Woodruff Vs. Trapnall

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Appellant : Woodruff

Respondent : Trapnall

Judgement :

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Woodruff v. Trapnall

51 U.S. (10 How.) 190

ERROR TO THE SUPREME COURT

OF THE STATE OF ARKANSAS

Syllabus

In 1836, the Legislature of Arkansas chartered a bank the whole of the capital of which belonged to the state and the president and directors of which were appointed by the general assembly.

The twenty-eighth section provided "that the bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas."

In January, 1845, this twenty-eighth section was repealed.

The notes of the bank which were in circulation at the time of this repeal were not affected by it.

The undertaking of the state to receive the notes of the bank constituted a contract between the state and the holders of these notes, which the state was not at liberty to break, although notes issued by the bank after the repeal were not within the contract, and might be refused by the state.

Therefore a tender, made in 1847, of notes issued by the bank prior to the repealing law of 1845 was good to satisfy a judgment obtained against the debtor by the state, and it makes no difference whether or not the debtor had the notes in his possession at the time when the repealing act was passed.

On 2 November, 1836, the State of Arkansas passed an act to incorporate the Bank of the State of Arkansas. The capital was one million of dollars, which was raised by a sale of the bonds of the state, or by loans founded upon those bonds. The president and directors were appointed by a joint vote of the general assembly. All dividends upon the capital stock were declared to belong to the state, subject to the control and disposal of the legislature.

The twenty-eighth section was as follows, *viz.:* "That the bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas." The other

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sections of the act were in the usual form of conferring general banking powers.

In 1836, William E. Woodruff was elected by the General Assembly of Arkansas Treasurer of the state, and on 27 October, 1836, executed a bond to James S. Conway, governor of the state, in the penal sum of three hundred thousand dollars conditioned for the faithful performance of his duties as treasurer. There were seven sureties, whose names it is not necessary to mention. The time for which Woodruff was to serve was two years, "and until his successor shall be elected and qualified." His term of office was thus from 27 October, 1836, to 25 December, 1838.

On 23 March, 1840, the State of Arkansas brought a suit upon this official bond against the principal and sureties in the Pulaski Circuit Court. The breach alleged was that Woodruff had not paid over to his successor the sum of $2,395.18. It is not necessary to trace the history of this suit; suffice it to say that it eventuated in a judgment against Woodruff for $3,359.22 and costs.

On 10 January, 1845, the legislature passed an act relating to the revenue of the state, the nineteenth section of which provided that, "from and after 4 March, 1845, nothing shall be received in payment of taxes or revenue due the state but par funds."

In the progress of the suit, Frederick W. Trapnall had become regularly substituted in place of the Attorney General to conduct the suit.

In 1847, Trapnall ordered an execution upon the judgment which the state had obtained against Woodruff, who, on 24 February, 1847, tendered and offered to pay to Trapnall the sum of $3,755 in the notes issued by the Bank of the State of Arkansas, which Trapnall refused to receive.

On 25 February, 1847, Woodruff filed a petition in the supreme court of the state praying for an alternative writ of mandamus commanding Trapnall to "receive and accept, in payment of the judgment, the notes of the bank, or to show cause why he shall refuse to do so." The writ was issued accordingly.

To this writ the following answer was filed:

"The answer of Frederick W. Trapnall, attorney for the state *pro tem.,* to an alternative mandamus hereto annexed, issued by the supreme court on the petition of William E. Woodruff."

"This respondent admits the judgment and tender as set out in the said petition, but alleges that he was not authorized to

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receive the said Arkansas state Bank notes, because the twenty-eighth section of the bank charter, under which alone the said Woodruff could claim a right so to satisfy the said judgment, was repealed by an Act of the Legislature of the State of Arkansas approved January 10, 1845, and entitled, 'An act making appropriations for the years 1845, 1846, and part of the year 1844, and for balances due from the state, and for other purposes,' and by the nineteenth section of the said act."

"And this respondent submits to the court, if the repeal of the said section does not deprive him of all authority to receive the said bank notes from the said Woodruff in satisfaction of the said judgment in favor of the State of Arkansas against him and others. Respectfully,"

"FREDERICK W. TRAPNALL"

To this answer Woodruff demurred, and there was a joinder in demurrer.

Before the argument, the following agreement was filed by the counsel of the respective parties.

"Be it remembered that the following matters are agreed upon by the counsel for the petitioner and respondent in this cause, to the end that the same may be filed and become a part of the record herein."

