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# The Kansas Mortgage Cases

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THE KANSAS MORTGAGE CASES.

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How Far Can a State Legislature Affect Prior Contracts  
by an Alteration of the Remedy Provided?

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Thesis Submitted in Competition for the Law School Prize

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By Alexander Otis.

Cornell University, 1897.

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## THE KANSAS MORTGAGE CASES.

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The most important case recently decided by the Supreme Court of the United States, excepting perhaps the matter of the income tax, is that of Beverly against Barnitz, 163 U. S. 118, reversing the decision of the Supreme Court of Kansas, reported in 55 Kansas 478. Under the pretense of regulating and altering the proceedings by which mortgages were foreclosed, the Kansas legislature so embarrassed mortgagees by adverse legislation that the value of their securities was seriously diminished.

In the early days of our constitutional history the legislature was declared to have the power to affect contracts by changing the remedy upon them. The obligation of the contract and the remedy were held to be distinct. But although this supposed distinction has played its part in the litigation of three quarters of a century, it has not been the main issue in an important case for over fifty years.

The Supreme Court of Kansas, in an opinion by Judge Martin, defended its views with singular ability; and the Supreme Court of the United States, while it reversed the decision of the court below, did not attempt to meet many of

the arguments presented, nor absolutely to close the door against a revival of the discussion in future litigation. Many jurists are of the opinion that the doctrine of the Kansas court is far from being unsound.

These considerations have induced the writer to attempt a thorough investigation of the problem: "How far may a state affect the rights of contracting parties by an alteration of the remedy existing at the date of the contract?"

As a result of this inquiry an attempt will be made to establish the proposition that the substantial rights of the creditor cannot be lessened by such legislation. In conclusion an effort will be made to solve the further problem presented by the case of Beverly against Barnitz: "Is a mortgage contract so merged in the decree of foreclosure and sale that the rights of purchasers thereunder may be affected by adverse legislation without impairing the mortgage contract?"

## LEGISLATIVE POWER OVER CONTRACTS.

The interpreters of the Constitution discovered at an early day that a literal application of the prohibition upon laws impairing the obligation of contracts would in many ways deprive the states of sovereign powers essential to the existence of any government. It was evident that the framers of the Constitution could not have intended such a result. Justice Marshall and his compeers soon came to recognize five distinct cases in which state laws might affect contracts. These have been classified by writers on constitutional law as follows:

- 1 By the exercise of the Police Power.
- 2 By the exercise of the Taxing Power.
- 3 By the Power of Eminent Domain.
- 4 By laws curing defects in contracts.
- 5 By laws affecting the remedy upon contracts.

Under the Police Power immoral contracts may be nullified and all remedy denied; under the Taxing Power the value of various classes of choses in action may be seriously diminished; under the Power of Eminent Domain corporate franchises may be condemned,--West River Bridge Company against Dix, 6 Howard 567; and under the power to cure defects invalid contracts may be made enforcible by subse-

quent legislation.

We think it can be shown that many instances of the supposed exercise of an authority to alter the remedy to the detriment of creditors are properly attributable to the exercise of one of the other legislative powers above enumerated.

## HISTORY OF THE CONSTITUTIONAL PROVISION.

Curiously enough the problem before us was foreshadowed in the first reported discussion of this clause in the Constitution. By referring to "Debates on the Adoption of the Federal Constitution, as Reported by James Madison", Elliott's Debates, Vol. V, at page 485, will be found the following:

Mr. King moved to add in the words used in the ordinance of Congress establishing new states, a prohibition upon the states to interfere in private contracts.

Gouverneur Morris: "This would be going too far. There are a thousand laws relating to bringing actions, limitation of actions, etc., which affect contracts. The judicial power of the United States will be a protection within their jurisdiction and within the state itself a majority must rule, whatever be the mischief done among themselves. # # #

Mr. Madison admitted that inconveniences might arise from such a prohibition but thought on the whole it would be overbalanced by the utility of it. He conceived, however, that a negative upon state laws could alone secure the effect. Evasions might be devised by the ingenuity of state legislatures.

Col. Mason: "This is carrying the restraint too far.

Cases will happen that cannot be foreseen, where some kind of interference will be proper and essential." He mentioned the cases of limiting actions on an open account--that of bonds after a certain lapse of time, asking whether it was proper to tie the hands of the states from making provisions in such cases.

Mr. Wilson: "The answer to these objections is that retrospective interferences only are to be prohibited."

Mr. Madison: "Is that not already done by the prohibition of ex post facto laws which will oblige the judges to declare such interferences null and void?"

It will be noted incidentally that ex post facto laws were regarded by Madison as covering civil as well as criminal matters. The restricted meaning placed upon the phrase by the Supreme Court was frankly admitted to be erroneous by Justice Washington--Ogden against Sanders, 12 Wheaton at page 286, citing Shep. Touch. 68, 70, 73, but it was too late to change.

In the debates which preceded the adoption of the Constitution, the contract clause seems to have provoked but little discussion compared with its importance. It is strongly defended in an able paper in the "Federalist", ascribed to Madison; but the article contains nothing pertinent to the present discussion.

In the case of Fletcher against Peck, 6 Cranch 87, when the constitutional inhibition was first enforced against a state government, Justice Johnson suggested some of the features of our problem in his dissenting opinion. "The states and the United States," said he, "are continually legislating on the subject of contracts, prescribing the mode of authentication, the time within which suits shall be prosecuted for them, in many cases affecting existing contracts by the laws which they pass and declaring them to have or lose their effect for want of compliance in the parties with such statutory provisions. Yet where to draw the line or how to define or limit the words, "obligation of contracts", will be found a subject of extreme difficulty."

