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Historical Lights from Judicial Decisions

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HISTORICAL LIGHTS FROM JUDICIAL DECISIONS*

THE history of a nation is to be looked for in a great variety of places. Its traditions, its public and private records, its religious and social orders, its literature and its laws, each yield copious results to the researches of the historian. The social, religious and economic conditions of a nation at any period of its history, the state of the domestic relations, the rights of property and of succession, the growth of personal liberty, all these and many more find their accurate expression sooner or later, in the written or unwritten laws of the land. And the movement of society, whether it be forward or backward, will there be indicated.

The savage needs few laws, and such as he has are elementary and as unstable as the will of a tyrant ruler. The nomad must have laws to protect his flocks and herds, and his possessary rights of pasturage, and he needs little more. The agriculturist requires, for his protection, more complicated land laws, and the advent of trade, navigation and manufacturing have been marked by the appearance of laws for their protection. To speak inversely to the fact, when laws for the protection of these interests are found, the existence of such interests may be conclusively inferred.

It is equally true that the social status of a people may be read in its laws. The simple code of a primitive people may serve, but the complexities of civilization, the growth of refinement and luxury, the struggles of men for liberty, these can all be traced, and perhaps nowhere more accurately than in the codes of laws that accompany them as a sure index of the occupations, the habits, the learning and the aspirations of the times. The *Magna Charta* is not a long instrument, yet it bears with it evidence of the existence of social aspirations and growth which made possible the long and bloody struggle of the Anglo-Saxon race for personal liberty and individual rights.

In modern times the laws of a country are to be found, not only in constitutions, codes and compilations of statutes, but in the decisions of the courts. It is there that the principles of natural justice, upon which the laws of modern states are presumed to rest, are pointed out and elaborated. It is there that constitutions and codes are construed and the effect that is to be given them defined. It is there that the real and not merely the apparent state of the law is to be looked for.

Nothing connected with the history of the United States is of more

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interest or importance than that which centers about the adoption of the Constitution, which furnished the framework or body for a nation, and the subsequent decisions of the Supreme Court, which breathed life into its vital parts. If those decisions had been reversed, it is impossible to forecast with certainty all the results, but, it is safe to say, the United States, as we know it, would never have existed.

I cannot better illustrate the subject I have in mind to discuss than by reference to some of these early decisions of the Supreme Court of the United States.

It must be remembered that when the Constitution was framed, there was no precedent to which its framers could turn with certainty of enlightenment. The Articles of Confederation were valuable chiefly as showing what should be avoided. The new charter of government must appeal first to the sovereign states, but it must be something more than a league between them, there must be a compact between the people themselves to form an indissoluble Union. It followed the English system in providing for a division of the powers of government into executive, legislative and judicial departments, each of which was of equal honor and dignity and neither of which had the right to infringe upon the prerogatives of the other. The government, being one of limited and restricted power, each department must, of necessity, be called upon from time to time to construe those provisions of the Constitution which related specially to the duties devolved upon it, and there was no express power given in the instrument to any one department to interpret or to construe it for another.

Unlike the English Parliament, Congress had power to pass laws only within certain defined limits. Whenever, therefore, it exercised this power it necessarily determined for itself that it was keeping within the prescribed limits. Was this determination final and conclusive upon the other departments, or did there exist, of necessity, a revisory power that could speak with authority in the interpretation of the Constitution, in defining the limits to which the other departments might go and to which all others must give heed?

In the light of what has happened since, this seems a simple question. But it was not so simple in the early days of the Constitution. Whichever department assumed this power without being able to point to an express grant of it in the federal compact, ran the risk of being charged with usurpation by the other departments, unless such assumption was accompanied by such plain, reasonable and convincing arguments for its necessity as would satisfy the judgment and allay the jealousies of all.

That task fell upon the Supreme Court of the United States in

the case of *Marbury* v. *Madison*.[1] Madison was secretary of state under President Jefferson. President Adams, near the end of his term, had appointed Marbury as one of the justices of the peace for the District of Columbia under an act of Congress authorizing such appointment. The appointment had been confirmed by the Senate, the commission made out and signed, and delivered to the secretary of state to have the great seal affixed and the commission recorded and delivered to the appointee. For some reason, not disclosed, the commission was not delivered to Mr. Marbury during Mr. Adams' term of office, and after the accession of President Jefferson, his secretary of state, Mr. Madison, declined to deliver it.

