power to prevent these dangers by the exclusion of all such slaves, and the arresting of all such traffic? Nor was it only succeeding the sale, but whilst these negroes are encamped by thousands throughout the state for sale, that the danger was imminent. And if any state might, for her own safety, thus interfere to guard the state against these dangers, from wicked or convict slaves introduced for sale from other states, and stimulated to revenge by the mode of their introduction; why might not the state, in addition to these evils from the character of the slaves, perceive new and greater sources of alarm, in the overwhelming preponderance in numbers, thus inevitably given to the slave over the white population; and might not Mississippi, situated as she was, find in this rapidly increasing disproportion, a sufficient reason upon the same principles of self-protection, to prevent the introduction of slaves as merchandise? In looking at the condition of the state, it was obvious that the disproportion was increasing in an alarming ratio, that the slaves already outnumbered the whites of the whole state, and in many adjacent counties three to one; and in many patrol districts, more than twenty to one. Who will dare to say, that there was no danger in permitting this disproportion to go on rapidly augmenting, and that self-

preservation might not demand the prohibition of the traffic? And who was to judge of this internal danger, and to guard against it, except the state in which it existed?

If a state cannot prevent its becoming a refuge of insurgents, the Botany Bay of the slave malefactors of other states; if it cannot prevent the introduction of slaves of a class, and under circumstances, and in a disproportion inviting the overthrow of its laws, and the massacre of its freemen; if it must become one vast negro quarter, with only great and extensive plantations, superintended by one overseer, and owned too often by absentee masters; it does not possess the power to guard the state against domestic violence or maintain internal tranquillity, and it is not a state and possesses no one reserved right, or attribute of sovereignty, if it is thus despoiled of the power of self-preservation. The cases of comparative danger, above cited, may differ in degree, but in degree only, and not in principle. If then, internal tranquillity; and self-protection be legitimate ends of state legislation, and if such prohibition of the introduction of slaves as merchandise, be one of the means to effect these ends and purpose, if the purpose is lawful as an object of state legislation, who can say that these means are not adapted to the end, and calculated to secure the object? Is it not, perhaps, the only means suitable to the case, or at all events, where there is a choice of means by the state, is it not one of those means within the range of state authority, to effect the legitimate purpose of guarding against domestic violence?

These principles are settled in our favour in Mills's Case, 11 Peters, 102, when this court decided, that an act of New York, excluding paupers, was constitutional. In giving the opinion of the court, Judge Barbour said: "But how can this apply to *persons*? They are not the subjects of commerce, and not being imported goods, cannot fall within a train of reasoning, founded on the construction of a power given to congress to regulate commerce, and the prohibition to the states from imposing a duty on imported goods." "The power to pass inspection laws involves the right to examine articles which are imported, and are therefore directly the subjects of commerce; and if any of them are found to be unsound or infectious, to cause them to be removed, or even destroyed." "We think it as competent, and as necessary, for a state to provide *precautionary measures* against the moral pestilence of paupers, vagabonds and possibly convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be labouring under an infectious disease." Judge Thomson said: "The power to direct the removal of gunpowder, is a branch of the police power, which unquestionably remains, and ought to remain, with the states. The state law here is brought to act directly on the article imported, and may even *prevent its landing*, because it might *endanger the public safety*." "Can any thing fall more directly within the police power, and internal regulation of a state, than that which concerns the care and management of paupers, or convicts, or any other class or description of persons, that may be thrown into the country, and *likely to endanger its safety?*" And, he adds, the state may exclude all persons whose admission would "*endanger its safety or security.*" Judge Baldwin, in his concurring opinion (Baldwin's Views,) 181, says: "On the same principle, by which a state may prevent the introduction of infected persons, or goods, and articles dangerous to the persons or property of its citizens, it may exclude paupers, who will add to the burdens of taxation, or convicts, who will corrupt the morals of the people, threatening them with more evils than gunpowder or disease." He adds, "if there is any one case to which the following remark of this court is peculiarly applicable, it is this: "It does not appear to me a violent construction of the constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as *the laws of the Union may not reach.*" (4 Wheat. 195.) "But if the state (inspection) law imposes no tax on imports or exports, the prohibition does not touch it, either by requiring the consent of congress, or making the law subject to its revision or control." "The state (in excluding paupers or convicts,) asserts a right of self-protection." "Poor laws are analogous to health; quarantine and inspection laws, all being parts of a system of internal police, to prevent the introduction of what is *dangerous to the safety* or health of the people."

Here are important principles established, and many of them cited from the previous opinions of Chief Justice Marshall. First, a state law, excluding the introduction of convicts or paupers from other states is constitutional; so are health laws, and inspection laws, and all laws of an analogous character, excluding dangerous articles or persons. The principles on which these laws are founded, are directly applicable to the case before us; and although the laws may have a "considerable influence on commerce," or "operate directly on the subjects of commerce," they do not spring from that, but from a higher source, the pre-existing and undelegated power of a state, and are not an exercise of the power to regulate commerce among the states. That they are founded on the right of "self-protection" in each state, the right to guard against "moral or physical pestilence"—to "destroy," "remove," or "prevent the landing" of gunpowder and other dangerous articles; to exclude any thing which "might endanger the public safety;" to prevent the introduction not only of paupers and convicts, but that "*the principle* involved in it, must embrace *every description* which may be thought to *endanger the safety* and security of the country," or that may "threaten" a state "with more evils than gunpowder or disease," and to "all regulations of internal police." We find too, that under the power of a state to "*regulate pauperism therein*," is embraced the power to exclude paupers from other states; and upon the same principle the right of a state to *regulate slavery therein*, would include the right to exclude slaves from other states; and if the power to exclude exists, it carries the power to prescribe the terms of admission. And the principle of the law is the same in all these cases.

We have seen too, that the power of congress to regulate commerce does not extend to "persons;" and it has been shown, that slaves are so regarded and described in the constitution. But even if they were "the subjects of commerce," if their introduction "might endanger the public safety," the state has the power to exclude them. Thus, infected articles or vessels can be excluded, even where it is only apprehended that there may be danger. So also, to exclude gunpowder or similar articles, yet they are certainly articles of commerce; but the power of the state to guard the public safety being a higher power than that of the government to regulate commerce, all such state laws are of paramount authority, although they may have a "considerable influence on commerce."

Here, too, it is established, that inspection laws, where *no tax is imposed*, although they may act both on *importation* and *exportation*, are not an exception from the power of congress to regulate commerce, but rights pre-existing in every state, and not granted by the constitution.

Here, too, the principle which Chief Justice Marshall conceded in 4 Wheaton, 195, that it is a proper rule "to consider the power of the states as existing over such cases as the laws of the Union may not reach," is quoted and affirmed by Justice Baldwin. If, then, as at least one of our opponents admits, the power to prohibit this transportation and sale of slaves from state to state does not exist in congress, it must remain in the states. If not, it is annihilated, and the slave trade perpetuated by the constitution.

No matter in what fearful numbers the slaves of very many states may be in the course of introduction from many into one of the slave-holding states by the slave traders; no matter how imminent the danger, there is no power any where to prevent it, unless indeed a state where the slaves preponderate, rushes upon her own destruction, and emancipates at once all the slaves within her limits. And was such the provision made in the constitution of the Union, and assented to by the slave-holding states? Did they consent to the alternative, you must at once emancipate all your slaves, or perpetuate the slave trade within your limits; you must either have no slaves, or all that may be introduced by traders No one would have dared to make such a proposition in the convention which framed the constitution; no one of the slave-holding states would have assented to it; and had such a proposition been seriously entertained, it would have dissolved the convention. Indeed, such an idea is now for the first time announced; for I have called in vain for the production of a single suggestion to that effect, by any one preceding the argument of this case. It is a discovery made by our opponents, and

is even more preposterous and humiliating, and no less dangerous to the South, than the power of absolute prohibition claimed by the abolitionists to be vested in congress. Indeed, that is the consequence of this very extraordinary position, for if congress can thus nullify the state law under the power to regulate commerce among the states, we have seen it settled on the very authority relied on by our opponents, that this power is "supreme and exclusive," as "full and plenary" as if vested in "a single government;" that it is a power to "prescribe the rules" by which commerce shall be conducted, the power to "limit and restrain" it, and to "embargo," which is *to prohibit.*

If we will look at the nature of the institution of slavery, we will see conclusive reasons against the extension of the commercial power to this subject. Slavery is a local institution, existing not by virtue of the law of nations, or of nature, or of the common law, but only by the authority of the municipal law of the state in which it exists. It is secured by the supreme, exclusive, pre-existing and undelegated power of each state, and not by the feeble tenure of any dependence upon the authority of congress.

