Daniel Webster

The Expounder of the Constitution

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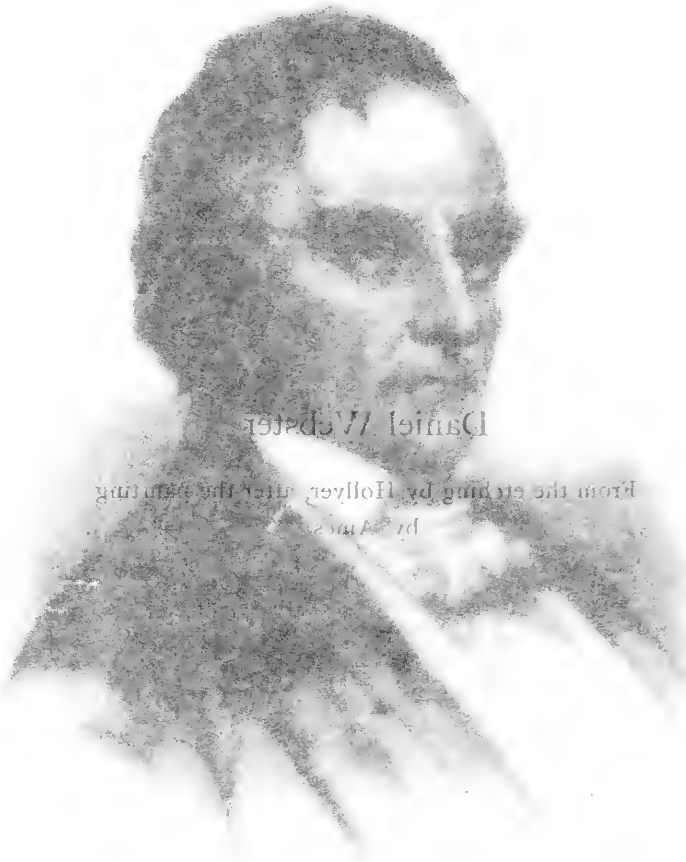


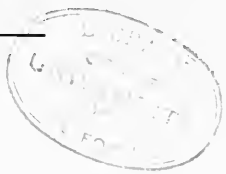
Daniel Webster

The Expounder of the Constitution

By

Everett Pepperrell Wheeler

"We cannot think of America without him. We cannot think of the Constitution or of the Union without him. His figure naturally belongs to and mingles with all great scenes and places which belong to liberty."—George Frisbie Hoar.



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PREFACE

I WAS brought up among men who knew Mr. Webster personally, and loved and honored him. I heard his oration before the New York Historical Society just before I went to college. In my Freshman year I went to his funeral, and saw him lie in simple state on his lawn at Marshfield. Every flag was at half-mast and every street draped in mourning. The hills were black with the countless throngs who assembled to pay the last tribute of respect to the first American of his day. The country showed how deeply it felt the loss of him who for fifty years had served it faithfully. My soul took in something of the universal emotion.

Then again, the men who influenced me in my youth were alive to the difficulties of the political situation, and their talk was of Mr. Webster, and the country, and the Union, and of the part he had played in the long struggle that attended their growth, and that finally effected their preservation. I lived through the Civil War and saw what that preservation cost when the final grapple came.

My professional studies have led me to a careful examination of the great cases that Webster argued, and the decisions that followed his arguments, and that have moulded our Constitution and made it

adequate to the needs of a great Nation. For twenty years in the brief intervals afforded a busy lawyer by the demands of his exacting profession, I have been collecting the materials for this book. It has really been an evolution, and I send it forth now, invoking for it the friendly consideration of my fellow-citizens, and believing that the Webster lesson was never more needed than it is now. One necessary result of free institutions is to develop independence. But the majority of mankind will always follow a leader. And the independence of the leader often begets subservience on the part of the follower, the result of which is injurious to the Commonwealth. In these days of industrial warfare, it is especially necessary to recur to the principles of our Constitution, and to cultivate respect for the rights of others as sedulously as we insist upon our own. This was the motif of Mr. Webster's career.

My attention was first drawn to the comparison between the Seventh of March speech and Mr. Lincoln's first inaugural by my cousin Alexander S. Wheeler, of Boston. He knew Mr. Webster well. His suggestions and personal knowledge have been of great service to me in the preparation of this book.

I have made a careful examination of the Webster manuscripts in the Congressional Library, and in the Library of the New Hampshire Historical Society at Concord, N. H. In both I have found much important unpublished material. Probably the most interesting of this is a manuscript of Mr.

Justice Story, giving an account of the argument of the Dartmouth College case, and of the case of Gibbons *v.* Ogden, that I discovered in the Library at Washington.