"1st. The record and proceedings in the case of William E. Woodruff, and the said persons named in said petition as his securities, against the State of Arkansas, upon the first and second writs of error remaining in this Court, and which are referred to in said petition, shall form a part thereof by such reference as fully as though the same were incorporated therein at full length."

"2d. That said respondent, as attorney of record for said state in the suit aforesaid, is the proper officer by law to receive and acknowledge satisfaction of said judgment."

"3d. That the notes of the Bank of the State of Arkansas, referred to in said petition and response and tendered in this case, were issued by said bank, pursuant to the charter thereof, prior to the year 1840."

"4th. That after the creation of said bank, down to the year 1845, the notes of said bank were received and paid out by said state in discharge of all public dues to and from said state."

"5th. That said bank continues to exist, with all its corporate functions, and that in the consideration of this case, all the acts of the general assembly of said state affecting said bank shall be deemed to be public laws, as they have been heretofore decided by this Court to be, and whereof this Court will judicially

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take notice; but to the end thereof, and for greater certainty, the Act of said general assembly entitled 'An act to incorporate the Bank of the State of Arkansas,' approved November 2, 1836, is here inserted at full length, and made part of the record in this cause, and which act of incorporation is in the words following."

Then followed the charter of the bank *in extenso.*

One of the grounds of the demurrer was the following:

"1st. That the nineteenth section of said act, entitled 'An act making appropriations for the years 1845, 1846, and part of the year 1844, and for balances due from the state, and for other purposes,' approved January 10, 1845, is a law impairing the obligation of contracts, and is repugnant to the Constitution of this state and of the United States, and therefore void."

On 28 July, 1847, the Supreme Court of Arkansas overruled the demurrer, and on 30 July, Woodruff sued out a writ of error to bring the case up to this Court.

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MR. JUSTICE McLEAN delivered the opinion of the Court.

An action was brought by the State of Arkansas in the Pulaski Circuit Court against the plaintiff in error and his sureties, Chester Ashley and others, upon his official bond as late treasurer of state for the recovery of a certain sum of money alleged to have been received by him, as treasurer, between 27 October, 1836, and 26 December, 1838. And a judgment was recovered against him and his securities, on 13 June, 1845, for $3,359.22

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and costs. An execution having been issued on the judgment, on 24 February, 1847, the plaintiff tendered to the defendant in error, who prosecuted the suit as Attorney General, the full amount of the judgment, interest, and costs, in the notes of the Bank of the State of Arkansas, which were refused.

The above facts being stated in a petition to the Supreme Court of Arkansas on 25 February, 1847, an alternative mandamus was issued to Trapnall, the defendant in error, to receive the bank notes in satisfaction of the judgment or show cause why he shall refuse to do so.

On the return of the mandamus, the defendant admitted the judgment and tender of the notes, but alleged that he was not authorized to receive them in satisfaction of the judgment because the twenty-eighth section of the bank charter, under which alone the plaintiff could claim a right so to satisfy the judgment, was repealed by an Act of the legislature approved January 10, 1845.

It was agreed by the parties that the record of the judgment should be made a part of the proceeding; that the defendant was the proper officer by law to receive satisfaction of the judgment; that the notes tendered were issued by the bank prior to the year 1840, and that down to the year 1845, the notes of the bank were received and paid out by the state in discharge of all public dues; that the bank continues to

exist with all its corporate functions.

The court was of opinion that the return of the defendant showed a sufficient cause for a refusal to obey the mandate of the writ, and gave judgment accordingly.

The twenty-eighth section of the bank charter, which was repealed by the act of 1845, provided "that the bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas." And the question raised for consideration and decision is whether the repeal of this section brings the case within the Constitution of the United States, which prohibits a state from impairing the obligations of a contract.

The bank charter was passed on 2 November, 1836,

"with a capital of one million of dollars, to be raised by a sale of the bonds of the state, loans, or negotiations, together with such other funds as may now or hereafter belong to, or be placed under the control and direction of, the state,"

the principal bank to be located at the City of Little Rock and its concerns to be conducted by a president and twelve directors, to be appointed by a joint vote of the general assembly. Branches were required to be established, the presidents and directors whereof to be elected in the same manner.

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The president and directors were to have a common seal, were authorized to deal in bullion, gold, silver &c.;, purchase real property, erect buildings &c.;, issue notes, make loans at eight percent on endorsed paper, or on mortgages, within the state; a general board was constituted, which was to make report of the condition of the bank annually to the legislature and perform other duties, and any debtor to the bank, "as maker or endorser of any note, bill, or bond, expressly made negotiable and payable at the bank, who delays payment," should have a judgment entered against him on a notice of thirty days.