In the case of Harvey v. Decker & Hopkins, Walker's Reports, 36, the supreme court of Mississippi declare, that slavery does not exist by "the laws of nature;" and they add, "it exists *and can only exist through municipal regulations.*" The same court, in Jones' Case, Walker's Reports, 83, say: "In the constitution of the United States slaves are expressly designated as *persons:*" and they add, "the right of the master exists, *not by force of the law of nature or nations,* but by virtue *only* of the *positive law of the state.*" Such is the settled law of Mississippi twice unanimously pronounced by her supreme tribunal.

The same doctrine has been pronounced by the supreme court of all the states where the question has been determined. Thus, in the case of Lunsford v. Coquillon, 14 Martin's Reports, 404, the supreme court of Louisiana declare, "the relation of owner and slave in the states of this Union, in which it has a legal existence, *is a creature of the municipal law.*" See Law of Slavery, 368; Story's Conflicts of Laws, 92, 97.

The supreme court of Kentucky have declared, that "slavery is sanctioned by the laws of this state, but we consider that as a right existing by a positive law of a municipal character, without foundation in the law of nature." Rankin v. Lydia, 3d Marsh. 470, and this is an acknowledged doctrine of the common law. 2 B. & Cres. 448; 3 D. & Ry. 679; 20 State T. 1; 10 Wh. 120; Com. v. Aves, 19 Pick. Law of Slavery, 357, 363, 367, 368. This court have said, that "The *sovereignty* of a state extends to *every thing* which *exists by its own authority,* OR is *introduced by its permission.*" 6 Wh. 469; 4 Peters, 564; Bald. Const. Views, 14. Slavery exists only by the authority of a state, it is introduced only by its permission; and to contend that it may not be introduced, but may be extended against the will of a state, is strangely incongruous. The principle here quoted has been applied in restriction of the commercial power.

In 1824, it was attempted to apply the commercial power of congress to the New York Canals, in relation to boats passing through them, or entering them from state to state, by requiring tonnage duties and entrance fees. That this power could have extended to voyages commencing in one state, and touching at, or terminating in another, is decided by this court; but it does not extend to canals created by the state authority. New York Leg. Res. 8th Nov. 1824; Debate U. S. Senate, 19th May, 1826; 3 Cowen, 753. Now, the only reason for this distinction is, that canals are, and rivers are not created by a state; otherwise the power to regulate commerce, which embraces navigation as well as traffic, must have included them. Now, this power is "supreme and exclusive," and if it extends to slaves, made so only by state authority, it must embrace all the canals, and perhaps all the rail-roads of every state. Property in slaves, so far as it exists, is created, not by the law of nature or of nations, but solely by the power of the state, and may be abolished at its will; differing in these essential particulars from other property. So as was said as to other property created by the authority of a state, in state or bank stocks, or bank notes, or lottery tickets. It is a principle recognised in all the states, and by this court, that their introduction from other

states, for sale or circulation, may be prohibited by any state, notwithstanding she may have state or bank stocks, or bank notes, or lotteries of her own, and these may be the subjects of lawful ownership and commerce in the state.

This power being claimed under the authority of congress to regulate commerce, the first congress which assembled in 1789, as well as every subsequent congress, would have possessed plenary, supreme and exclusive power over the whole subject of regulating the transportation of slaves from state to state. Why, then, during the lapse of more than half a century, has congress never exercised this power, which was an exclusive and not a concurrent power? Many of the great men who formed the constitution, were members of congress for many years succeeding its adoption. Why, then, did they never exercise, or even propose to exercise the power in question? They were called upon by petitions, immediately after the organization of the government, to exercise, both as among the states and as to foreign nations, the entire power which they possessed on this subject. Why did they not then exercise this power? Because, it was then universally acknowledged that congress possessed no such power.

In 1794, petitions were again transmitted by the Quakers and others to congress, calling on that body to exercise all its constitutional powers over the subject; and these memorials were referred to a committee of the house, consisting of Mr. Trumbull, Mr. Ward, Mr. Giles, Mr. Talbot, and Mr. Groves, all members from non-slave-holding states, except Mr. Giles, of Virginia; the select committee, according to parliamentary rule, being favourable to the object of the memorialists to the extent of the powers vested in congress. This committee, thus composed, clearly repudiated the power now claimed by our opponents, but brought in an act "to prohibit the carrying on the slave trade from the United States to any foreign place or country," which act became a law on the 22d March, 1794. 2d Vol. Laws United States, 383.

These proceedings, corroborated by Mr. Giles's statement as a member of the committee, ought to be conclusive. In the debates of the Virginia convention of 1829, 1830, page 246, we find Mr. Giles using the following language on the 10th Nov. 1829: "Mr. Giles then referred to a memorial, which was presented to congress by the representatives of several societies of Quakers. He happened to be a member of the committee to whom the subject was referred He had relied on the declaratory resolution, in the negotiation which he had to carry on with the Quakers. *All the committee were, in principle, in favour of the measure;* but it was his duty to satisfy these persons, that congress had no right to interfere with the subject of slavery at all. He was fortunate enough to satisfy the Quakers, and they agreed, that if congress would pass a law, to prohibit the citizens of the United States from supplying foreign nations with slaves, they would pledge themselves, and the respective societies they represented, never again to trouble congress on the subject. The law did pass, and the Quakers adhered to their agreement. He did not know whether or not the documents, on the subject of this negotiation, were still in existence; but he believed they had been filed away with other papers.

"Subsequently, an act was passed prohibiting the introduction of slaves into the United States, in which this principle was again touched in a more specific, but a different form. It was again his fortune to be on the committee to whom that subject was referred, and he drew up two provisoes to a bill then pending before congress, for prohibiting the introduction of slaves into the United States after the year 1807; the object of which was to draw a distinct line of demarcation between the powers of congress, for prohibiting the introduction of slaves into the *United States*, and those of the *individual states* and territories. It was then decided, by an *unanimous vote*, that when slaves *were brought within the limits of any state*, the power of congress *over them ceased*, and the power of the *state began the moment* they became within those limits." Here is the clearest testimony on the subject, that as to the slaves "*brought within the limits* of any state," congress had no power whatever; and that such was the "unanimous" opinion of the House of Representatives in 1794 and 1807.

The act of the 10th of May, 1800, 3 L. U. S. 382, prohibits citizens or residents

of the United States from owning or serving in vessels engaged in the foreign slave trade, forbidden by the act of 1794. The act of 28th February, 1803, 3 L. U. S. 529, prohibits the bringing of any negroes, mulattoes, or other persons of colour, not being natives, citizens, or registered seamen of the United States, into any state where the laws of the state prohibited such importation. This act extended to free negroes as well as slaves, and was a practical construction of the 1st clause of the 9th section of the 1st article of the constitution, applying that clause to such states as did not "think proper to admit" the persons prohibited by that act, the term "migration" being applied to free negroes, and "importation" to slaves. Then came the act of 2d March, 1807, 4th L. U. S. 94, (to go into effect on the 1st of January, 1808, the time designated in the 9th section of the 1st article of the constitution,) which prohibits the introduction from abroad into the United States of slaves under various penalties. The act of 20th April, 1818, 6th L. U. S. 325, enforces the last act chiefly by devolving the proof on the party accused, that the coloured persons had not been brought in, in contradiction of that law. The act of 3d March, 1819, 6th L. U. S. 433, authorizes the employment of the armed vessels of the United States in enforcing the previous acts. The act of 15th May, 1820, 6th L. U. S. 529, makes the foreign slave trade, before prohibited, *piracy*, and inflicts upon all concerned in it the punishment of *death;* and no less than nineteen various laws, enforcing or providing money to enforce this act, have been since passed by congress down to the present period. No less than thirty laws have been passed by congress on the subject of the slave trade, and no less than fifty reports made in the two houses of congress from 1791 to the present period; yet no one act embraces the slave trade between the states, except such as acknowledge the binding force of state laws, and require conformity on the part of vessels of the United States and their owners to those laws, (as they do to the health laws of the states;) nor in any one of these numerous reports was it ever pretended, that congress possessed the power now claimed by our opponents, but in all these acts or reports, it is either repudiated directly, or by implication. And if congress did not act in 1791, or 1794, or 1803, on this subject, why not in 1807—8, or in 1818, 1819, 1820, or on the numerous occasions upon which they have since legislated on this subject? Not only why did they not act by the passage of laws regulating or prohibiting this slave trade between the states, but why no proposal by any member of congress to act, and this universal concession that the power was not vested in the general government? Such has been the negative action of congress in regard to a power which is claimed to be vested exclusively in the general government. But not only has congress declined the exercise of this power, now claimed to be vested exclusively in the government of the United States, but congress has repeatedly recognised the existence of this power as vested in the states alone.