An application was then made by Mr. Marbury to the Supreme Court of the United States for a writ of mandamus to compel Mr. Madison, as secretary of state, to deliver the commission. An order to show cause was granted, and upon the return of the writ and answer of the respondent, and after argument by counsel, the Chief Justice, JOHN JAY, delivered the opinion of the court.

It was held that Marbury had a legal right to his commission, and that mandamus was a proper remedy to pursue and could lawfully be maintained against the secretary of state. The writ, however, was denied on the ground that the Supreme Court was without original jurisdiction to issue such writ. It was true, the learned Chief Justice said, that Congress, in the act to establish the courts of the United States, expressly authorized the Supreme Court to "issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

"The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description, and if this court is not authorized to issue a writ of mandamus to such officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority. The Constitution vests the whole judicial power of the United States in one Supreme Court and such inferior courts as Congress shall, from time to time, ordain and establish. In the distribution of this power, it is declared that 'the Supreme Court shall have original jurisdiction in all cases affecting ambassadors or other public ministers and consuls, and those in which a state shall be a party. In all other cases the Supreme Court shall have appellate jurisdiction.'

"The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue

[1] 1 Cranch 137.

writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

"The question whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it."

After discussing at some length the origin of the Constitution and showing that the powers granted by it are defined and limited, and that unless such limitations are to be recognized the Constitution is without force or meaning, the learned Chief Justice concludes:

"If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

"So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

"If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

It was fortunate that the case which first called for an adjudication of this important question was one which called upon the court to abridge its own powers and to acknowledge that the court itself, as well as Congress, must strictly regard the limits fixed by the Constitution in exercising its powers. There was no opportunity to say that the court was ambitious to assume power not granted, in view of the fact that it had just disclaimed a power which Congress had voluntarily assumed to vest in it.

The historic interest of this case lies in the fact that it established

for the first time a right of interpreting the Constitution in the judicial department of the government,—the department most permanent in form and, therefore, most stable and conservative and least liable to the mutations of political fortunes, and, also, that the other departments cheerfully acquiesced in such right. So that it has come to be as well settled as any express provision of the Constitution that that instrument, as interpreted by the Supreme Court of the United States, is the Supreme Law of the land. Any other doctrine must have led to confusion and anarchy, involving the destruction of the Constitution and the government it established.

The case of *M'Culloch* v. *Maryland*[2] involved the power of Congress to establish a United States bank and the power of a state to tax such bank, but it led to the declaration of other principles of great importance which have been accepted as the law of the land.

Among the acts passed by the First Congress, after the adoption of the Constitution, was a law for the incorporation of a United States bank, under which a bank, with branches in various cities, was established. This act was not passed without great opposition, and it is doubtful if it could have passed the Congress and become a law but for the convincing argument made by Alexander Hamilton, then secretary of the treasury, in his report to Congress.[3] The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to renew it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of another law in 1816. The opposition to the measure then manifested itself by hostile legislation in some of the states. The state of Maryland passed a law entitled, "An Act to Impose a Tax on all Banks or Branches thereof in the State of Maryland, not Chartered by the Legislature," which act was aimed directly at the branch of the United States Bank which had been established at Baltimore. An action was brought in a Maryland court to recover certain penalties which it was claimed had accrued to the state of Maryland in consequence of the non-payment of this tax. A judgment was recovered and affirmed by the court of last resort of that state, from which an appeal was taken to the Supreme Court of the United States upon the ground that the Maryland law was in violation of the Constitution of the United States because,

First, Congress had power, under the Constitution, to establish the bank, and,

Second, that the state had no power by taxation or otherwise to impair a constitutional power of Congress.

[2] 4 Wheat. 316.

[3] Lodge's Life of Hamilton, 98-102.

When the case came on for argument in the Supreme Court, the attorney general of the United States appeared for the government, and there were associated, as counsel, Daniel Webster and William Pinkney. The state of Maryland was represented by three eminent counsel, the leader of whom was Luther Martin, then the attorney general of Maryland, one of the greatest, if not one of the most scrupulous, lawyers of his time. The arguments covered a broad field, and the opinion of the court, rendered by Chief Justice MARSHALL, did not fall short of the arguments of counsel in this respect. In the course of the opinion, the Chief Justice announced the following great principles, which have since been received as settled law in this country, although many of them can scarcely be considered to be involved in the decision of the question before the court:

"Congress has power to incorporate a bank.