Justice Johnson goes on to illustrate his position further by claiming that the interpretation undertaken by the court would deprive the state of the power of eminent domain, something which, of course, the majority of the court had no notion of doing. See on this point, Garrison against the City of New York, 21 Wallace 196, where it is held that: "In the proceeding to condemn property for public use there is nothing in the nature of a contract."

THE RIGHT AND THE REMEDY DISTINGUISHED.

The difficulties suggested by the constitutional delegates and by Justice Johnson first came before the court in the case of *Sturges against Crowninshield*, 4 Wheaton 122, and *Ogden against Sanders*, 12 Wheaton 213. They arose under the state bankrupt acts and settled the law in regard to the power of the states to pass such statutes in the absence of a national bankrupt act. It was in these cases that an attempt was first made to draw a distinction between the obligation of a contract and the remedy upon it. In the former case Justice Marshall said: "The distinction between the obligation of the contract and the remedy given by the legislature to enforce that obligation has been taken at the bar and exists in the nature of things. Without impairing the obligation of the contract the remedy certainly may be modified as the wisdom of the nation may direct. Confinement of the debtor may be a punishment for not performing his contract or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment or may withhold this means and leave the contract in full force. Imprisonment for debt is no part of the contract and simply to release the prisoner does not release its obligation. # # # # # By way of analogy the statutes of

limitations and against usury have been referred to in argument and it has been supposed that the construction of the Constitution which this opinion maintains would apply to them also and therefore must be too extensive to be correct.

They rather establish that certain circumstances shall amount to evidence that the contract has been performed than dispense with its performance."

Justice Marshall went somewhat further in the case of *Ogden* against *Sanders*, *supra*. "In prescribing the evidence which shall be received in its courts," said he, "and the effects of that evidence, the state is exercising its acknowledged powers. It is likewise in the exercise of its legitimate powers when it regulates the remedy and mode of procedure in its courts." He goes on to declare that a state may abolish all courts, "if it be crazy enough to do so", and continues: "If it leaves the obligation untouched but withholds the remedy, or affords one that is merely nominal, it is like all other cases of misgovernment and leaves the debtor still liable to his creditor should he be found, or should his property be found, where the law affords a remedy."

It has often been remarked that Marshall never cited authorities; but it does not follow that he never consulted them. In introducing the dissertation above outlined he

says: "Law has been defined by a writer whose definitions especially have been a theme of almost universal panegyric, to be 'a rule of civil conduct prescribed by the supreme power of a state.' " The definition quoted is found in Blackstone, Vol. I, page 52. On the very next page occurs a passage which Marshall, to a moral certainty, had read and had in mind, when he wrote the above. The great English commentator divides all laws into three parts, declaratory, directory and remedial; and of the last division, on page 55 he says: "The remedial part of a law is so necessary a consequence of the former two that laws must be very vague and uncertain without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of securing or asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law."

It is interesting for once to be able to trace Justice Marshall's thought to its fountain head; and though the distinction he attempted to draw between the obligation of a contract and the remedy upon it has seriously embarrassed his successors, he doubtless would have been the last man to follow his theory to its logical conclusion. The remedy for a breach of contract is just as essential to the obligation of that contract as is the remedial part of a law to

its binding force. Any contract might be rendered nugatory by taking the remedy thereon away or, as Justice Marshall suggests, making it "merely nominal". It is urged, though with diffidence, that Justice Marshall said more than he intended and fell into error. He attempted to explain certain powers of the legislature over contracts on the theory he advanced. It is believed that they are all explainable on other and less dangerous grounds. We will therefore proceed to examine each instance in which the legislature has been said to have exercised a power to impair contracts by altering the remedy, with view to determine whether such a result has, in fact, been accomplished.

## STATUTES OF LIMITATION.

When Justice Marshall drew his distinction between the obligation of a contract and the remedy upon it, a statute of limitations was regarded by the courts as a mere rule of evidence, a rebuttable presumption, a defense to be regarded as more or less dishonorable. Lord Mansfield held the slightest acknowledgment sufficient to take the case out of the statute. He gives these illustrations of words that are sufficient: "as saying, 'Prove your debt and I will pay you; I am ready to account, but nothing is due you;' and much slighter acknowledgments than these will take the case out of the statute."

This was the state of the law when a statute of limitations, applied to prior contracts, was conceded to be constitutional. Since then there has been a marked change in the construction of such laws by the courts and such enactments came to be regarded as "statutes of repose." III Parsons on Contracts, page 63; Edwards against Kearsey, 96 U. S. 595. Some of the state courts have recently gone a step further and held that a statute of limitations, to all intents and purposes, pays the debt. Board of Education against Blodgett, 155 Ill. 441. Thus from a mere rule of evidence a statute of limitations has come to be a part of the substantive law.

It is of an anomalous character; and is rather to be regarded as an exception to a general rule than as an illustration of the opposite rule.

But the operation of such a statute upon prior contracts is confined by the courts within very narrow limits, as will be seen from an examination of a few leading cases.

In Terry against Anderson, 95 U. S. 634, an act of the Georgia legislature, requiring <sup>that</sup> all claims accruing before the close of the war, should be sued upon within nine months from the date of the act, or be forever barred, was held constitutional. Justice Waite said in his opinion: "The business interests of the entire people of the state had been overwhelmed by a calamity common to all. Society demanded that an extraordinary effort be made to get rid of old embarrassments and permit a reorganization upon the new order of things. This clearly presented a case for legislative interference within the just influence of constitutional limitations. For this purpose the obligation of old contracts could not be impaired but their prompt enforcement could be insisted upon or their abandonment claimed."