On the 19th April, 1792, the constitution of the state of Kentucky was formed. On the 6th November, 1792, Gen. Washington, then President of the United States, delivered his annual address to the two houses of congress, in which he said: "The adoption of a constitution for the state of Kentucky has been notified to me. The legislature will share with me in the satisfaction which arises from an event interesting to the happiness of the part of the nation to which it relates, and conducive to the general order." And on the succeeding day he transmitted to the two houses of congress in a special message, "a copy of the constitution formed for the state of Kentucky."

On the 9th of November, 1792, the senate of the United States responded to the address of the President, in which they say, "The organization of the government of the state of Kentucky, being an event peculiarly interesting to a part of our fellow citizens, and conducive to the general order, affords us peculiar satisfaction." On the 10th of November, 1792, the house of representatives responded through a committee, of which Mr. Madison was chairman, to the address of the President, in which they say, "The adoption of a constitution for the state of Kentucky, is an event on which we join in all the satisfaction you have expressed. It may be considered as particularly interesting, since, besides the immediate benefits resulting from it, it is another auspicious demonstration of the facility and

success, with which an enlightened people is capable of providing, by free and deliberate plans of government, for their own safety and happiness."

Such were the solemn forms and sanctions under which this constitution of the state of Kentucky, the first of the new states, was then received by the President and two houses of congress, and the two members subsequently admitted under it as representatives of the state. Now this very constitution contains provisions as to slaves precisely similar to those embodied in the constitution of Mississippi, and among others, after prohibiting emancipation of slaves by the legislature, they say, "they (the legislature) *shall have full power* to prevent slaves from being brought into this state as merchandise." 1 Littell's Laws of Kentucky, 52. Here is this constitution, with this clause, thus solemnly sanctioned at that early period, almost cotemporaneous with the organization of the government, by George Washington, the President of the convention which formed the constitution of the Union, and by John Langdon and Nicholas Gilman, of New Hampshire; Rufus King and Elbridge Gerry, of Massachusetts; Roger Sherman and Oliver Ellsworth, of Connecticut; Jonathan Dayton, of New Jersey; Robert Morris and Thomas Fitzsimmons, of Pennsylvania; George Read, John Dickinson and Richard Bassett, of Delaware; James Madison, of Virginia; Hugh Williamson, of North Carolina; Pierce Butler, of South Carolina; William Few and Abraham Baldwin, of Georgia; *all* members of the congress which received and sanctioned this constitution of Kentucky, and *all* members of the convention which framed the constitution of the Union; thus constituting, in *that congress*, a representation from *ten* of the *twelve* states which formed the constitution. And yet this constitution, thus received and sanctioned, contains a clause directly repugnant to the constitution of the United States, and authorizes that state to violate that instrument, by an authority, as maintained by our opponents, to exercise that commercial power as to slaves, which was vested exclusively in congress, and prohibited to the states. But no one entertained that opinion in 1792, when ten of the twelve states which formed the constitution of the Union were represented in congress. Suppose, in lieu of this clause to prohibit the introduction of slaves as merchandise, the constitution of Kentucky had contained a delegation of power to the legislature of that state, to "regulate commerce between that state and all other states," or "to coin money," or to "declare war," or to exercise any other power vested exclusively in congress; who believes that such a constitution could ever have received the sanction of Gen. Washington, Mr. Madison, James Monroe, and all the other great men of the congress of 1792, or that the state could ever have been admitted, prepared and organized, to subvert the constitution of the Union, by that very executive and congress which was solemnly sworn to preserve and maintain that instrument? And yet, by the argument of our opponents, this very constitution of Kentucky, in this clause as to slaves, contains a delegation to the state of the power vested exclusively in congress to regulate commerce among the states. To every unprejudiced mind this authority ought to be conclusive.

On the 1st March, 1817, an act of congress was passed to enable the people of the western part of the territory of Mississippi "to form a constitution and state government." 6 L. U. S. 175. By which act it was required, as a condition precedent of admission, that this constitution should not be "*repugnant*" to the "*constitution of the United States.*" On the 4th December, 1817, this constitution was *submitted to both houses of congress*—Sen. J. 21; House J. 21; and on the 10th December, 1817, this constitution being declared to be in "pursuance" of the act before quoted, was admitted not to be repugnant to the constitution of the United States, and the state received as a member of the Union; yet, this very constitution contained the clause, that "they (the legislature) shall have full power to prevent slaves from being brought into this state as merchandise." Here, then, the very power under which Mississippi now acts, was thus deliberately conceded by congress not to be "repugnant to the constitution of the United States."

On the 26th August, 1818, the constitution of the state of Illinois was formed, and although slaves and slavery were by the 6th article prohibited to be "hereafter introduced into the state"—yet the slaves already there were not emancipated, although it was provided, that their "children hereafter born shall be free," and

the introduction of slaves from any other state, even "to be hired," was prohibited. By the official census of 1820, 907 slaves were enumerated and returned from the state of Illinois, and in 1840, 184 slaves are enumerated and returned from the same state. Illinois, then, under her constitution of 1818, was to a limited extent, a slave-holding state; the slaves already there not being emancipated, but the future importation being prohibited, and the post nati being liberated.

This subject is thus referred to in a speech delivered by the Hon. Henry Baldwin, then a representative in congress from the Pittsburg district of Pennsylvania, and now one of the judges of this court. In that speech, Judge Baldwin said: "When the constitution of Illinois was presented to us, it was found, not to conform to the ordinance of 1787, in the exclusion and abolition of slavery; on comparing their provisions, they were inconsistent: the gentleman from New York, who moved this amendment last year, objected to the admission of Illinois on this account; there was a short but an animated discussion; it was contended, that the ordinance did not extend *to states*, and was not binding on them, *and so this house decided by a majority* of 117 to 34 (54 from the non-slave-holding states). In the senate, there *was no objection*. Illinois was admitted, she and Indiana now have slaves, *and always have had them*. Here is a precedent in point, and I hope will not be without its weight in the body which made it, at least with those members whose names are recorded in the journal." Niles' Reg. vol. 19, page 30. In 1818, as well as at this moment, the prohibition of the introduction of slaves for sale, is void in that state, if it be void in Mississippi; for the validity of the prohibition as a question of power, surely cannot depend upon the number of slaves in a state.

On the 2d March, 1819, an act passed to enable the people of the territory of Alabama to form a constitution and state government, 6th L. U. S. 380. By this act, one of the conditions precedent, on which this constitution was authorized to be formed, was, that it should not be "repugnant" to the "constitution of the United States." On the 7th Dec. 1819, a copy of this constitution was submitted to the house, and referred to a select committee, H. J. 8; and on the 6th Dec. 1819, it was also presented to the senate of the Union, and referred to a select committee, S. J. 6; and by a joint resolution of both houses of congress, of the 14th Dec. 1819, the constitution of Alabama, being conceded to be "in pursuance" of the act before quoted, and of course "not repugnant to the constitution of the United States," Alabama was admitted as a member of the Union. Yet the constitution of that state contains the clause, that "they (the legislature) shall have full power to prevent slaves from being brought into the state as merchandise." And here again the constitutionality of this provision was distinctly admitted by the congress of the United States.

In the case of Missouri, the question was decided in our favour, after a severe conflict. But let it not be supposed, that all who opposed the admission of Missouri as a state of the Union, did it upon the ground, that as a slave-holding state, she could not prohibit the introduction of slaves as merchandise; for the number who maintained any such doctrine, did not exceed half a dozen members, at any period of this discussion, and it was eventually abandoned, and the objection was, 1st to admit Missouri as a slave-holding state at all, and 2d to that clause of the constitution, which prevented "free negroes, and mulattoes, from coming to, and settling in this state, under any pretext whatsoever." As to the first, it was contended that the authority to admit new states into the Union, was a discretionary power vested in congress; and that in the exercise of a sound discretion, congress might make it a condition of admission, that slavery should be abolished. As to the 2d point, it was urged that the power to exclude free blacks, some of whom might be citizens and voters in the several states, conflicted wit. that provision of the constitution of the Union, in the first clause of the 2d section of the 4th article, which declared, that "the citizens of each state shall have the same privileges and immunities as citizens in the several states." The first question was decided in favour of Missouri, by the congress of 1819, 1820, and the second question was not then decided.

By the act of congress of the 6th March, 1820, the people of the Missouri terri-

tory were authorized to "form a constitution and state government," 6th vol. L. U. S., 455. By this act slavery was to be prohibited in the territory ceded by France, under the name of Louisiana, north of lat. 36° 30', not included in the state of Missouri. By this act the people of the Missouri territory were authorized to form "a constitution and state government. *Provided*, that the same when formed shall be republican, and *not repugnant to the constitution of the United States*," and the 7th section of this act was as follows: "That in case a constitution and state government shall be formed for the people of the said territory of Missouri, the said convention or representatives, as soon thereafter as may be, shall cause a true and attested copy of such constitution, or frame of state government, as shall be adopted or provided, to be transmitted to congress." This constitution, "in pursuance of this act," was formed on the 19th of July, 1820, and contained the following, among other provisions:—

26. The general assembly shall not have power to pass laws:—

1st. For the emancipation of slaves, without the consent of their owners:—

They shall have power to pass laws:—

"To prohibit the introduction of any slave for the purpose of speculation, or as an article of trade or merchandise."