"The government of the Union is a government of the people; it emanates from them; its powers are granted by them; and are to be exercised directly on them and for their benefit.

"The government of the Union, though limited in its powers, is supreme within its sphere of action; and its laws, when made in pursuance of the Constitution, form the supreme law of the land.

"There is nothing in the Constitution of the United States, similar to the Articles of Confederation, *which exclude incidental or implied powers.*

"If the end be legitimate and within the scope of the Constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.

"The state governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers.

"The states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the National Government."

As indicating the latitude taken in the opinion, I quote a few paragraphs:

"In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be

exercised in subordination to the states, who alone possess supreme dominion.

"It would be difficult to sustain this proposition. The convention which framed the Constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might 'be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the convention, by Congress, and by the state legislatures the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true they assembled in their several states—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

"From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.' * * *

"It has been said that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. * * *

"The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

This language, uttered nearly a century ago, by Chief Justice MARSHALL, has a recently familiar sound, although even at this time there are not lacking those who denounce such language as the

utterances of demagogues, or as being at variance with the idea of "a republican form of government."

The historic interest of this case lies in the fact that it was the origin of the doctrine of *implied powers,* without which the sovereignty of the nation must have been greatly abridged. It has been appealed to on many occasions of stress, and is still the rallying cry of those who believe in a nation with a big N.

I crave your indulgence for referring to one more of the early federal cases which is of historic interest, as being the first case in which the power of Congress, under the interstate commerce clause of the Constitution, was discussed and defined. It is the case of *Gibbons* v. *Ogden,*[4] decided in 1824. Like the Maryland case, it was brought by appeal from the highest court of a state—New York—to the Supreme Court of the United States.

The legislature of New York had granted to Robert R. Livingstone and Robert Fulton the exclusive right for a term of years to navigate the waters of that state with boats moved by fire or steam. Ogden, as assignee of Livingstone and Fulton, had acquired the exclusive right to navigate such waters between Elizabethtown, New Jersey, and the city of New York. Gibbons was the owner of two steamers which he employed in running in competition to Ogden from Elizabethtown to New York, and a bill was filed by Ogden to restrain Gibbons from infringing upon his exclusive rights, based upon the New York statute and his assignment from Livingstone and Fulton. An injunction being awarded by the court of New York, Gibbons answered, setting up an act of Congress passed in 1793, entitled, "An Act for Enrolling and Licensing Ships and Vessels to be Employed in the Coasting Trade and Fisheries and for Regulating the Same," and claimed rights in virtue of a license under that act. At the hearing in the state courts, the injunction was perpetuated and an appeal was taken to the Supreme Court of the United States on the ground that the New York statute infringed upon the power of Congress to regulate commerce between the states.

At the hearing in the United States Supreme Court, Daniel Webster was principal counsel for Gibbons. The state of New York was represented by Mr. Oakley, an eminent lawyer of his day.

Chief Justice MARSHALL, speaking for the court, delivered an exhaustive opinion, in which he discussed and defined the term "commerce" as used in the Constitution, rejecting the narrow meaning given to it by counsel who represented the state of New York. He said:

[4] 9 Wheat. 1.

"Counsel for the appellee would limit commerce to traffic, to buying and selling, or to the interchange of commodities. Commerce undoubtedly is traffic, but it is more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribed rules for carrying on that intercourse."

The learned Chief Justice showed by elaborate and unanswerable logic that the powers granted to Congress to regulate commerce between the states was essentially an exclusive power which could not be shared with the states. As a result of the decision, the monopoly attempted to be established by New York in the navigation of its rivers was overthrown, and they were opened to the commerce of the world. It is worthy of note in passing, that the lifting of the embargo was followed by a rapid increase of steamboats on the Hudson River and adjacent waters, which the monopoly had held in check. The doctrine of this case, now so familiar, because of the numberless cases since decided by the Supreme Court of the United States involving questions of interstate commerce, acquires its importance and interest from the fact that it was the pioneer case and laid down the principles upon which has been established the present broad doctrine of the power of Congress over the subject to which it related. If the decision had been the other way, and the narrow construction put upon the Constitution which was contended for by the state of New York, who can forecast the results?