Some doubt has been suggested whether the notes of this bank were not bills of credit within the prohibition of the Constitution. We think they cannot be so held consistently with the view taken by this Court in the case of *Briscoe v. Bank of the Commonwealth of Kentucky,* 11 Pet. 311. It was there said that

"to constitute a bill of credit within the Constitution, it must be issued by a state on the faith of the state, and be designed to circulate as money. It must be a paper which circulates on the credit of the state, and is so received and used in the ordinary business of life."

The bills of this bank are not made payable by the state. A capital is provided for their redemption, and the general management of the bank, under the charter, is committed to the president and directors, as in ordinary banking associations. They may in a summary manner obtain judgments against their debtors. And although the directors are not expressly made liable to be sued, yet it is not doubted they may be held legally responsible for an abuse of the trust confided to them.

The entire stock of the bank is owned by the state. It furnished the capital and

receives the profits. And in addition to the credit given to the notes of the bank by the capital provided, the state declares in the charter they shall be received in all payments of debts due to it. Is this a contract? A contract is defined to be an agreement between competent persons to do or not to do a certain thing. The undertaking on the part of the state is to receive the notes of the bank in payment from its debtors. This comes within the definition of a contract. It is a contract founded upon a good and valuable consideration -- a consideration beneficial to the state, as its profits are increased by sustaining the credit, and consequently extending the circulation, of the paper of the bank.

With whom was this contract made? We answer, with the holders of the paper of the bank. The notes are made payable to bearer; consequently every *bona fide* holder has a right, under the twenty-eighth section, to pay to the state any debt he may owe it, in the paper of the bank. It is a continuing

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guarantee by the state that the notes shall be so received. Such a contract would be binding on an individual, and it is not less so on a state.

That the state had the right to repeal the above section may be admitted. And the emissions of the bank subsequently are without the guarantee. But the notes in circulation at the time of the repeal are not affected by it. The holder may still claim the right, by the force of the contract, to discharge any debt he may own to the state in the notes thus issued.

It is argued that there could have been violated or impaired no contract with the plaintiff in error, as it does not appear he had the notes tendered by him in his possession at the time the twenty-eighth section was repealed.

It is admitted that he had the notes in his possession at the time he made the tender, and that they were issued by the bank before the repeal of the section, and nothing more than this could be required.

The guarantee of the state that the notes of the bank should be received in discharge of public dues embraced all the bills issued by it; the repeal of the guarantee was intended, no doubt, to exclude all the notes of the bank then in circulation. Until the repeal of the twenty-eighth section, the state continued to receive and pay out these notes. Up to that time, no one doubted the obligation of the state to receive them. The law was absolute and imperative on the officers of the state. The holder of the paper claimed the benefit of this obligation, and it is supposed his right could never have been questioned. The notes were payable to bearer, and the bearer was the only person who had a right to demand payment of the bank, or to pay them into the state Treasury in discharge of a debt. The guarantee included all the notes of the bank in circulation as clearly as if on the face of every note the words had been engraved "This note shall be received by the state in payment of debts." And that the legislature could not withdraw this obligation from the notes in circulation at the time the guarantee was repealed is a position which can require no argument. Anyone had a right to receive them and to test the constitutionality of the repeal.

Suppose a state legislature should pass a law authorizing the drawers of promissory notes payable to bearer to discharge the same by the payment of produce. Would

such a law affect the rights of the bearer? The contract would stand, and the law would be declared void. A standing guarantee by a mercantile house to receive in payment of its debts all notes drawn by a certain other house is valid on the ground that the notes were taken on the credit of such guarantee. It may

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be terminated by a notice, but when so terminated, are not all the notes good against the guarantors, which were executed and circulated prior to the notice? Who could commend the justice of guarantors, who should endeavor to avoid responsibility, on so clear a principle? *Louisville Manuf. Co. v. Welch, post,* 51 U. S. 461 .

A state can no more impair, by legislation, the obligation of its own contracts than it can impair the obligation of the contracts of individuals. We naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals. The obligation of the State of Arkansas to receive the notes of the bank in payment of its debts is much stronger than in the above case of individual guarantee.