It shall be their duty, as soon as may be, to pass such laws as may be necessary,

1. To prevent free negroes and mulattoes from coming to, and settling in this state, under any pretext whatever: and

The constitution thus formed, was submitted to both houses of congress, and referred, in Nov. 1820, to special committees, who reported in its favour, and that it was *not repugnant to the constitution of the United States*. And now, then, it is believed not a single member upon the discussion which had taken place, did suppose that this clause prohibiting the introduction of slaves as merchandise, was unconstitutional, but it was contended by many, that the 4th clause of the 26th section of the 3d article, preventing "free negroes" coming into the state, was repugnant to the 1st clause of the 2d section of the 4th article of the constitution of the Union before quoted, as to the reciprocal rights of citizens in all the states, it being contended that free negroes were citizens in some of the states. The great difficulty then arising out of this clause, the whole question on the 2d February, 1821, was on motion of Mr. Clay, of Kentucky, referred to a select committee of thirteen, of which he was chairman, but eight of whom were from non-slave-holding states. On the 10th of February, Mr. Clay reported from this committee, declaring that they had "limited their inquiry to the single question, whether the constitution which Missouri had formed for herself, contained any thing in it, which furnished a valid objection to her incorporation in the Union. And on that question they thought that there was *no other provision* in that constitution, to which congress could of right take exception, but that which makes it the duty of the legislature of Missouri to pass laws to prevent free negroes and mulattoes from going to, and settling in the said state." After stating, that part of the committee believed this clause "liable to an interpretation repugnant to the constitution of the United States, and the other thinking it not exposed to that objection," they proposed that Missouri should be admitted, on her passing a law exempting this clause from any supposed interpretation, which would prevent citizens of any of the states from settling in Missouri. On the 2d March, 1821, congress passed a joint resolution, providing for the admission of the state of Missouri into the Union "upon the fundamental condition, that the 4th clause of the 26th section of the 3d article of the constitution, submitted on the part of said state to congress, shall never be construed to authorize the passing of any law, and that no law shall be passed in conformity thereto, by which any citizens of either of the states in this Union, shall be excluded from the enjoyment of any of the privileges and immunities, to which such citizen is entitled under the constitution of the United States," 6 vol. L. U. S. 390. The assent of Missouri was required to this condition, which being afterwards given, the state was admitted into the Union.

Now the power to prohibit the introduction of slaves as merchandise, was just as clearly granted in the constitution of Missouri, as the power to prevent the ingress

of free negroes or mulattoes. It had been expressly provided by congress, that the constitution of Missouri should not be repugnant to the constitution of the United States. That constitution was discussed in three committees, and in the two houses of congress for more than three months, and the whole subject, from 1818, till 1821, and after this full discussion, with an ardent desire on the part of a portion of congress, approaching an actual majority, to exclude Missouri, if any clause in her constitution should be found repugnant to the constitution of the United States, this clause as to the introduction of slaves as merchandise, was distinctly, and it may be truly said, almost unanimously conceded to be constitutional, and the only proviso required by congress from the state, was in relation to the clause in regard to free negroes. Surely this ought to be conclusive, so far as the authority of the almost unanimous voice of congress, on full deliberation, can go to settle any question. Amongst those who stand most conspicuously committed on the record, in favour of the validity of this clause in the constitution of Missouri, is Mr. Clay, of Kentucky, now one of my distinguished opponents in this case, for whose opinion as a statesman and a jurist, as then recorded, I ask from this court all the consideration to which it is so justly entitled. Of all the members of that congress, which admitted Missouri as a state of the Union, no one contributed more to that result, than the Hon. Henry Baldwin, now one of the judges of this court, and then the representative from the district of Pittsburg, Pennsylvania. And here I trust that I may be indulged in stating that I was one of his constituents at that period, and as he well recollects, one of the most ardent and active of the supporters of his course on this great question. At first, public sentiment seemed to be almost overwhelmingly against him in his district; the Legislature of Pennsylvania had passed unanimous resolutions against the admission of Missouri as a slave-holding state, and but one member of congress from the state, had then dared to follow his bold and daring lead upon this subject, and that member was driven for a long time most unjustly into disgrace among his constituents. He was burnt in effigy, and it is said, barely escaped from violence? Well do I recollect that momentous crisis, and the obloquy to which Mr. Baldwin was doomed for a time at that period. But he stood on the rock of the constitution; he stood unmoved by the surges of popular commotion; he was a leader who fought in the advanced guard of that great conflict, and although for a time he seemed like Curtius taking the fatal leap for the salvation of his country, he was saved by the returning justice and intelligence of a magnanimous people, triumphantly re-elected to congress, and elevated to higher and higher honours. The constitution of the state of Missouri, which by his vote he thus declared not to be repugnant to the constitution of the United States, contained this very clause for the prohibition of the introduction of slaves as merchandise, and I claim the full influence of his vote under these imposing circumstances.

On the 30th January, 1836, the people of the territory of Arkansas formed a constitution which contained the following clause: "They (the legislature) shall have power to prevent slaves from being brought to this state as merchandise." On the 10th March, 1836, this constitution was "submitted to the consideration of congress," in a special message by the President. Senate Journal, 210. On motion of Mr. Buchanan, of Pennsylvania, in the senate, on the same day, it was referred to a select committee. On the 22d March, 1836, Mr. Buchanan, as chairman from the select committee, reported a bill for the admission of Arkansas as a state, under the constitution submitted by the President, and after considerable debate, the bill passed the senate by a vote of 31 to 6, fifteen of the ayes being from non-slave-holding states and from both political parties, and four of the noes being from non-slave-holding states; namely, Messrs. Knight, Prentiss, Robbins, Swift, and two from slave-holding states, namely, Messrs. Clay and Porter, both of whom placed their negative on this ground alone, that Arkansas had formed her constitution without asking, as was usual, the previous assent of congress. Having participated in that debate, and taken a deep interest as a senator from Mississippi, in the admission of Arkansas, and successfully opposed an adjournment till the bill was engrossed, I recollect well all the proceedings, and that but a single senator based his objection on the ground of the particular clause in question, as to slaves. Such,

then, was the view of the senate as to the constitution of Arkansas; and that they felt constrained to oppose any clause in the constitution of a state, which they deemed repugnant to the constitution of the Union, is clearly proved by a reference to the proceedings and debates on the confirmation by the senate, at the same time, of the constitution of Michigan. On the 1st April, 1836, when the adoption of the constitution of Michigan, and the bill for the admission of that state (as well as of Arkansas,) was pending before the senate, the following proceedings will be found at page 259. "The motion by Mr. Clay, to amend the bill, by inserting 2 line 4 after "confirmed," except that provision of the said constitution, by which aliens are admitted to the right of suffrage," yeas 14, nays 22; a reference to these proceedings and debates will show that the senate considered it its duty not to confirm any clause of the constitution of a state, repugnant to the constitution of the United States, but to strike out such clause before the admission of the state; and the clause in question as I well recollect, and as the printed debates will show, was not stricken out, because, after a very prolonged argument, it was not considered repugnant to the constitution of the United States, the question as to the qualification of voters in a state being decided to be a matter exclusively belonging to the states. Arkansas was admitted at the same time with Michigan, and under this view of the subject, why was not the clause in question as to slaves stricken out? For the most obvious of all reasons, because but a single senator considered it repugnant to the constitution of the United States. Such were the proceedings in the senate; and in the house, the constitution of Arkansas was submitted, and she was admitted as a state, on the 13th June, 1836, by a vote of 143 to 50, (House Journal, 1003,) several of the members from the slave-holding states voting in the negative, on the same ground as that assumed in the senate. Nor was the matter passed by in silence, for whilst this bill was pending, Mr. Adams moved to strike out from the bill, that portion of it in regard to slaves and slavery, (page 997,) but it was not seconded; and the constitution of Arkansas was confirmed and accepted with this clause included.

Here, then, in 1792, 1817, 1818, 1819, 1821, and 1836, are six states whose constitutions were expressly regarded by congress, to be conformable to the constitution of the United States, admitted at all these periods with clauses in all of them, as to the exclusion of slaves as merchandise, precisely similar to that now under consideration. One of these was the state of Mississippi, whose right thus to prohibit the introduction of slaves as merchandise, was in the act of admission and confirmation of her constitution, expressly conceded by congress.