In Mitchell against Clark, 110 U. S. 643, the court said: "It has been repeatedly held that a statute of limitation which reduces materially the time within which suit may be commenced, though passed after the contract was made, is not

void if a reasonable time is left for the enforcement of the contract by suit before the statute bars that right."

In *Sohn* against *Waterson*, 17 Wallace 596, and *Koshkong* against *Boston*, 104 U. S. 695, statutes shortening the time within which actions were to be brought on prior contracts were upheld as reasonable.

But when the legislature of Virginia, as one of its series of many efforts to avoid the receipt of coupons on the state bonds in payment of taxes, declared that all outstanding coupons must be presented in this way within a year or be barred; and it appeared that the bonds were held in all parts of the union; and that the purpose of the legislature was to impair a substantial right of creditors, and not merely to make them exercise due diligence in the prosecution of their remedies; the Supreme court was prompt to declare the limitation unreasonable and therefore unconstitutional. In *re Brown*, 135 U. S. 701.

It is believed that the above cases clearly demonstrate that a statute of limitations cannot be permitted to deprive creditors of any substantial right under their contracts; and that as soon as such rights are impaired, the statute immediately becomes unconstitutional. It is also urged that the fact that such a statute may be retroactive at all is to be explained upon historical grounds. In any event, the utmost that a legislature can do is to insist that existing

rights be speedily enforced. It must be confessed that the court seems to have reserved to itself a wide discretion and has shown a disposition at times to test the constitutionality of legislation by the purpose for which it appeared to be passed.

## BANKRUPT LAWS.

The limits of the power of the states to pass bankrupt laws were defined in the cases of *Sturges against Crowninshield* and *Ogden against Sanders*, supra. It was there held that the states might pass such laws in the absence of a United States bankrupt act; but such laws, it was held, could not operate upon prior contracts, nor upon contracts between citizens of different states. The power thus conceded was so very limited that few state bankrupt acts have since been passed. It is a little curious to notice that the very cases in which the distinction which has since proved so troublesome was first drawn, a state law which acts wholly on the creditor's remedy, was denied any retroactive effect whatever. The truth of the matter is that the final decision was in the nature of a compromise, in the *Sanders* case, and not one of the opinions therein written can be regarded as expressing the views of a majority of the court. The bar was for a long time puzzled to know just what the case decided and the court was obliged to refer back to that decision and explain itself in a subsequent case.

## IMPRISONMENT FOR DEBT.

But while holding that state bankrupt acts could have no retroactive effect, the cases above cited decided that state insolvent laws, which released the person of the debtor, were good, though retroactive. And in *Mason against Haile*, 12 Wheaton 370, it was held that a state law might abolish imprisonment for debt altogether. The power thus acknowledged has often been regarded as the exercise of an authority to impair contracts by an alteration of the remedy. But as Justice Marshall pointed out, imprisonment for debt may be regarded either as a punishment for non payment or as a part of the remedy for not paying. Even in the latter view the denial of the remedy may certainly be classified as an exertion of the Police Power.

In reality, however, the power rests upon historical rather than theoretical grounds. The debtor has from the earliest times been accorded the right, by the clemency of the law-making power, to free his person by the surrender of his goods. This is clearly pointed out by Chancellor Kent, 1 Kent Com. 422:

"The *cessio bonorum* of the Roman law, introduced by Julius Caesar, and which prevails at present in most parts of the continent of Europe, only exempted the person of the

debtor from imprisonment. It did not release or discharge the debt or exempt the future acquisitions of the debtor from execution for the debt. The English statutes of 32 Geo. II, commonly called the 'Lord's act', and the more recent English statutes of 33 Geo. III, 1 Geo. IV, and 5 Geo. IV, have gone no further than to discharge the debtor's person; and it may be laid down as the law of Germany, France, Holland, Scotland, England, etc., that the insolvent laws are not more extensive than the *cessio bonorum* of the Roman law!"

In sustaining the legislative power to abolish imprisonment for debt, the constitutional interpreters merely held that the law was as it always had been. For further cases in point see: *Beers against Houghton*, 9 Peters 329; *Cook against Moffat*, 5 Howard 295; *Penniman's case*, 103 U. S. 714.

## RECORDING ACTS.

The power of the legislature to pass recording acts has been cited by many judges who have sought to distinguish the obligation of a contract and the remedy upon it; and all the text books class such laws among "Laws affecting the remedy." But ordinarily a recording act in no way concerns the parties to a contract. As between them it makes not the slightest difference whether or not the instrument were ever recorded. Such acts are usually for the purpose of giving notice of the transaction to third parties, to prevent fraudulent conveyances and to protect subsequent creditors, purchasers and mortgagees in good faith.

In Jackson against Lamphire, 3 Peters 290, the court says "It is within the undoubted power of state legislatures to pass recording acts by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts."

In Vance against Vance, 108 U. S. 314, a Louisiana law requiring the registration of "tacit" mortgages was upheld.

In Louisiana against New Orleans, 102 U. S. 203, an act requiring prior judgments against the municipality to be registered before issuing process for their collection was held constitutional on the ground that no rights of the creditor were affected. This statute is of a different character from most recording acts in that it operates upon the relations of the parties to the contract. It may be compared to a law requiring judgments to be docketed or other regulation of procedure, which, while operating upon the contract, is merely formal in its requirements. But the primary purpose of these regulations is the protection of third parties and the proper regulation of the rival claims of creditors. If they did not accomplish this result and were made the means of seriously hampering the collection of debts, under the doctrine here contended for they would be unconstitutional.