The bank belonged to the state, and it realized the profits of its operations. It was conducted by the agents of the state under the supervision of the legislature. By the guarantee, the notes of the bank for the payment of debts to the state were equal to gold and silver. This, to some extent, sustained their credit and gave them currency. Loans were made by the bank on satisfactory security. The debts of the bank, or a large proportion of them, may fairly be presumed to have been collected. But the means of the bank, thus under the control of the state, became exhausted. Whether this was the result of withdrawing the capital from the bank by the state does not appear upon the record. We only know the fact that its funds have disappeared, leaving, it is said, a large amount of its paper, issued before the repeal of the guarantee, worthless in the hands of the citizens of the state.

The obligation of the state to receive these notes is denied on the ground that the twenty-eighth section was a general provision, liable to be repealed at any time by the legislature. And it is compared to a general provision to receive, for public dues, the paper of banks generally, unconnected with the state. There is no analogy in the two cases. One is a question of public policy, influenced by considerations of general convenience, which everyone knows may be changed at the discretion of the legislature. But the other arises out of a contract incorporated into the charter, imposing an obligation on the state to receive, in payment of all debts due to it, the paper of a bank owned by the state and whose notes are circulated for its benefit. The power of the legislature to repeal the section, the stock of the bank being owned by the state, is not controverted, but that act cannot affect the notes in circulation at the time of the repeal.

It is objected, that this view trenches upon the sovereignty of the state, in the exercise of its taxing power and in the regulation

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of its currency. We are not aware that a state has power over the currency farther than the right to establish banks, to regulate or prohibit the circulation, within the state, of foreign notes, and to determine in what the public dues shall be paid.

It is a principle controverted by no one that on general questions of policy, one legislature cannot bind those which shall succeed it, but it is equally true and undoubted that a legislature may make a contract which shall bind those that shall come after it.

The notes of the bank in circulation at the repeal of the twenty-eighth section, if made receivable by the state in discharge of public dues, may so far resuscitate them as that in the course of time they will find their way into the treasury of the state, where in justice and by contract they belong. It is presumed there will be no complaint, as there will be no ground for any, by the citizens of the state if these notes, now dead and worthless, should be so far revived as to reach their appropriate destination. And if, as a consequence, some increase of taxation should be required by the state, it will be nothing more than is common to all other states that perform their contracts. It would be a most unwise policy for a state to improve its currency through a violation its contracts. In such a course, the loss of the state would be incomparably greater than its gain. Any argument in commendation of such an action by a state cannot be otherwise considered than as exceedingly infelicitous and unjust.

If these notes be receivable in payment of public dues by the state, having been in circulation at the time of the repeal of the above section, as we think they clearly are, no doubt can exist as to the sufficiency of the tender. The law of tender which avoids future interest and costs has no application in this case. The right to make payment to the state in this paper arises out of a continuing contract, which is limited in time by the circulation of the notes to be received. They may be offered in payment of debts due to the state, in its own right, before or after judgment, and without regard to the cause of indebtment.

Whatever may be the demerits of the plaintiff in error, they do not affect the nature and extent of the obligation of the state. And that obligation cannot be withdrawn from this paper. Into whosesoever hands it shall come, it carries with it the pledge of the state to receive it in payment of its debts. In this case, the payment is made by the securities of Woodruff, and exacted by the state, to whose organization and management of the bank may be attributed its insolvency. In procuring the notes of the bank, these securities had a right to

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rely, and no doubt did rely, upon the guarantee of the state to receive them in payment of debts.

In sustaining the application for a mandamus, the supreme court of the state exercised jurisdiction in the case. To that court exclusively belongs the question of its own jurisdiction. For the reasons stated, the judgment of the supreme court is

Reversed, and the cause is remanded for further proceedings to that court, as it may have jurisdiction, in conformity to the opinion of this Court.

MR. JUSTICE CATRON, MR. JUSTICE DANIEL, MR. JUSTICE NELSON, and MR. JUSTICE GRIER dissented.

MR. JUSTICE GRIER.

With all respect for my brethren, I feel constrained to express my entire dissent from the opinion of the majority of the Court which has just been delivered.

There is no portion of the power and jurisdiction committed to this Court which demands so much caution in its exercise as that of declaring the legislation of a state to be null and void because it comes in conflict with the Constitution of the United States. And more especially should this be the case where one of the states of this Union is really, though not nominally, the true party defendant and is charged not merely with legislation injuriously impairing contracts between her citizens, but with a direct and dishonest repudiation of her own solemn obligations. Such is the charge on which the state and people of Arkansas have been publicly arraigned before this Court. But it is one I am unwilling to endorse or believe without other evidence than the record before us contains. When a state is charged with a repudiation of her contracts, the party making it is bound to show beyond dispute that the state has made a contract; when, where, how, and with whom; and not leave it to surmise, strained inferences, or fanciful construction, as to the nature of the obligation, or the parties to it.