Such has been the uninterrupted, positive, as well as negative action of congress on this subject for half a century, from the organization of the government to the present period, repudiating their own power, and admitting again and again the possession of this power by the states, and by the slave-holding states proper, as well as in the case of Illinois, where slavery existed when it became a state, and still exists, but is disappearing on the death of the slaves now living. Now, let it never be forgotten, that the case upon which our opponents rely, establishes the doctrine, that this power to regulate commerce, is not a concurrent power, but one vested exclusively in congress; and therefore, to show that the clause in question embraces an authority that can constitutionally be exercised by a state, demonstrates that congress has no power over the subject.

Having examined the action of congress on this question, let us now investigate that of the states. We have before referred to the clause in the original constitution of the state of Kentucky, authorizing the legislature to prohibit the introduction of slaves as merchandise. At the November session, 1794, the legislature of Kentucky passed a law, declaring, "That no slave or slaves shall be imported into this state as merchandise." This act inflicted a penalty of $300 for each slave so illegally imported, but did *not emancipate the slave;* and it permitted emigrants and citizens to bring in slaves for their own use. The act then was almost precisely similar to the provisions in Mississippi. 1 Lit. Laws Kentucky, 246. By the amended constitution of the state of Kentucky, adopted August 17th, 1799, the clause authorizing the legislature to prohibit the introduction of slaves as merchandise, is retained and adopted. Con. 237 By the act of Feb. 8th, 1815, 5 Lit.

Laws Ky. 293, a penalty is inflicted on the importation of slaves as merchandise, but the slave is not emancipated. The act of 12th Feb. 1833, 2d vol. Stat. of Ky. 1482, continues the restriction as to importation for sale, and introduces further restrictions with special exceptions as to emigrants, but the slave is not emancipated. During this very session of the legislature of Kentucky, in 1840 and 1841, an attempt was made to repeal this act and failed. These laws have been invariably enforced by all the judicial tribunals in Kentucky. I will refer only to a few decisions. Commonwealth v. Griffin, Oct. 7, 1832, 7 J. J. Marshall's Rep. 588; Lane v. Greathouse, Ib. 590. It was decided in these cases that either the importation or sale of slaves introduced for sale, was an indictable offence. See further, 5 Marsh. 481; 1 Bibb, 615; Barrington v. Logan, Fall Term, 1834; 2 Dana, 432.

In Virginia there are numerous laws before and since the adoption of the constitution, prohibiting the introduction of slaves from other states, except under special exception, one of which was an *oath that the owner did not introduce them for sale.* Act of 1778, preventing further importation of slaves, chap. 1, Cha. Rev. p. 80; act of 1785, chap. 77, p. 60; act of 1788, chap. 53, p. 24; act of 1789, chap. 45, p. 26; act of 1790, p. 7, chap. 11; act 17th Dec. 1792; Pleas. & Pace, 1 Rev. Code, 186, sec. 13, 1794, 1800, 1803, 1814, 1805, 1810, 1812, 1816, 1819; see 1 vol. Rev. Code Va. 421, and notes. Generally, by these laws, the slaves introduced against their provisions were declared free, and these laws have been uniformly enforced by all the courts of Virginia, by the highly respectable court for the District of Columbia, and by the Supreme Court of the United States. 1 Leigh. 172; Gil. 143; 2 Munf. 393; 2 Marsh. 467; Law of Slavery, 329; 5 Call, 425; 6 Randolph, 612; 3 Cranch, 324, and note, 326; 8 Peters, 44. The acts of Virginia of 1788, 1789, 1790, and 1792, cotemporaneous with and shortly after the adoption of the constitution, and passed by some of the very men who had either been in the convention which formed the constitution of the United States, or in that of Virginia, which ratified it, are entitled to high respect.

Tennessee, it is understood, took with her, on the separation from North Carolina, laws of that state, restricting the introduction of slaves for sale, and on the 21st October, 1812, that state passed a law prohibiting the introduction of slaves as merchandise; but permitting emigrants or citizens to bring in their own slaves for their own use. The penalty for the violation of the law was the seizure for the state of the slaves illegally introduced, and sale to the highest bidder. 2 Scott's Laws of Tennessee, 101.

In 1798, the legislature of Georgia passed a law, forbidding the importation of slaves from any other state into Georgia, except by persons removing into the state, or citizens who became owners of slaves in other states by last will or otherwise. Marbury & Crawford's Digest of Laws of Georgia, page 440; and see also, act to same effect, Dec. 1793, cited Prince's Digest Laws of Georgia, page 455. By act of 1817, Prince's Digest, 373, the importation of slaves from any state for sale in Georgia was made a high misdemeanor, and punished with imprisonment for three years in the penitentiary.

By act 3d February, 1789, S. & J. Adams' Laws of Del. p. 942, not only the importation of slaves into that state, but their exportation from Delaware to other states without license from five justices, was prohibited under a severe penalty. This act is referred to and confirmed by act June 24th, 1793, c. 22, p. 10, 94; June 14th, 1793, c. 20, and by act January 18th, 1797, L. Del. 13, 21. To forbid by a state law the exportation of slaves, if they be articles of merchandise under the commercial power, is still more clearly to violate the constitution, than to prohibit their importation; yet such laws have been passed and enforced by Delaware and many other states.

By the act of Pennsylvania, of the 29th March, 1788, and the act of 1st March, 1780, explained and amended by the last act, all negroes born after the passage of the act were to be free; but the slaves then born and living in the state were continued in slavery, and to be registered. No slaves could be introduced for sale or exported for sale, and all who were brought in, except by sojourners for six

months, and members of congress for temporary residence during the session of congress, were declared free. Purdon's Dig. 595, 597; 1 Dal. L. 838; 1 Smith, 692; 2 Dal. L. 586; 2 Smith, 443. At an early period the question of the existence of slavery in Pennsylvania was considered, and that slaves were property there, was unanimously pronounced, after the most elaborate arguments by the highest judicial tribunals of that state. In January, 1795, a suit for freedom under the operation of the general provisions of the constitution of Pennsylvania, was instituted, in the case of Negro Flora v. Greensberry. On the 15th December, 1797, a special verdict was found, and at the March term, 1798, the case was sent to the supreme court, and by them decided, that slaves were property in Pennsylvania. It was then taken to the high court of errors and appeals of that state, and after four days argument, it was announced by the court "that it was their unanimous opinion, slavery was not inconsistent with any clause in the constitution of Pennsylvania," and conformably to this opinion the entry of record is, "the court is *unanimously* of opinion, that Negro Flora is a *slave*, and that she is the *property* of defendant in error, and the judgment of the supreme court is affirmed."

Pennsylvania, we have seen, had slaves in 1780, and in 1788, and in 1790, when the laws of 1780 and 1788, were continued in force by her constitution, and she still has slaves, recognised as such in the state, and returned under the present and every preceding census, and as to these slaves, they are as much the property of their owners, and the subject of sale within the state, as the slaves of Mississippi. On this subject, we have not only the decision of their highest tribunal before quoted, but an uninterrupted series of decisions to the same effect from the earliest date down to the present period. I will now cite a decision of the circuit court of the United States for the Eastern District of Pennsylvania, at April term, 1837. Judges Hopkinson (and Baldwin of the supreme court of the United States) presiding. The case is reported in 1st Bald. Rep. p. 571. At page 589, Judge Baldwin, in delivering the opinion of the court, says: "While the abolition act put free blacks on the footing of free white men, and abolished slavery for life, as to those *thereafter born*, it did not otherwise interfere with those born before, or slaves excepted from the operation of the law; they were *then*, and *yet are*, considered as *property;* slavery yet exists in Pennsylvania, and the rights of the owners are now the same as before the abolition act; though their *number is small*, their *condition is unchanged*." Now, we have seen that Pennsylvania prohibited both the importation and exportation of slaves for sale; and her supreme tribunals, as well as the circuit court of the United States, have uniformly maintained and enforced these laws, yet upon the position assumed by our opponents, they are null and void, and slaves can be both exported from Pennsylvania for sale into other states, and introduced from other states into Pennsylvania for sale, and the sale is valid; and the purchasers may hold property in any number of slaves thus introduced and sold.

See the following decisions of the highest judicial tribunals of Pennsylvania, affirming the existence of slavery there, and the validity of the laws forbidding the exportation of slaves for sale in Pennsylvania, and their importation from other states into Pennsylvania for sale. 4 S. & R. 218, 425; 4 Yates, 115, 109, 240; 1 Dal. 167, 475, 469; 2 Yates, 234, 449; Addison, 284; 7 S. & R. 286, 378; 3 S. & R. 4, 5, 6, 396; 6 Bin. 213, 204, 297; 1 Wash. C. C. R. 499; 1 Bro. 113; 5 S. & R. 62, 333; 2 S. & R. 305; 1 Yates, 365, 388, 235, 220, 480; 4 Bin. 186; 1 S. & R. 23; 3 Bin. 301, 2 Dal. 224, 227; 4 Dal. 258, 260; 4 Wash. C. C. R. 396; 1 Watts, 155.