An important part of the decision of every case are the briefs and arguments of counsel. In the early days, when there were fewer cases, the arguments were printed with the opinion, and we are indebted to that practice for the preservation of some of the greatest legal arguments ever addressed to a court. We learn from them that many of the profound doctrines concerning the interpretation of the Constitution of the United States, by which the early justices of that court won great and lasting distinction, and from which the nation has reaped incalculable benefits, were first propounded, elaborated and illuminated by the learning and eloquence of the great lawyers who argued the cases.

I will close what I have to say upon this subject by a brief reference to a few Michigan cases which have local historical interest.

It is doubtless known to most of you that slavery once existed in Michigan. Reference to that fact will be found in various histories. But it may not generally be known that we are indebted to the opinions of Judge WOODWARD, one of the early territorial judges of Michigan, for a history of the origin of slavery in this territory, and for the declaration of the law which resulted in its

more speedy extinction. Judge WOODWARD's opinions in two cases will be found printed in Vol. 12 of the Michigan Pioneer and Historical Society's publications.

At the time of the adoption of the ordinance of 1787, which prohibited slavery in the territory over which it established a government, slavery already existed. And the question soon arose as to whether the prohibition of the ordinance could be construed to apply to such slaves as were held as property before the ordinance took effect, or only to such slaves as were brought into the territory after that event. There were three classes of slaves involved in the controversy. First, those who had been held by French owners when Michigan was a part of the domain of France, the owners of whom claimed for their title the protection of the treaty of cession under which the territory passed from France to Great Britain. Second, those who were held by British owners at the time of Jay's treaty and were claimed as property under its provisions. So long a time had elapsed since those treaties were made—particularly the French treaty—that but few persons were living, whether as owners or slaves, who could be affected. Third, those who, since the territory had come under American control had been brought into it from states where slavery was lawful. In this class was included much the larger number.

The first case decided by Judge WOODWARD arose out of a *habeas corpus* proceeding brought on behalf of Elizabeth, James, Scipio and Peter Dennison, claimed as slaves by Catherine Tucker. In the return to the *habeas corpus,* Catherine Tucker asserted rights under both treaties. Judge WOODWARD, in his opinion, gave effect to the French treaty of cession and remanded the slaves to their mistress. The date of this opinion does not appear.

The second case, decided in 1808, arose upon the application of one Richard Patterson, a British subject residing in Sandwich, Canada, for a warrant for the apprehension of Joseph and Jane, his slaves, who had fled from their master and taken refuge in Detroit. In his opinion, Judge WOODWARD recognized the rights of the master to his slaves under the laws of Canada, but declined to recognize such rights as binding upon an American court, and refused to allow the warrant to issue. He fortified his position by citing the decision of LORD MANSFIELD in the Somerset case, and said that as the courts of England declined to deliver up slaves who had escaped from bondage and sought shelter on English soil, he would follow their example.

In his opinion in both of these cases he went somewhat outside of the record to give his opinion of slavery in general in emphatic

language, and made it very evident that the greater number of slaves who had been brought into the territory since the ordinance of 1787 took effect were, in his opinion, unlawfully held as such. This volunteered opinion of the learned Chief Justice, although not having the force of a judgment upon the rights of such persons, was generally accepted and acted upon, and I find no record of any case affecting the liberties of such slaves.

It is a matter of common knowledge that it has been claimed that Michigan was, during the period between the adoption of its first constitution in 1835 and its admission into the Union in 1837, an independent and sovereign state owing no allegiance to the government of the United States, but I doubt if it is generally known that it has been judicially determined that this was a fact.[1]

The case of *Scott* v. *Detroit Young Men's Society*,[5] lessees, was ejectment brought by the Detroit Young Men's Society to recover possession of real estate which it claimed under a deed executed to it in its corporate name. The corporation known as the Detroit Young Men's Society was incorporated under an act of the state legislature passed at its first session after the adoption of the constitution, and approved March 26, 1836, by Stevens T. Mason, as governor of the state. It was claimed by Scott, the defendant, that there was no such corporation, because the government of the state of Michigan was not established, and neither the legislature nor the executive department of that government had any legal existence on the 26th day of March, 1836, and prior to the admission of the state into the Union by Congress, January 26, 1837.