Assuming the State of Arkansas to be, for the purposes of this case, a private corporation, or an individual, and bound by the same principles of law and equity which affect other persons in their intercourse with the world, let us examine whether William E. Woodruff, the plaintiff below and in error, has shown a contract which entitled him to the remedy sought, in the Supreme Court of Arkansas, and which we are now called on to afford him. The record shows that his bond was given to the State of Arkansas on 27 October, 1836, before the act was passed which incorporated the Bank of the State of Arkansas. His contract, as it appears on the face of his bond, is

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to pay $300,000, "lawful money of the United States," subject to a condition which is forfeited. He was treasurer of the state, and between the date of his bond and on 21 December, 1838, he received large sums of money, and among others, the sum of $286,757.49, in drafts from the Secretary of the Treasury of the United States. Of these moneys a balance remained in his hands, which he refused to pay over, and a suit was brought on his bond in 1840; and on 23 January, 1847, final judgment was recovered for the sum of $3,359 and costs, and an execution having issued for the same, Woodruff, for the first time, in February, 1847, tendered to the attorney of the state not lawful money of the United States, which he had contracted to pay, and for which judgment was given against him, but notes of the state Bank of Arkansas, then and now insolvent, and the notes almost worthless. Woodruff then petitioned the supreme court for a mandamus to compel the attorney of the state to receive these worthless notes in place of the money he had contracted to pay, and which he was condemned by the judgment of the court to pay, and because of the refusal of the Supreme Court of Arkansas to issue a peremptory mandamus, he has appealed to this Court to compel them, on the ground that the law of the state which forbade its officers to receive payment of taxes and debts in anything but specie or par funds impaired the obligation of contracts. The twenty-eighth section of the act of 1836, incorporating the bank, directed that the bills and notes of the bank should "be received in all payments of debts due to the State of Arkansas." But another statute, passed in 1845, enacted, that "from and after 4 March, 1845, nothing shall be received in payment of taxes or revenue due the state but par funds or treasury

warrants of the state."

Now for seven years and upwards after the default of the plaintiff in paying over money which he had received, he was permitted to pay in notes of this bank, but in all this time he made no tender of payment in such notes. When sued on his bond, he makes no tender of notes, pleads no setoff, but, after judgment of the court that he shall pay money, he claims a right to satisfy the execution by handing over that which is not money. If this claim be not just, it has at least the merit of novelty, as it is certainly without precedent either in the courts of England or America.

Let us assume for argument's sake that every enactment of the Legislature of Arkansas is in the nature of a contract or promise with some person, and cannot be repealed, and that the state had guaranteed or endorsed every note issued by the bank, or, what will make the case stronger for the plaintiff, that his bond was made payable in the notes of the State Bank

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of Arkansas. Is he entitled to the extraordinary process now demanded, or had he a right to allege such contract on the part of the state at this stage of the proceedings? If he had not, and the court below were right in refusing to issue the mandamus, whether the act of 1845 was void or valid, he has no right to call upon this Court to reverse their judgment, because they may have given a wrong reason for it, and unnecessarily passed their opinion on the validity of an act which did not affect the plaintiff's case, or deprive him of any right.

If a creditor gives public notice to his debtors that he will accept, in payment of his debts, wheat, tobacco, or Arkansas notes, and his debtor for a course of seven years refuses or neglects to accept of the offer and tender payment in such articles, and is afterwards sued upon his bond or note, and even after suit brought makes no such tender, or pleads his readiness to pay in such articles, and judgment is obtained against him on his bond for money due; can he afterwards ask a court to allow him to tender payment in anything else than money, or have a rule on the plaintiff's attorney or a mandamus to compel him to accept notes of a broken bank, or other specific articles, in payment of an execution issued on the judgment? Again, if the obligation sued upon is payable in specific articles, and no tender of them is made before suit brought, or plea that the defendant is ready and willing to pay according to contract, and the court give judgment against the debtor for a certain sum of money as damages for his breach of his contract, can he afterwards compel the sheriff or the plaintiff's attorney to accept specific articles in satisfaction of a judgment and execution for money? And again, if a defendant hold notes drawn or endorsed or guaranteed by the plaintiff, he may plead them as a setoff, and obtain judgment in his favor. But if he enter no such plea, or demand no such setoff, and judgment is entered against him for the money due, can he purchase the plaintiff's notes after judgment, and ask the court to compel the plaintiff's attorney to accept them in payment? It does not appear, nor have the learned counsel asserted, that such is the peculiar law of Arkansas, and it certainly is not the law anywhere else.