I will call attention but to one of these cases decided in 1806, by the circuit court of the United States for the Pennsylvania district, by Judge Peters, of the district court, and Judge Washington, one of the Judges of the supreme court of the United States, both experienced and eminent jurists, and both familiar with the proceedings of the convention which formed the constitution of the United States, and both distinguished cotemporaries with, and associates of its framers. This was the case of a suit for freedom by a slave imported from South Carolina into Pennsylvania in 1794, contrary to the prohibitory act of that state. The

facts were embraced in a special verdict, and time taken for the court to deliberate, when the decision was pronounced by Judge Washington, as follows: "To dispose at once of an objection to the validity of this law, which was slightly glanced at, I observe, that the 9th section of the 1st article of the constitution of the United States, which restrains congress from prohibiting the importation of slaves prior to the year 1808, does not, in its words or meaning, apply to the state governments. Neither does the 2d section of the 4th article; which declares, that 'no person, held to labour or service in one state under the laws thereof, escaping into another, shall, in consequence of any law therein, be discharged from such service;' extend to the case of a slave *voluntarily carried* by his master into another state, and there leaving him under the protection of some law declaring him free. The exercise of this right, of *restraining the importation of slaves from the other states*, under different limitations, is not peculiar to Pennsylvania. Laws of this nature, but less rigid, exist in most of the states where slavery is tolerated." 1 Wash. C. C. R. 560, 561. Although the constitutional objection to the prohibitory law of Pennsylvania was but slightly glanced at in the *argument*, it seems to have been maturely considered by the court, and the very question decided, that the law was constitutional, and that the clause in the constitution of the United States, restraining congress until 1808 from prohibiting the introduction of slaves, "does not in its words or meaning *apply to the state governments*;" when we recollect that this was the case of a slave imported from one state into another, the importance of the above decision becomes obvious, and especially as the court recognises in the same decision the constitutionality of the laws of other states, and of the *states where slavery is tolerated*, restraining the importation of slaves from other states; and this very case, and the doctrine contained in it, were solemnly reaffirmed by the same court, in the case ex parte Simmons, 4 Wash. C. C. R. 396, and applied to the case of a slave introduced from South Carolina into Pennsylvania *in the year* 1822.

In Maryland, by acts of 1796, variously modified in 1797, 1798, 1802, 1804, 1805, 1806, 1807, 1809, 1812, 1819, 1820, 1821, 1822, 1823, 1824, 1828, 1831, 1832, 1833, 1834, 1836, 1837, (see 1 Dorsey's Laws of Maryland, page 334, &c.) the importation of slaves for sale into Maryland was prohibited; and in most of the laws, the slaves so imported were declared free, and importation, except by emigrants, though not for sale, was generally prohibited. These laws have been invariably enforced by repeated decisions of the judicial tribunals of that state, as well as of the adjacent states, and by *the Supreme Court of the United States*. 5 Har. & John. 86, 99, 107, and note; Law of Slavery, 381, 382, 388, 389; 5 Rand. 126; 4 Har. & M'Hen. 418; 4 Har. & John. 282; 3 Har. & John. 564; 6 Cranch, 1; 1 Wheaton, 1; 8 Peters, 44.

In New York, slavery existed to the same extent, as regards the rights of the master, as in most of the slave-holding states proper, until very recently. By the colony laws of New York, prior to the revolution, slavery was as firmly established in that state as in any of the Southern states, and the importation of slaves into New York *encouraged by law*. See acts of 1730 and 1740, et al.; 1 Colony Laws, 72, 193, 199, 283, 284.

The act of 2[illegible]th March, 1781, c. 32, 56, recognised slavery as in full force in New York, as [illegible]so did the act of 1st May, 1786, c. 58, sec. 29, 30. The act of the 22d of F[illegible]ary, 1788, c. 40, enacted cotemporaneously with the adoption of the constitu[illegible] of the United States, recognised and continued the existence of slavery in New York, but prohibited the importation of slaves *for sale*, and the act was continued by subsequent laws. 1 Revised Stats. 656; K. & R. 1; R. L. 614, cited 14 John. 269.

By the act of 4th July, 1799, c. 62, slaves born in the state after that date were declared free at 28 years of age, but all others were continued as slaves. By act 30th March, 1810, the importation of slaves, except by the owner for nine months residence, was prohibited; and most of the former laws were incorporated into the act of 9th April, 1813; and finally, on the 4th of July, 1827, slavery was in fact abolished; except, perhaps, as to the very few slaves born before 4th July, 1799, and subsequently lawfully introduced as slaves.

By the official census by the United States, of the population of New York, the following slaves were returned from that state. In 1790, 21,324 slaves; in 1800, 20,613 slaves; in 1810, 15,017 slaves; in 1820, 10,088 slaves; in 1830, 76 slaves; in 1840, 3 slaves. Let it be remembered also, that, by the constitution of New York, the statutes of that state, enacted by the legislature, received the sanction of a council of revision before they became laws, which council consisted of the governor, the chancellor, and judges of the supreme court. Con. 181. These laws, forbidding the importation of slaves for sale, received a judicial sanction before their enactment; and let it be remembered, that many of them passed with the sanction of many of the distinguished statesmen of New York, who had participated either in the convention which formed, or which ratified the constitution of the United States. Whilst, by the act of 1788, and other laws of a subsequent date, slaves subsequently imported into the state could not be sold by the *master* or *owner;* yet, *even these slaves* were property in all other respects; they were assets for the payment of debts; they could be sold by a trustee or assignee of an insolvent; by an administrator or executor, or by a sheriff under an execution; and all *other slaves* were subject to sale by their owners as all other property. 2 John. Cases, 79, 488, 89; 11 John. 68, 415; 17 John. 296; 3 Caines, 325; 8 John. 41; 14 John. 263, 324; 9 John. 67; 15 John. 283; 19 John. 53. The first case, in which the law was settled under these statutes in New York, was decided in 1800, and will be found reported in 2 John. Cases, 79, 488.

In 1794, A. the owner of a slave in New Jersey, removed to New York with the slave, and put the slave to service with B. until they or their executors should annul their agreement. Held, that a sale of the slave was prohibited by act of February, 1788; but that a sale of the slave by executors, trustees, assignees, &c. would be valid. Chancellor Kent declared, "The act (of 1788) was hostile to the *importation* and to the *exportation* of slaves, as *an article of trade*, not to the *existence of slavery itself;* for it takes care to re-enact and establish the maxim of the civil law, that the children of every female slave shall follow the state and condition of their mother." And he adds, that "sales made in the ordinary course of the law, and which are free from any kind of collusion, are not within the provisions of the act." "By considering the sale mentioned in the act, as confined to a voluntary disposition of the slave for a valuable consideration, by the owner himself, we are enabled effectually to reach the mischief in view, *the importation of slaves for gain*, and we take away every such motive to import them."

In the same case, Beeson, Justice, says: "By the law of this state slavery may exist within it. *One person can have property in another*, and the slave is part of the *goods of the master*, and may be *sold*, or otherwise aliened by him; or remaining unaliened, is on his death *transmissable to his executors;* but, by the act under consideration, a slave imported, or brought in, is not to be sold," &c.—as to all other slaves in New York, the court decide:

1st. That they may be sold by the owner as other property, but as to imported slaves, that they cannot be sold by the owner; but 1st, that he may give them away, and the title of the donor be valid.

2d. That their issue may be sold even by the owner who imported their mother.

3d. That the imported slaves are liable to sale by sheriffs, assignees, trustees, executors or administrators, as all other property.

In these opinions the court was unanimous, and the case is in point in every particular, and was subsequently recognised in all succeeding cases.

The same court, in 2 John. Cases, 89, held, that as to a slave imported in 1795, from New Jersey to New York, the sale was void, under the act of 1788; and this case also was affirmed in 1802, and the principle of the two cases, and especially of the former, was expressly recognised by the supreme court of New York in 1820; and that a *note given* for the purchase of a slave so imported and sold, was void 17 John. 295.