In the matter of tax sale deeds the contract is between the state and the purchaser by which the former practically farms out its taxes for collection. Laws which restrict the oppressive operation of these contracts have been favored by the courts, for no form of contract is more obnoxious to the judiciary. The Supreme court of New Hampshire once half seriously pronounced a tax sale deed to be "prima facie void." This may afford an explanation of the somewhat sweep-

ing observations of Justice Miller, in Curtis against Whitney 13 Wallace 68, where he says: "It is one of the contingences to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation." The act under consideration in that case required holders of tax titles to give notice to the occupant of the land before proceeding to perfect his title. The idea of notice to third parties, protection to third parties, is the primary notion in all the acts of this description. They are therefore not to be relied upon as authority for supporting any law which affects the substantial rights of parties under a contract by the regulation of the remedy upon it.

## RULES OF EVIDENCE.

As a state must establish courts for the administration of justice, so it must regulate the terms, proceedings, constitution and the like of those courts. In doing so it must regulate the methods in which contractual rights may be enforced. By so doing can it impose conditions which render prior contracts less valuable? The confusion of the subject and the difficulty of answering the question exist just here: It is at this point that the legislative and judicial functions of the government meet. The constitutional inhibition is upon the legislature and not upon the courts. Courts and not legislatures have built up the rules of evidence; but it is the province of legislatures and not of courts to alter them.

But when, in the exercise of this authority, a state legislature has attempted to make it more difficult to prove contracts and thus to embarrass the collection of debts, the Supreme court has not hesitated to declare the legislation unconstitutional. For instance, in *Walker against Whitehead*, 16 Wall 317, where the Georgia legislature provided that the plaintiff must show that he had paid taxes on his debt in order to establish his cause of action, the law was held to be inoperative as to prior debts. Here was a rule of

evidence affecting the remedy on the contract and the remedy only; but notwithstanding the distinction drawn between the remedy and the obligation of a contract Justice Swayne declared in his opinion that "the laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it."

In the case of *Wilmington Railroad against King*, 91 U. S. 3, a law passed by the legislature of North Carolina was under consideration. It provided that in actions on contracts made during the war the measure of damages should be the actual value of the property bought and sold and not the value of the Confederate money at the date of the transaction. The Supreme Court of the United States had, in previous decisions, held that contracts not made in furtherance of rebellion were good though payment was to be made in Confederate currency; and that the measure of damages should be the value of the currency at the time of the contract. This rule often worked hardship as the standard of value fixed was fluctuating with the fortunes of the war; and it reduced the plaintiff's claim to an absurdly low figure in the case in point. The statute would seem to be merely a rule for the guidance of juries and clearly within the power to control procedure, if such a power exist, but the Supreme court, with but one dissenting voice, pronounced

the law unconstitutional. A like decision was made in Effinger against Kenney, 115 U. S. 566, with regard to a similar act passed by the legislature of Virginia.

There was no element of repudiation in these statutes; their purpose was fair and honest; but they sought to affect substantial rights under contracts by a modification of the rules governing the remedy and were therefore unconstitutional.

## LAWS CHANGING FORMS OF ACTION.

Can the effectiveness of a contract be impaired by a subsequent change in the form of action for its enforcement? There are several cases, it must be confessed, which seem to hold that a form of action less speedy and effective may be substituted for the one existing at the time of the contract. In *Tennessee against Sneed*, 96 U. S. 62, it was held that an act of the state legislature requiring the payment of taxes under protest and a suit within thirty days thereafter does not leave a party without an adequate remedy for asserting his right to pay his state taxes in certain bills made receivable therefor under the charter granted to the Bank of Tennessee, in the year 1838; but which bills the collector refused to accept.

This decision was followed by that of *Antoni against Greenhow*, 107 U. S. 769, the first of the famous Virginia coupon cases. It will be remembered that Virginia funded its state debt by the issuance of bonds, making the coupons thereon receivable for taxes. This expedient so depleted the revenue of the state, that every legislative device was exhausted to defeat the right thus granted. One of these schemes was to require the collector to refuse the coupons, the payment of the tax under protest and an expensive and

involved litigation to establish the right to have the coupon received. This law was upheld; but in a subsequent case, where the taxpayer, after the refusal of his coupon, simply did nothing, and the collector sold his property to satisfy the claim for taxes, the court held the collector personally liable in conversion. It is difficult to unravel the logical tangle in which the court involved itself in order to arrive at these decisions; but the task is foreign to the subject in hand.

The remedies afforded the bondholder in Tennessee against Sneed and Antoni against Greenhow were forms of action prescribed by a sovereignty in consenting to be sued by a subject. In both instances the legislature might have taken away the remedy thus afforded altogether and still be free from constitutional restraint. Though both cases are frequently cited to maintain the proposition that a creditor can be embarrassed by an alteration of the remedy, it is clearly through a misconception of the principle upon which they must have been decided.

But there is a recent case which cannot so easily be explained away. It is that of the Fourth National Bank against Francklyn, 120 U. S. 747, There a statute of Rhode Island gave a process against stockholders' property on a judgment against a corporation. The court sustained a subsequent act

requiring that the remedy against the corporation should first be exhausted, and that a fresh suit should then be brought against the stockholder. It must be confessed that this case upholds a statute which takes from the creditor his right to the more effective remedy at his command when the contract was made; and upon which he may have relied in giving credit. To be sure his claim against the stockholder is not taken away but is merely postponed; and the case undoubtedly proceeded on the theory that the remedy substituted for the old one did not impair any substantial rights under the contract. The decision, however, borders upon very doubtful territory and was one of the authorities chiefly relied upon by the Kansas court in Beverly against Barnitz.