When suit is brought on a contract, it becomes merged in the judgment; if the defendant claims a right to pay it in anything else than money, he must plead it and set it up on the trial, for the court, on an action for money, can give judgment only for the payment of money. If, after trial, verdict, and judgment the plaintiff on motion

could raise a new question as to setoff, tender, or a right to satisfy his debt in some other way than by payment of money, the judgment of a court, instead of being the end of controversy, would be but the beginning of litigation.

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Of this the present case is a most flagrant instance. The plaintiffs in error were sued on their bond in 1840, on an obligation to pay "lawful money of the United States." They contested the claim in court for seven years, never alleged by plea or otherwise any contract on the part of the state by which they were entitled to pay in anything but money, never tendered notes of the Bank of Arkansas, never alleged that the state was liable as guarantor of the notes of the bank, and bound to accept them as a setoff or in payment, but after final judgment affirmed in a court of error, and execution issued, they commence a new litigation, which has now lasted for four years more.

If a citizen of Arkansas had sued the defendants on their bond, and thus had claimed the right to tender payment of it in anything else than money, owing to some promise or contract of the plaintiff to accept the paper of a particular bank in payment of his bond, no lawyer can pretend that the defendants were not bound to make their defense on the trial, or that, after judgment to pay money, any court has the power to compel the plaintiff to accept anything else. That a sovereign state has not the same rights in a court of justice that are granted to her humblest citizens is a doctrine that I have not heard advanced and do not feel bound to disprove. And yet if the Supreme Court of Arkansas had issued the peremptory mandamus asked by plaintiff, they would have assumed a power over the sovereign state which the law would not allow them to exercise over any of her citizens. The Constitution of the United States forbids any state "to make anything but gold and silver a tender in payment of debts;" yet it is claimed that this Court has the power to compel a state to accept payment of a judgment for $3,000 lawful money of the United States in worthless paper of a broken bank, or in other words, in a collateral proceeding to set aside and reverse the judgment of the court condemning the defendants to pay money, and let them into a defense on some alleged contract of the defendant to guarantee the notes of a certain bank, or to accept payment in something else than money, and thus try the defense after judgment. If courts of justice have such a power, it would seem that this is the first instance in which they have been called upon to exercise it, as the books of reports can furnish no precedent of such a proceeding.

Thus far, I have considered this case on the assumption that the State of Arkansas, by her direction to her officers to receive payment of debts due to her in the notes of the bank, has become the guarantor and endorser of such notes, and has thereby divested itself of all power to lay and collect taxes payable in any other medium or currency than notes

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of the bank, and irrevocably made them a sufficient tender to her for all debts due, and shown, as I think, that the court below were justifiable in refusing to the plaintiff the writ prayed for in his petition. Let us now inquire whether there is any such contract between the parties in this case which has been impaired by the legislation of the state. For it is well settled that the plaintiffs have no right to invoke the aid of this Court to exercise the high power entrusted to it of deciding on the validity of state legislation, unless some rights vested in them by contract with the state or some

other person has been impaired or destroyed thereby.

I admit that if the defendant, as treasurer of the state, had received debts or taxes due the state in the notes of the bank before the repeal of this law directing him to receive them, it would be a gross violation of its contract to refuse to receive from him such currency or specific articles as he had received in pursuance of law. But that is not the case before us. On the contrary, the bond given by the plaintiff was antecedent to the incorporation of the bank; their contract with the state was to pay "lawful money of the United States," and the subsequent act cannot be said to be incorporated in it, or make a part of their contract. The treasurer received for the use of the state money, not notes of the bank, as the record shows. They do not pretend that after the passage of the act, or even after its repeal up to the time that judgment was obtained against them, they ever held a dollar of these bank notes, or ever tendered a payment of their debt in them. Where, then, is the contract with these plaintiffs, or how has it been impaired? If other persons have received these notes on the faith of their guarantee by the state, and their value has been diminished or destroyed by the refusal of the state to receive them in payment of their dues, what right have the plaintiffs to complain, or to come to this Court for aid? Who is attempting to commit a fraud, or deny the obligation of their contracts, the State of Arkansas or the plaintiffs themselves? For seven years after this balance was due from the treasurer, from 1838 till 1845, he was permitted to pay it in notes of the bank; but he refused to accept the offer. The bank becomes insolvent, the offer to receive payment in its worthless paper is withdrawn. And two years afterwards, and after the plaintiffs are condemned to pay their debt according to their covenant, in lawful money of the United States, after an execution has issued to compel a compliance with the judgment of the court, they ask this Court to annul their contract and the judgment of the Supreme Court of Arkansas, that they may pay their debt in depreciated paper bought up for the purpose. It seems to me