In 1803 the supreme court of New York enforced the act of 1788 as well as of 1801, rendering void the sale of imported slaves. 3 Caine's Rep. 325. Now, slaves already in the state of New York, stood on the same footing as slaves in

Mississippi, and it was only as to slaves imported into either state, after a certain date, that the sale is sought to be invalidated; and if the law is void in Mississippi, under the argument of our opponents, it must have been equally void in New York, during all this period, notwithstanding these repeated decisions to the contrary of the courts of that state, upholding the rights of property and of sale of all the slaves in New York, upholding the right of property and the sale for debts, or in course of distribution even of these imported slaves, but rendering void *the sale by the importer.*

By the law of North Carolina, of 1794, Haywood's Man. 533, 4, c. 2, the introduction of slaves *after the 1st of May next*, for sale or hire, was prohibited, and an oath was required that the slaves were not introduced for traffic, with an exception in favour of emigrants bringing in their own slaves for their own use, and an exception in favour of travellers. The penalty was one hundred pounds for each slave so illegally introduced. Upon the general revisal of the laws of this state, at the September session, 1836–7, the importation of slaves from certain states was altogether interdicted. 1 Turner & Hughes' Dig. 571 to 574.

The acts of South Carolina, of 1800 and of 1801, prohibited the importation into that state of slaves from any place "without the limits of this state," under penalty of $100 for each slave so illegally imported, and forfeiture of the negro to be sold by the state. The act of 1802, excepts from former act, persons bringing into or through the state any slaves, on taking oath that they were not intended for sale; and if imported contrary to the law, they were declared free.

By the act of Missouri, of 19th March, 1835, digesting former laws, various restrictions were imposed on the introduction of slaves, and nearly similar provisions were adopted by Arkansas on the 24th of February, 1838. Rev. Stat. Missouri, 581, Ib. Arkansas, 730. In Missouri, the validity of laws restricting or totally prohibiting the importation of slaves has been repeatedly affirmed by the supreme court of that state, 1 Missouri Rep. 472, 2 Ib. 214, 3 Ib. 270; and several of these decisions recognise and enforce the provision, before quoted, of the constitution of Illinois, prohibiting the introduction of slaves into that state.

By territorial laws, before referred to, adopted in 1808, restrictions were imposed in the territory embracing the present states of Mississippi and Alabama, on the introduction of slaves as merchandise. By the constitutions of each of these states, adopted in 1817 and 1819, full power is given to the legislatures to prohibit this traffic. By the amended constitution of Mississippi of 1832, this traffic was entirely prohibited, and by the act of 13th of May, 1837, such importation for sale into that state, is declared a high misdemeanor, punishable with imprisonment, with a fine of $500 for each slave so introduced, and the nullity of the contract of sale, and forfeiture of the purchase money.

In Louisiana, by the acts of 1826; of the 19th of November, 1831; 2d of April, 1832; before referred to, the introduction of slaves into that state for sale, was prohibited under severe penalties, and the slaves so illegally introduced declared free.

By the act of Rhode Island, of 1784, subsequently continued and still in force, so far as shown by their most recent digests, the importation of slaves into the state was forbidden, with the exception of domestic slaves of "citizens of other states travelling through the state or coming to reside therein," and the slaves illegally imported declared free. The slaves then in the state, or imported under the above exceptions, were *continued as slaves*, but their children born after the date of the law became free. Laws of Rhode Island, page 451.

By the laws of Connecticut, of 1774 and of 1784, since three times re-enacted, and revised and continued in 1797 and 1821, slavery was continued as to the slaves already in the state, but all born after the 1st of March, 1784, were declared free. See Stat. 428, 440; 1 Swif. Sys. 220; 12 Con. Reps. 45, 59, 60, 64. These laws declared "that no Indian, negro, or mulatto slave shall at any time hereafter be brought or imported into this state, by sea or land, from any place or places whatsoever, to be disposed of, left or sold within the state."

In the case of a slave brought from Georgia to Connecticut, in 1835, and left there for temporary purposes, as was contended, such slave was declared free, one judge only dissenting, and he upon the sole ground that the slave was not *left*

within the meaning of the act of 1784. In this case, reported in 12 Conn. 38 to 67, and decided in 1837, it was held, first, that slavery did exist in Connecticut as to the slaves introduced prior to a certain date; that these slaves "still continued to be held *as property*, subject to the control of their *masters;* and that numbers of them still continue so to be held, as proved by the last census of the state." 2d. The doctrine of 8 Conn. 393, was affirmed, in which it was declared that a certain negro in Connecticut "was the *slave* and *personal property*" of his master in Connecticut. 3d. That "there is nothing in the constitution of the United States" forbidding any state from preventing slaves being *voluntarily* brought within their limits. 4th. That slavery is local, and *must be governed entirely* by the laws of the state in which it is attempted to be enforced. 5th. That the law of Connecticut, and of any other state preventing the importation of slaves from any other state for sale, are valid. 6th. That a state, retaining in servitude the slaves within its limits, may legislate "to prevent the increase of slavery by importation." This case was very elaborately argued, and the opinion prepared with great care and ability; and upon these points, evolved by me from the decision, the court was unanimous. The case is precisely in point on the principles decided; and if slaves can be imported, for sale, into Mississippi, they can be imported, for sale, into Connecticut; for the slaves already in the latter are just as much "the property of their masters" as in the former. See also similar decisions in Connecticut on most of these points. 2 Root. 335, 517; 2 Conn. 355; 3 Conn. 467; 8 Conn. 393.

By the act of New Jersey of 14th March, 1798, Elmer's Digest, 520, slaves already within the state, it is expressly enacted, *shall remain slaves for life;* and their sale by their owners is permitted, except collusive sales of decrepit slaves. The importation of slaves, for sale, is prohibited under a pecuniary penalty, but certain persons are permitted to bring in certain slaves for their own use. By the act of 27th of February, 1820, Elmer, 525, slaves born after 4th of July, 1804, are declared free; the males at 25, and the females at 21 years of age. The importation of slaves into the state for sale, or exportation for sale, is forbidden, and also generally, with some exceptions; and the slave unlawfully imported or exported is declared free. The law of New Jersey, of 1798, differs in no respect from the present provision in Mississippi, and these laws have been universally recognised in New Jersey. See 2 Halsted, 253; 3 Hal. 219, 275; 1 Penning. 10; 4 Hal. 167; 1 Hal. 374.

In Indiana, no slave can be imported under their laws. 1 Blackford's Indiana Reports, 60; 3 American Jurist, 404. Nor in Ohio, Maine, Massachusetts, New Hampshire, or Vermont, under their constitutions. See Book of Cons. pages 273, 19, 38, 62, 81. See Com. v. Aves, 19 Pick.; 4 Mass. 123, 128, 129; 2 Tyler, 192.

When the constitution of the Union was formed, all the states were slave-holding states, except Massachusetts; and by the doctrine of our opponents, none of them but that state could have prohibited the introduction of slaves, for sale, and yet they all exercised the power. That there may be no mistake on the subject, I refer the court to Senate Document, 505, containing the census of each state, compiled by the department of state, under the resolution of congress of February 26th, 1833 (and the supplement returned this year), showing the number of slaves in those states generally denominated free states.

	1790.	1800.	1810.	1820.	1830.	1840.
New Hampshire,	158	8				
Rhode Island,	952	381	108	48	17	5
Connecticut,	2,759	951	310	97	25	54
Vermont,	17					
New York,	21,324	20,343	15,017	10,088	75	3
New Jersey,	11,423	12,422	10,851	7,557	2,254	658
Pennsylvania,	3,737	1,706	795	211	403	31
Delaware,	8,887	6,153	4,177	4,509	3,292	2,613
Illinois,			168	917	747	184

And yet all these nine states, now denominated free states, did, so far as they existed in 1790, hold slaves, and acknowledge property in slaves, and the sale of slaves within their limits was valid; and according to the argument of our opponents, all their laws, prohibiting the importation of slaves for sale, then were, and still are, unconstitutional; and slaves always could, and now can be, lawfully imported and sold, and held as slaves there: for the doctrine is, that so long as a single slave is held as such in any state, any number of slaves may be imported into and sold and held as slaves within its limits, the alternative being between total, immediate, and absolute emancipation of all slaves on the one hand, and the perpetuity of the slave trade on the other.

But the acts of 1792, of Virginia, and of 1796, as well as previous laws of Maryland, prohibiting in effect the introduction of slaves from other states for sale, have been repeatedly and unanimously recognised as valid, and enforced by the supreme court of the United States, and also by the highly respectable court for the District of Columbia.

By act of congress, the laws *in force* in Virginia and Maryland, at the date of the cession by those states of their respective portions of the District of Columbia, were *continued* in force after the cession, meaning thereby of course, only such laws of those states as were not repugnant to the constitution of the United States, for such laws only could have been previously in force in those states, and such laws only could have been *continued* in force in the District. These laws then under the declaratory act of congress, as has been universally conceded, continued in force by virtue of their previous operations over those parts of the District formerly included in the ceding states, and not by virtue of any act of congress re-enacting their provisions; and here let it be remarked, that even as to those laws of any state adopted prior to the constitution of the United States, but which were repugnant to powers granted exclusively to congress by that instrument, it is an admitted principle, that all such laws became null and void, after the adoption of the constitution, and all subsequent decisions enforcing any laws of a state even prior to 1788, forbidding the introduction of slaves for sale, proclaim the consistency of those laws with the constitution of the United States, as fully as though they had been subsequently enacted.