## LAWS MAKING DEFECTIVE CONTRACTS VALID.

But, it is urged, a legislature may certainly affect contracts retrospectively by altering rules of evidence; for a crime may be proved by evidence incompetent when it was committed; and the law making such evidence competent is held not to be ex post facto. Hopt against Utah, 110 U. S. 574, True enough. A crime is no less a crime because there stands some technical difficulty in proving it; nor is a contract the less a contract because the evidence necessary to establish it is incompetent. A valid contract, however, may not be rendered invalid by a law rendering it impossible of proof. But an invalid contract may be rendered enforceable by such subsequent legislation.

In Saterlee against Mathewson, 2 Peters 412, where an act was sustained which cured a defective title, Justice Washington said: "Should a state declare, contrary to the principles of law, that contracts founded upon an illegal or an immoral consideration, whether in existence at the time of passing the statute, or which hereafter be entered into, should nevertheless be valid and binding upon the parties; all would admit the retrospective character of such an enactment, and that the effect of it was to create a contract between the parties where none had previously existed; but

it surely could not be contended that to create a contract and to destroy and impair one mean the same thing. The law was retrospective, but did not impair the obligation."

This doctrine was again asserted in *Watson against Mercer*, 8 Peters 88. It was upon this principle that the case of *Elwell against Daggs*, 108 U. S. 150, was decided. Here the Texas legislature abolished the usury laws. A contract usurious under the law of its date was held to have been purged of its illegality by a subsequent repealing statute. It was this principle also that controlled the decision in *Campbell against Holt*, 115 U. S. 620. Here a statute of limitations had been repealed, and a debt, which would have been barred under the law existing at the date of the contract, was held to be enforceable. The court drew a distinction between statutes of limitation and of prescription. The one, it held, merely afforded the debtor a defense which might be taken away by the power that gave it. In the other, property had been acquired by a grant presumed; and to take that away would be to take away property without due process of law. This doctrine is contrary to the view of the matter taken by the Illinois court in *Board of Education against Blodgett*, 155 Ill. 144, where it is held that a statute of limitations practically pays the debt, and therefore cannot be repealed without taking away the debtor's property. The

position of the Supreme Court of the United States would appear to be the sounder in reason and authority; but as a decision of a state court, upholding the Constitution against its own law is not appealable, the question must remain an open one.

There can be no doubt, however, that were a rule of evidence altered so as to impair contracts instead of perfecting them, the legislation would be unconstitutional. No usury statute could make prior contracts usurious. *Ogden against Sanders*, at page 348; and, as already seen no statute of limitations can absolutely bar a prior debt.

### EXEMPTION LAWS.

The authority of a state legislature to affect contracts by exempting property from execution is frequently asserted.

The principal authority for this proposition is a dictum of Chief Justice Taney in *Bronson against Kinzie*, 1 Howard 312, where he says: " A state may, if it thinks proper, direct that the necessary implements of agriculture or the tools of the mechanic, or articles of necessity in household furniture shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered in every civilized community as properly belonging to the remedy to be executed or not by every sovereignty, according to its own views of policy or humanity."

But in the case of *Edwards against Kearsey*, 96 U. S. 595, where the legislature of North Carolina attempted to exempt property to the amount of a thousand dollars or more and make this exemption retroactive, the Supreme court declared in no uncertain voice that prior contracts could not be affected by any such subterfuge, and Swayne, in commenting on the doctrine as laid down by Judge Taney, said: "The remedy subsisting in a state when and where the contract is made and to be performed, is a part of its obligation;

and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution of the United States, and is therefore void. # # # # # The learned Chief Justice seems to have had in mind the maxim 'de minimis'. Upon no other ground can any exemption be justified.

A similar rule was laid down in the earlier case of *Gunn against Barry*, 15 Howard 610. There the new Georgia constitution, approved by Congress at the end of the war, gave to debtors a greater exemption than had been allowed under existing statutes. This was held unconstitutional as to prior debts, notwithstanding congressional approval of the new constitution. In that case Judge Swayne said: "The legal remedies for the enforcement of a contract, which belong to it at the time and place where it was made, are a part of its obligation. A state may change them, provided the change involves no impairment of a substantial right. If the provision of the constitution or the legislative act of a state fall within the category last mentioned, they are to that extent, utterly void. They are, for all the purposes of the contract which they impair, as if they had never existed. The constitutional provision and statute here in question are clearly within that category and are therefore void."

The truth of the matter is that the exemption of articles of necessity for immediate subsistence, may be protected, not because of any power to impair contracts by an alteration of the remedy, but upon the same principle that imprisonment for debt may be abolished. The stern common law, which stripped the wife of everything else, left her paraphernalia, and in a like manner the state, in the exercise of its Police Power, may refuse to imprison the debtor, or to allow the creditor to turn him naked upon the community, to become a charge upon the taxpayer. But this power, while protecting the debtor from being deprived of his means of earning a livelihood, can, under no pretense be extended to deprive the creditor of any of his just and substantial rights.

## DIVORCE LAWS.

The power of the legislature to grant divorces has been attempted to be classified under the head of an alteration of the remedy. In the Dartmouth College case, 4 Wheaton at page 323, Justice Story says: "A general law regulating divorces from the contract of marriage, like a law regulating remedies in other cases of breach of contract, is not necessarily a law impairing the obligation of such a contract. It may be the only effectual mode of enforcing the obligation of a contract on both sides. A law punishing a breach of contract by imposing a forfeiture of the rights acquired under it; or dissolving it because the mutual obligations were no longer observed, is in no correct sense a law impairing the obligations of a contract. Could a law compelling a specific performance by giving a new remedy be justly deemed an excess of legislative power?"