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that if the charge of fraudulent disregard of their contract be imputable to either of the parties in the argument, so far as it affects the contract between them, it is not the state which is justly liable to it, but the plaintiffs. The repeal of the twenty-eighth section of the act incorporating the bank, if it impaired the obligation of a contract with any person, certainly did not add to or change the obligation given by the plaintiffs, or impair it in any respect. If it was a contract at all, it was with the corporation. So far as it affected the plaintiffs, it was a gratuitous offer and direction or permission to the treasurer to receive, accept, and pay over debts due the state in a specific article not money, nor a legal tender as such. There is no complaint that the state ever refused to receive from the treasurer taxes or debts received by him in this currency, under this permission or direction of the act. For the seven years that he was permitted to pay his own debt in that medium, he refused to accept of the offer. If a wealthy creditor, for the purpose of sustaining the credit of a particular bank, publishes to the world that if his debtors will pay him in notes of that bank, he will accept them, and after the bank fails gives notice that he will no longer receive them, can a debtor who for seven years has refused to accept this offer and pay his debts in the manner proposed allege that this is a contract binding on the creditor forever? Can he allege that this offer to receive payment in a specific article, unaccepted by him, has changed the nature of his bond, and that a demand of payment according to the letter of his obligation impairs any contract between them? Such a doctrine as regards the contracts of individuals has never been advanced in a court of justice.

And why a different rule should be applied to contracts when a sovereign state is one of the parties has certainly not been explained.

It needs no argument to demonstrate that a contract must have at least two parties, and that all laws made by a sovereign state are not necessarily contracts, and therefore irrevocable. The act of the Legislature of Arkansas under consideration is entitled, "An act to incorporate the Bank of the State of Arkansas." It creates a corporation and confers certain powers and privileges upon it. So far as it does this, as has been decided by this Court, the act may be considered in the nature of a contract, and that these powers and privileges cannot be annulled or withdrawn without the consent of the artificial power thus created, or the individuals for whose benefit the franchise was granted. It is true also that when a law is in the nature of a contract or grant, and absolute rights have vested under that contract, a repeal of the law cannot divest

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those rights. But the plaintiffs in this case are not corporators, or stockholders in the bank; they hold no franchise, powers, or privileges, under the act of incorporation; they are no parties to the contracts, nor have they any vested rights under it which have been impaired by the repeal of the twenty-eighth section. If the corporation, or those who claim the franchises and powers granted to it, do not complain of an infringement of their contract, no other person can. As to them, it is a mere speculative question, which this Court is not bound to decide.

So far as it affected the plaintiffs, the twenty-eighth section was but a gratuitous offer to accept notes in place of gold and silver, if they would pay their debt, a mere license at the pleasure of the state if not accepted by them. To call it a grant or vested right under a contract seems to me a perversion and abuse of terms. But admitting that the directions given in this act to her public officers to deposit the funds of the state in this bank, and receive its paper in payment of its debts, constituted a part of the contract with the corporation, and could not be repealed, did it bind the state after the corporation ceased to perform the functions and duties imposed upon it? If a state creates a banking corporation with a certain capital, and requires it to pay its notes in specie on demand, and agrees to make it a depositary, and use and receive its notes as cash, is the state bound by its contract to do so when the corporation fails or refuses to fulfill the duties and purposes of its creation? If such be the case, it is certainly a one-sided contract; there is no mutuality in it.

Does it make any difference in the case also whether the stock of the corporation is furnished by the state or individuals? In neither case are the stockholders individually liable for the mismanagement or defaults of the corporation unless previously made so by the act of incorporation. The State of Arkansas furnished one million of dollars as the stock upon which this banking corporation was to issue notes and discount paper. She has nowhere agreed to guarantee the solvency of the bank or be liable for its issues. If individuals had furnished the stock, they would not be personally liable for its debts. If the stockholders had all made deposits of their money in the bank, and received interest on long deposits, and received its notes as gold and silver, it would not have amounted to a contract with the public, or note holders, or anybody else, that they should continue to deposit their money or receive its notes in payment of debts after the bank became insolvent and its notes worthless. The most refined legal *astutia* has thus far been unable to discover in such conduct of individuals an

implied promise to receive broken bank notes in payment of debts, or a liability to the