After elaborate arguments by counsel on each side, RANSOM, Judge, delivered the opinion of the court and said: "This case presents two very important questions for our determination; the first, involving the validity of the acts of our state government, and in fact the very existence of such government, prior to the admission of the state into the Union by Congress, January 26, 1837. * * * We shall first inquire whether Michigan was a *state*, with a constitution, and a government organized under it, possessing the sovereign power of state legislation over the people within her limits on the 26th day of March, 1836. If not, then the 'act to incorporate the Detroit Young Men's Society' passed by the body claiming to be the legislature of such state, and approved by Stevens T. Mason as governor of such state on the day last mentioned, was a nullity. It gave no vitality or powers to the plaintiff, as a corporation. They had no power to take and hold the real estate in question, or to sue for its recovery."

[5] 1 Doug. 119.

I shall not take your time, although I am not sure but that you would find it interesting, to quote further from the exhaustive and learned opinion of Judge RANSOM, by which he fortified the conclusion which the court had reached, that Art. 5 of the Ordinance of 1787, for the government of the territory of the United States northwest of the river Ohio, secured absolutely and inviolably to the people of the territory of Michigan, as established by the act of Congress of January 11, 1805, the right to have a permanent constitution and government whenever the territory should contain 60,000 free inhabitants, a right which could in no way be modified or abridged or its exercise controlled or restrained by the general government. That the assent of Congress to the admission of Michigan into the Union was only necessary because the older states represented in Congress possessed the physical power to refuse a compliance with the terms of the compact contained in the ordinance of 1787, and there was no third party to whom the state could resort to enforce such compliance. But the right to admission became absolute and unqualified on the adoption of the constitution and the organization of the state government. And that the act passed in March, 1836, to incorporate the Young Men's Society of Detroit was legal and valid, as the act of an independent and sovereign state.

It is generally supposed, I presume, that the cultivation of sugar beets in Michigan is a very recent affair. In fact, the Encyclopedia Americana, under the topic of sugar beets, says that the first experiments with sugar beets in the United States were made by two Philadelphians in 1830. About ten years later David Child, of Northampton, Massachusetts, attempted beet cultivation and the making of sugar. He produced 1,300 pounds at a cost of 11 cents per pound. These efforts failed and seemed to have discouraged further effort until the Genert brothers, natives of Brunswick, Germany, inaugurated a plant at Chatsworth, Illinois, in 1863, which failed seven years later.

In the case of *Hasey* v. *The White Pigeon Beet Sugar Company*,[6] however, a suit was brought upon the following instrument:

"WHITE PIGEON, June 10, 1840.

"By order of the Board of Trustees, the treasurer of the White Pigeon Beet Sugar Company will pay to Henry A. Knapp, or bearer, Seven and Thirteen One-Hundredths (7.13) Dollars.

"Signed, SAMUEL A. CHAPIN, Pres.

"C. YATES, Sec."

[6] 1 Doug. 193.

This would seem to bear conclusive evidence of the fact that prior to 1840 the raising of beets for sugar had been carried on at White Pigeon, Michigan, to an extent sufficient to warrant the organization of the White Pigeon Beet Sugar Company for the manufacture of sugar.

In *Rossiter* v. *Chester*[7] it was decided that the maritime laws of the United States did not apply to the Great Lakes and that, consequently, the doctrine of general average did not apply to them. If this doctrine had remained settled law, it would have had a serious effect upon the navigation of the Great Lakes, which have since become the greatest avenues of internal commerce in the country. But, fortunately, this doctrine was overruled by the Supreme Court of the United States in the case of *The Eagle*,[8] and later in *Backus* v. *Coyne*.[9]

These are only a few of the many cases to be found in the thousands of volumes of judicial decisions in this country containing material indispensable to the student of history, who, in addition to dry facts, desires to know the motives and influences that have given direction to events.

EDWARD CAHILL.

LANSING, MICHIGAN.

[7] 1 Doug. 154.
[8] 8 Wall. 15.
[9] 35 Mich. 5.