Of course the above was written before Mr. Bishop had pointed out the distinction between the contract to marry and the so called "contract of marriage." The latter is now held to be not a contract but a "status"; and the power of the legislature to regulate that status, whatever its limits may be, has nothing to do with our discussion.

## LAWS ABOLISHING THE TAXING POWER.

One of the most frequent attempts by legislatures to defeat contracts by taking away the remedy upon them is in the case of the obligations of municipalities. In each instance the attempts have proved futile. The favorite device has been to repeal acts which empowered the city to levy taxes to meet its debts. The leading cases on this subject are: New Jersey against Wilson, 7 Cranch 164; Van Hoffman against the city of Quincey, 4 Wallace 535; Louisiana against Pillsbury, 105 U. S. 300; Nelson against St Martin's Parish, 111 U.S. 721; Mobile against Watson, 116 U.S. 289; and Siebert against Lewis, 122 U. S. 284.

In the case last cited the town issued railroad bonds, and contracted that the taxes to meet them should be levied in a certain way. The court held that the taxes could be levied in no other manner.

In the Van Hoffman case, Justice Swayne, who seems to have given our problem more attention than any other jurist of his bench, acknowledged the difficulty of the subject and the embarrassment caused by the earlier dicta, as follows: "It is competent for states to change the form of the remedy, or to modify it otherwise as they see fit, provided that no substantial right as secured by the contract is

thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed to be deemed legitimate and those which, under the form of modifying the remedy impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution and is to that extent void. If these doctrines were *res integrae* the consistency and soundness of the reasoning which maintains a distinction between the contract and the remedy, or to speak more accurately, between the remedy and the other parts of the contract, might, perhaps, well be doubted; I Kent 456, Sedg. Stat. Cons. Law 652, Justice Washington's dissenting opinion, 12 Wheaton 379. But they rest in this court upon a foundation of authority too firm to be shaken; and they are supported by such an array of judicial names that it is hard for the mind not to feel constrained to believe that they are correct. The doctrine on the subject established by the latest adjudications of this court, render the distinction rather one of form than of substance."

In the case of Louisiana against Pillsbury supra, Justice Field said: "The only ground on which a change of remedy, existing when a contract was made, is permissible without impairment of the contract, is that a new and adequate and

efficacious remedy be substituted for that which is superseded." In the case of Louisiana against the Mayor of New Orleans, where the collection of a judgment for damages for mob violence was rendered impossible, through a statute repealing the taxing power, the law was upheld because the right arose out of tort and the constitutional inhibition did not apply.

It is needless to review the other cases under this head. They all maintain the doctrines above laid down; and had the court always been equally consistent the problem of this thesis could scarcely have arisen.

## STAY LAWS.

Some of the state courts have dealt with laws granting a stay of execution on judgments beyond reasonable limits. No case of the sort seems to have been passed upon by the Supreme court of the United States; but it is safe to assume, in view of the cases already cited, that no such law would there be sustained. A court in the exercise of its judicial power may doubtless, in its sound discretion, grant a stay of execution without the aid of statute. But it may once more be remarked that the constitutional restraint applies to the legislative and not to the judicial department of the government.

In view of the cases already cited it would also appear that such a law might be sustained did it postpone the creditor for a time so short that his substantial rights could not be said to be impaired. The courts, in all these cases, seem to apply that flexible yardstick which they call "reasonableness."

## REGULATION OF FORECLOSURE SALES.

Three cases, all decided between 1840 and 1845, pass upon statutes similar to that which gave rise to the litigation in Beverly against Barnitz. In the case of Bronson against Kinzie, 1 Howard 312, the legislature of Illinois extended the time in which mortgagors might redeem and also required that the mortgaged property should be appraised and that, on the foreclosure sale, the property should bring two-thirds of the value thus fixed or the sale would be of no effect. Chief Justice Taney, in the course of an opinion holding the law invalid, said: "Although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided that the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution.

"If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable interest in the

premises may in like manner be conferred upon others, and the right to redeem so prolonged as to deprive the mortgagee of his security, by rendering the property unsaleable for anything like its value. This law gives to the mortgagor and to the judgment creditor an equitable estate in the premises to which neither of them would have been entitled under the contract, and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made."

In a dissenting opinion Justice McLean pointed out some of the inconsistencies in the reasoning of the chief justice. He said: "Where shall this judicial discretion find a limit? There must be some limit. If the legislature may not modify the remedy at their discretion in regard to existing contracts, they must be prohibited from making any change. Any departure from this rule of construction must depend upon the arbitrary decision of courts, and each court in this respect may exercise its own discretion until the question is settled by this tribunal."

In the case of McCracken against Hayward, 2 Howard 608, Justice Baldwin stated the rule as follows: "The obligation of a contract consists in its binding force on the party who makes it. This depends upon the laws in existence when it is made; these are necessarily referred to in all con-

tracts and form a part of them as the measure of the obligation to perform them by the one party and the right acquired by the other. # # # # If any subsequent law affect to diminish the duty ~~of~~ impair the right, it necessarily bears on the obligation of one party or to the injury of the other." This was also a case where the statute sought to extend the equity of redemption in the mortgagor.

In the case of the Lessees of Gantley against Ewing, 3 Howard 707; Justice Catron said: "The new remedy prescribed by the act of 1841, changed the contract and required, among other things, that the mortgaged premises should not be sold to satisfy the debt unless they were first valued and one-half that value was bid for them. If the legislature could make this alteration in the contract and in the decree enforcing it, so it could declare that the property should bring its entire value, or that it should not be sold at all, thereby impairing or defeating the obligation, under the disguise of regulating the remedy."