In 1802, a claimant of a slave, without the consent of the true owner, brought him from Maryland into Alexandria, in the District of Columbia, (formerly Virginia,) where he remained more than a year, and the circuit court for the District of Columbia decided, that being a slave imported contrary to the law of Virginia, of 1792, manumitting slaves imported from any other state, and held twelve months in that state, unless upon oath made within a certain time that the importer did not bring them in "with an intention of selling them"—and this oath not having been taken by the *claimant* who introduced the slave, he was free. Scott v. Negro London, 3 Cranch, 326. The decision was reversed by this court, *upon the ground*, that although the prescribed oath was not made in due time by the *claimant*, who introduced the slave as his, yet such oath having been made within the proper time by the *owner*, that on that ground the slave was not free; but the validity of the Virginia law was fully recognised. 3 Cranch, 324.

In 6 Cranch, 1, this court also admitted the validity of the law of Maryland, of 1783, prohibiting the introduction of slaves into that state.

In 1 Wheaton, 1, this court again unanimously admitted the validity of the Maryland act of 1796, before quoted, prohibiting the importation of slaves for *sale*, or also to reside, except as to emigrants. The court expressly declare that, that "act of the state of Maryland," "*is in force* in the county of Washington (District of Columbia)."

In 8 Peters, 44, Lee v. Lee, the case is thus stated by the reporter, and the *unanimous* decision of this court, as pronounced by Justice Thompson, is also given. "The plaintiffs in error filed a petition for freedom in the circuit court of the United States for the county of Washington, and they proved that they were born in the state of Virginia, as slaves of Richard B. Lee, now deceased, who moved with his family into the county of Washington, in the District of Columbia, about the year 1816, leaving the petitioners residing in Virginia as his slaves,

until the year 1820, when the petitioner Barbara, was removed to the county of Alexandria, in the District of Columbia, where she was hired to Mrs. Muir, and continued with her thus hired for the period of one year. That the petitioner Sam, was in like manner removed to the county of Alexandria, and was hired to General Walter Jones, for a period of about five or six months. That after the expiration of the said periods of hiring, the petitioners were removed to the said county of Washington, where they continued to reside as the slaves of the said Richard B. Lee, until his death, and since as the slaves of his widow, the defendant." The court said:

"By the Maryland law of 1796, it is declared, that it shall not be lawful to import or bring into this state by land or water, any negro, mulatto, or other slave for sale, or to reside within this state. And any person brought into this state as a slave, contrary to this act, if a slave before, shall thereupon cease to be the property of the person so importing, and shall be free."

"And by the act of congress of the 27th of February, 1801, it is provided, that the laws of the state of Maryland, as they then existed, should be, and *continue in force* in that part of the district, which was ceded by that state to the United States."

"The Maryland law of 1796, is, therefore, *in force in the county of Washington*, and the petitioners, if brought directly from the state of Virginia into the county of Washington, would, under the provisions of that law, be entitled to their freedom."

Here, the law of Maryland, of 1796, prohibiting the introduction of slaves from other states into that state, was *enforced* by the unanimous opinion of the Supreme Court of the United States. This is not an extra-judicial opinion, but a decision directly in point, *enforcing* a law of Maryland, which involved this very question now to be decided by this court. And, here let me observe, that if it is lawful and must be permitted under the commercial power to introduce slaves from one state into another for sale, it cannot be lawful in any state to emancipate them as a consequence of such introduction, any more than to forbid the sale. And here let it be remarked, that, our opponents concede that each state may emancipate all the slaves within their limits by a state law, where there is no opposing provision of the state constitution, and where there is, then by an amendment of her state constitution, to be adopted by the state. Each state may dissolve at pleasure, or establish the relation of master and slave within her limits, and that congress can neither dissolve nor establish that relation in a state. But to add to the number of slaves in a state against her will by the authority of congress, is so far to establish and extend the relation of master and slave within her limits by the authority of congress. But, by the concession of our opponents, a state may emancipate all the slaves within her limits, by declaring them not to be property within her limits, and then this commercial power they say will not extend to that state. As, however, a state cannot do this as to goods and merchandise, by declaring them not to be property within her limits, so as to exempt them when imported from the operation of the commercial power, this very distinction shows, that goods and merchandise are, and slaves are not within the operation of the commercial power. But this admission of our opponents, that a state may emancipate all or any portion of the slaves within her limits, concedes, as it seems to me, the whole case, for if the state may emancipate, must she not have the power, *the moment the slaves are brought within her limits;* for they are then within her territory and jurisdiction, and subject to her exclusive power; and if a state may not thus emancipate as soon as the slaves are landed, must she wait for days or years, or who is to prescribe the time when the state laws shall begin to operate, or the number of slaves that shall be embraced within the provision, whether it shall include the anti nati or post nati, or extend only to those that may be hereafter introduced, or include also all those already in a state; and no one will deny, that if to emancipate slaves introduced for sale be not forbidden by the commercial power, it cannot be forbidden by that power to declare the sale unlawful.

We have seen in the course of this argument, that ten of the twelve states which framed the constitution, have passed laws, many of them cotemporaneous with the

formation of the constitution or almost immediately after, prohibiting the introduction from other states, of slaves for sale, and have enforced these laws. That similar provisions have been made in effect by all the states in their laws or constitutions, and that these provisions have all been enforced, that the supreme judicial tribunal of every state (where the question has been made,) have again and again, during a period of more than fifty years, declared these laws to be valid; and that the supreme court of the United States have, again and again, unanimously recognised their constitutionality, *and carried them into execution*; that at least six of the new states have affirmed in their constitutions the power to pass those laws, and that congress (sometimes by an unanimous vote) have on all these occasions, commencing in 1792, and terminating in 1836, conceded that these constitutions affirming this power, were "not repugnant to the constitution of the United States."

Does not all this settled action of all the departments of the governments of the states, and of the United States fix the construction of the constitution in this respect, and leave it no longer an open question for the investigation of this court. This court have declared that "a cotemporary exposition of the constitution practised and acquiesced under for a period of years, fixes the construction, and *the courts* will not shake or control it." 1 Cranch 299. And now, will this court, by a single decree, overthrow the law as settled for more than fifty years, by all the departments of the governments of the states, and of the Union? If so, it must sacrifice at once a hecatomb of acts and decisions, and change the structure of the government itself. It would be a judicial revolution, more sudden and overwhelming in its effects, than the last great revolutions in France and England, which were little more than changes of dynasty. I have called it a revolution, not a usurpation; but the most daring usurper never effected so sudden and extensive a change in the civil and political rights, and settled internal policy of a nation. These have been generally spared by conquerors and usurpers, or if not spared, they were not subverted by a single decree, to be at once proclaimed and executed. But here, the moment this decree shall be recorded, the revolution will have commenced and terminated, and this court will reassemble among the fragments of laws subverted, and decisions overthrown. The constitutions of six of the states; the laws of all upon this subject, and a series of uninterrupted judicial decisions for more than half a century, will be at once obliterated. With them will fall the acts of congress upon this question, from the admission of the first, to the last of the new states, and many confirmatory decisions of this tribunal. This decree affects the past, the present, and the future. Reaching back to 1788, it annuls all the state laws forbidding the introduction of slaves, and reinslaves all, and the descendants of all that were liberated by those statutes. And all this is to be effected by a single decree, no time allowed to prepare for the mighty change, but it is to be the work of an instant.

So much for the past and present, and now for that dark and gloomy future, when this court, having annulled all the state laws on this subject, shall announce that it is a question over which the power of congress is supreme and exclusive. Could the Union stand the mighty shock, and if it fell, shall we look upon the victims of anarchy and civil war, resting wearied for the night from the work of death and desolation, to renew in the morning the dreadful conflict? Throwing our eyes across the Atlantic, shall we behold the consequences, when the overthrow of this Union, this second fall of mankind, shall be there promulgated? Shall we there see those daring men, now pleading the cause of self-government around the thrones of monarchs, sink despairing from the conflict, amid the shouts of tyrants exulting over the prostrate liberties of man. And who can expect such a decree from this tribunal? No, this court will now prove, that however passion or prejudice may sway for a time any other department of this government, here the rights of every section of this Union are secure. And when, as I doubt not, all shall now be informed, that over the subject of slavery, congress possesses no jurisdiction; the power of agitators will expire, and this decree will be regarded as a re-signing and re-sealing of the constitution.