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note holders, because their conduct had given credit to the bank. But it seems there is a more stringent rule of morality with regard to sovereign states and their contracts. In their case, under some fiction of the law, without regard to the fact or their actual undertaking, there has been discovered an implied contract running with the paper, like a covenant running with land, which renders them liable for all the issues of the bank, into whosesoever hands it may come, and forever disables them to lay or collect a tax or pay a debt till they have lifted and paid every note of the broken bank in which they were stockholders, although they never directly pledged the faith of the state or agreed to be liable for a single dollar issued by the bank. If individuals had furnished the one million of dollars capital under an act of incorporation which did not make the stockholders personally liable, every person who received the notes would do it on the credit of the capital paid in. Why it should not be the same case when a state furnished the capital I am unable to perceive. Nor can I comprehend how a direction by a state to its officers to make deposits in a bank and receive its notes in payment of debts amounts *per se* to a contract running with the notes which binds the state to receive them forever, whether the corporation be solvent or insolvent, dead or alive. But the liability of the state for these issues is argued and attempted to be proved by another legal fiction -- to-wit that the state is the bank and the bank is the state. And why? Because she created the corporation? No, for that would make her liable for the paper of every corporation created by the legislature.

It is, then, because she is owner of the stock, receives the profits, makes the bank her depositary, and gives credit to its notes by ordering them to be received in payment of her debts. And it is from this doctrine of identity that this contract of guarantee, running with the paper, has been inferred, or rather imputed to the state. If the same identity exists when individuals stand in the same relation to a corporation, and the same contract of guarantee be imputed to them -- and I can see no reason why it should not -- it is strange that no traces of the doctrine can be found in our books of reports.

But there are certain inferences which necessarily follow as corollaries from this decision in this case, and certain doctrines for which it may be quoted as a precedent although not directly asserted, that confirm me in refusing my assent to it.

1st. That if the same rules of law for the interpretation of contracts, and the rights of the parties to them, affect all persons, whether natural or artificial, the individual and the sovereign state, it may fairly be inferred hereafter that when a bond or

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note payable in specific articles is sued upon, the defendant is not bound either to tender them or plead a tender, but, after judgment for a sum of money, he may make payment to the sheriff of the execution in specific articles, and not in money.

2d. That after a court has solemnly adjudged that the defendant shall pay to the plaintiff a certain sum of money, they can compel him to receive in lieu of it worthless rags.

3d. That a defendant who has been condemned by the judgment of a court to pay to the plaintiff a sum of money may buy up notes drawn or endorsed by the plaintiff and by mandamus or rule of court compel the plaintiff's attorney to accept them in payment.

4th. If these consequences are not legitimately to be inferred from this judgment, then it necessarily follows that this Court exercise a controlling power over sovereign states and judgments obtained by them which it cannot exercise over the humblest individual or petty corporation.

5th. That this Court has the power to compel any state of this Union, which repudiates its debts to pay them because such refusal or repudiation impairs the obligation of her contracts.

6th. That so long as any portion of the three millions of dollars of notes issued by this bank before 1845 remains unpaid, the State of Arkansas cannot collect a dollar of taxes from her citizens in lawful money.

7th. That the courts have a right to compel a state to pay bank notes guaranteed by them, before and in preference of all other debts.

8th. That the collectors of taxes, so long as any of this issue of bank notes can be found, may buy them up at the rate of one dollar for ten or a hundred, and have the assistance of the court to compel the state to receive them at part even where the collector has received gold and silver.

9th. That when a state, a corporation, or an individual publishes to the world their willingness to accept payment of their debts in the issues of a bank, it amounts to a contract, by implication, with the public, and each individual composing it, to guarantee the notes issued by said bank, and that this contract runs with and is attached to said notes in the hands of the bearer, provided the notes were issued before such offer is withdrawn.

As I cannot assent to anyone of these propositions, and as I believe they are legitimate deductions from the decision of the Court, I beg leave to express my dissent from it.

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MR. JUSTICE CATRON.

I concur in the dissenting opinion just delivered by my brother GRIER.

MR. JUSTICE DANIEL.

I dissent from the decision of the Court in this case, and entirely concur in the arguments and conclusions expressed in the opinion delivered by my brother GRIER.

Order

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Arkansas and was argued by counsel. On consideration whereof

it is now here ordered and adjudged by this Court that the judgment of the said supreme court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said supreme court for further proceedings to be had therein in conformity to the opinion of this Court.