The three cases above cited, for over fifty years, remained the main authorities on the records of our national tribunal in the matter of laws affecting foreclosure sales and extending the mortgagor's equity of redemption. During that time a radical change has taken place in nearly all the states, in the law of mortgages and in the nature of the

mortgage contract. When these cases were decided a mortgage was an estate in the lands, a deed with a defeasance, and the mortgagee held the legal title. When he sold the property on foreclosure he sold his title, the purchaser on foreclosure stepped into his shoes; or the mortgagee could acquire a perfect title by strict foreclosure. It was contended by the Kansas court that these authorities of half a century ago were authorities no longer, owing to the change in the nature of the mortgage contract. It was contended that since the mortgage debt is now the main thing looked to, and the effect of the agreement upon the land merely that of a lien, the contract relation no longer exists when the mortgage has been foreclosed, the land sold and a deficiency judgment taken.

In addition to the cases reviewed under this sub-division, Howard against Bugbee, 24 Howard 461, and Brine against Insurance company, 96 U. S. 627, are cited as authorities by Judge Shiras in Beverly against Barnitz, but they are similar in purport to those reviewed above.

## MERCER OF CONTRACTS IN JUDGMENT.

A puzzling question now presents itself for consideration. Is the mortgage contract merged in the decree or terminated by the foreclosure sale? In considering it we in New York must bear in mind that in Kansas, Illinois and many other states, the sale on foreclosure does not cut off the equity as it does here. A statute which affects the rights of the purchaser and mortgagee only cannot very well be said to impair a contract between the mortgagor and mortgagee. If the statute were applied only to mortgages which had been already foreclosed, the mortgagee would not be affected, and the law, if unconstitutional, would be so on the ground that it took away the purchaser's property without due process. If the law apply to existing mortgages not already foreclosed it is hard to see why any additional burden imposed upon the land, or any extension of the equity of redemption does not act directly on the mortgage contract, because the land must be sold subject to these new conditions which did not exist at the time the mortgage was made. It is difficult to understand how new privileges can be conferred upon the mortgagor without in some way impairing the contractual rights of the mortgagee.

If, however, the statute does not impose new conditions

subject to which the land is sold, but operates only upon the judgment and in no way on the contract the law is sustained. A couple of cases will illustrate this principle.

In the case of Morley against the Lake shore, 146 U. S. 162, the court held, that; "after the cause of action, whether a tort or a broken contract, not itself prescribing interest until payment, shall have been merged into a judgment; whether interest shall accrue upon the judgment is a matter not of contract between the parties, but of legislative discretion; which is free, so far as the United States Constitution is concerned, to provide for interest as a penalty or liquidated damages for non-payment of the judgment, or not to do so."

This theory was also applied in the case of Insurance company against Cushman, 108 U. S. 51, where, by the law in force at the date of the contract the mortgagor might redeem within a certain time after foreclosure by the payment of the purchase price plus ten percent, a statute was upheld which reduced the rate of interest to be paid on redemption to eight per cent. Justice Harlan laid it down that the mortgage was merged in the decree or at least when the sale occurred; that the purchaser at the sale was entitled to the interest on his purchase money as provided by law at the date of the sale, but not as provided by law at the

date of the mortgage. He held that the right of a purchaser to draw a certain rate of interest on the purchase money in case of redemption was no part of the mortgage contract. The court held that the fact the reduction of interest might affect the value of the land on foreclosure sale was too remote a contingency to be regarded.

This case was one of those most strongly relied upon by the Kansas court and it was thus distinguished by Justice Shars in his opinion in Beverly against Barnitz: "The case of Cushman against the Insurance company does not collide with the previous and subsequent cases. There the new statute did not lessen the duty of the mortgagor to pay what he had contracted to pay; nor affect the time of payment; nor affect any remedy the mortgagee had by existing law for the enforcement of his contract."

Now, if a state legislature should extend the time in which mortgagors might redeem after sale on foreclosure, it is hard to see how this case can be distinguished. In such event the duty of the mortgagor to pay what he had contracted to pay would not be lessened, nor would the time of payment nor the remedy of the mortgagee under existing law be affected, in any other way than it would be by the statute upheld in the Cushman case. It was stated at the outset that the decision of the Supreme court by no means

closed the door against a revival of the question in future litigation, and it is just here that the door seems to be open. It is believed, however, that the doctrine laid down in the Cushman case will not be extended to apply to anything but regulations of interest on decretal sales. It is believed that an attempt to reach the mortgage contract by laws affecting the proceedings after merger will be defeated on the theory that they do render the property less saleable, and thus impair the security of the mortgagee. It was not obvious in the Cushman case that such would be the result of the statute there under consideration, and the case may be hereafter distinguished on that ground. This, however, is a matter of pure speculation.

## BEVERLY AGAINST BARNITZ.

Every leading authority among the decisions of the national tribunal, which bears upon the problems suggested by the Kansas mortgage cases, has now been discussed under the various subdivisions of this thesis. It would have been a hopeless task to trace the fluctuations of the state courts upon the question. We are therefore ready to apply such principles as we have been able to elucidate to the facts there in litigation.

In 1893 the legislature of the state of Kansas passed an act regulating the procedure in the foreclosure of mortgages. Among other things it provided that on the sale by the sheriff of the mortgaged premises, the purchaser should be given a "certificate of sale", which would not ripen into a complete title until eighteen months thereafter. Meanwhile the mortgagor was to remain in possession, making no account of rents and profits, and might redeem at any time within that period. The holders of the mortgage securities immediately proceeded to test the constitutionality of these enactments. In the cases of Watkins against Glen and Beverly against Barnitz the matter was brought to issue. In April, 1895, the Supreme court of Kansas held the statute unconstitutional, as to mortgages made before its passage. But the decision

was not unanimous; and before the next term there was a change in the personnel of the court. A re-argument was granted in the latter case and the former decision was reversed. The effect of this decision was to keep mortgagors in possession throughout the state, pending the decision of the Supreme court of the United states. Chief Judge Martin in his opinion supporting his views, frankly admitted that the provision keeping the mortgagor in possession without accounting for rents and profits was probably indefensible; but urged that the rest of the law should be sustained. Had this been his decision the question whether the equity of redemption could thus be extended would have been fairly presented. But his court sustained the whole statute, though admitting one phase of it to be unconstitutional. When the Supreme Court of the United States came to reverse this decision, as of course, it was bound to do under the circumstances, it cited the cases reviewed under the subhead, "Regulation of Foreclosure Sales," distinguished the cases under "Merger of Contracts," and remarked that, under the Kansas statute "What is sold is not the estate pledged, but a remainder, an estate subject to the possession for eighteen months of another person, who is under no obligation to account for profits."

Had the Kansas court been more honest and less anxious

to protect the temporary interests of the impoverished Kansas farmer; had it declared the portion of the statute unconstitutional, which it was obliged to admit could not be supported under the very authorities upon which it was obliged to rely; had it been contented to present the problems of the case fairly to the superior tribunal; the result would have been far more doubtful and the question, at any rate, would have been squarely decided. As it was Judge Martin's ingenious reasoning and able argument were doubtless regarded as a mere special plea for a statute which the pleader admitted to be in parts indefensible, the Supreme court contented itself with deciding no more than it was obliged to, and the settlement of the more doubtful phases of the case seems to have been left open for future litigation.

After urging the doctrine of merger, discussed elsewhere, Judge Martin contended that a statute extending the equity of redemption, in any event, acted only on the remedy, and was well within the limits of that power as prescribed by the authorities. He made the following summary of the decisions which he regarded as supporting his doctrine:

"If a state legislature may totally abolish imprisonment of the debtor as a means of enforcing payment; if it may shorten the statute of limitations; if it may reasonably

extend and enlarge exemptions of property from sale for the payment of debts; if, where coupons are by law made receivable for the payment of taxes, it may require such payment in the first instance in cash, to be afterwards refunded and the coupons taken up; if it may reduce the rate of interest on redemption from decretal sales; if it may lessen the interest on former judgments; if it may require the holder of a tax sale certificate to give three months notice of the time when a tax deed will be applied for; if it may require transcripts of judgments against a particular city to be filed in a certain office as a prerequisite for payment; if it may reduce the terms of court in number and duration; if it may amend the laws as to attachments, garnishments and receivers; so as to take away causes therefor which were before sufficient; if, in short, it may regulate at pleasure the modes of proceeding in the courts, and all this as to existing obligations, it is difficult to form a process of reasoning which would forbid it from so regulating the procedure upon the foreclosure of mortgages, as to make more definite and certain the indefinite estate impliedly reserved by every mortgagor of real property, and called into active existence only by the foreclosure and which indefinite estate is extended by the Federal courts of equity for six months, in the first instance,

and afterward once <sup>or</sup> oftener, in the discretion of the chancellor, according to the circumstances of the case."

Assuming that the Kansas statute had done no more than to extend the equity of redemption, or even that it left the mortgagor in possession for eighteen months providing for an accounting by him for rents and profits, the above argument would appear extremely plausible. But it is believed that each instance of the supposed authority of the legislature cited by Judge Martin has been shown to have been exercised upon grounds other than that of an alteration of the remedy and that even had the Kansas statute been modified as suggested it could not have been sustained.

## CONCLUSION.

What answer, then, are we now able to give to the question which confronted us at the outset: How far can a legislature affect a contract by altering the remedy upon it? It is believed that it has been shown that the supreme court has departed as far as it can from the early distinction drawn between the contract and the remedy, without actually abolishing it. The rule seems to be that a law which alters the remedy must not impair the contract or substantially lessen its value. There seems to be a field between laws which are regarded as substantially impairing the contract and those which affect it to some extent but do not lessen the rights of the creditor to any material degree where judicial discretion may be exercised. The rule is sometimes stated thus: "Where the act impairs the contract under the disguise of altering the remedy it is void."

It is submitted that, while it is the duty of courts to determine and interpret the intention of legislatures, they have no right to concern themselves with the motives which prompted the legislation. The fact that one law was passed for the purpose merely of altering procedure, and another similar law for the purpose of enabling debtors to repudiate their obligations should not, it is urged, be the test

of the constitutionality of the respective statutes. It is submitted, with all due diffidence, that the wide field of discretion the courts have reserved to themselves in this matter tends to put them over the legislature; that judges sometimes appear to regard themselves as censors of legislative honor, rather than servants of the legislative will under the constitution.

The following is offered as the best statement of the rule governing this whole matter that the writer has been able to formulate in view of the decisions:

While it is the duty of the legislature to provide means for the enforcement of contracts, while it may establish courts and provide rules for their guidance, while it may alter those rules and change forms of action, substituting for existing remedies other remedies equally effective, it cannot diminish the value of contracts by rendering their enforcement more difficult. It cannot alter rules of evidence, extend exemptions, remove taxing powers, or impose cumbersome restrictions upon forms of procedure and apply such changes to prior contracts, if thereby the substantial rights of the creditor are diminished,--for the laws existing at the time the contract is made, in the place where it is to be performed, are part and parcel of the obligation of that contract.