Most of my references to Mr. Webster's writings are to the edition of his works in six volumes, published by Little & Brown during Mr. Webster's lifetime, and of which numerous editions have since been published. This edition is referred to as *Webster's Works.* The recent more complete edition, published by Little, Brown & Company, is referred to in those cases in which it contains matter not in the original edition. This is cited as *Webster's Writings and Speeches.*

EVERETT P. WHEELER.

CONTENTS

CHAPTER I

CHAPTER II

CHAPTER III

CHAPTER IV

CHAPTER V

CHAPTER VI

CHAPTER VII

CHAPTER VIII

CHAPTER IX

CHAPTER X

CHAPTER XI

CHAPTER XII

CHAPTER XIII

CHAPTER XIV

CHAPTER XV

CHAPTER XVI

CHAPTER XVII

CHAPTER XVIII

CHAPTER XIX

CHAPTER XX

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CHAPTER I

INTRODUCTION

THE work of a truly great man must needs be permanent in its nature. To understand the true character of existing systems and to value them justly, it is needful to recur from time to time to their development and to study the part that statesmen have played therein. No American has done more to make our government what it is than Daniel Webster. To understand the Constitution of America, we must needs examine what he did while it was yet—so to speak—in the gristle, and this study will also teach us something of the true function of the profession of law in this country.

The labors that fall to an American lawyer are so varied in character that no one man can perform them all. In the mother country the profession for this reason is divided into ranks and grades, and he who serves in one does not attempt the

responsibilities of the other. The attorney must be a shrewd and skilful man of business. The proctor must be familiar with the rules of navigation. There is no height of intellectual attainment to which the advocate may not aspire, and no resource of learning or power of persuasive or judicial eloquence which will not aid him in his daily task.

Again, the development of our system of jurisprudence to provide for the rapid changes in the conditions of business and social life imposes a constant duty upon the intelligent and conscientious lawyer. The law which regulated the business of a few stages and canal-boats was inadequate to direct the complicated affairs of carriers by steam on land and sea. The judge-made code for the carrier of articles that could be weighed and measured, had but a limited application to the companies who put at the service of the public the invisible force of electricity, and have made New York and Boston, Chicago and San Francisco, parts of one great municipality. The English common law was well adapted to the thickly settled and compact island of Great Britain, but was insufficient and in some particulars ill adapted to the requirements of a people scattered over thirteen Commonwealths just formed into one Union.

There is yet another more arduous responsibility resting on the American lawyer from which our English brethren are exempt. First among the nations the United States established a written Constitution which should be the supreme law of

the land, supreme over Executive and Legislature, and which gave to the courts of justice the power to enforce its supremacy, by declaring that a statute which had received the votes of both houses of Congress and the signature of the President, or which had been adopted by a State Legislature and signed by its Governor, should yet be altogether held for naught if it violate the supreme Constitution.

Well might we say when we contemplate the magnitude of these labors,—Who is sufficient for these things? No doubt now, as in the Apostles' time, there are many who pervert the word of God, of whose justice and equity courts of justice ought to be the visible embodiment. But also there are many who, like St. Paul, speak in godly sincerity, and fulfil with singleness of heart the true function of the lawyer, which is to aid the court in the discharge of its exalted and responsible office.

Preëminently such a man was Mr. Webster. He became a member of the bar at a time when many of the most important questions since determined were unsettled. More than any other man, he aided in their settlement.[1]

Coleridge tells us that "The first man upon whom the light of an idea dawned, received thereby the function of a lawgiver." It was because Mr. Webster, in his capacious mind, apprehended with

[1] "It is impossible to overestimate the support that the court derives from the bar, and in Mr. Webster's arguments fidelity to the court is as conspicuous as fidelity to his client. It is not client first and conscience afterwards, but duty to both together, one and inseparable."—CHIEF JUSTICE FULLER, *Webster Centennial*, p. 275.

such clearness the idea which was the soul of the novel system our fathers established, that he was able to lead our courts to formulate this idea in their judgments.

But it may be asked, How can this be? Is it not the duty of judges to declare, and not to make the law? In one sense no doubt it is. The judge ought not to depart from the principles of the law as he finds them established. But when a case comes up, as often it does, which involves a new application of these principles or modification of rules already settled, to adapt them to a new state of facts for which no precise provision has been or could have been made, the judge does, in a very real and important sense, make the law and is a lawgiver as well as a judge. If the lawyer who presents such a case to the court is adequate to his task, he must first thoroughly understand the existing rule and the reason for it; next, he must appreciate the change in circumstances and conditions which makes this in its precise form no longer applicable. To this he must add constructive ability, and be able to show how the rule, as it has hitherto served, may most wisely and fitly grow to meet the requirements of the present and of the future. No man in America ever combined these qualities to a higher degree than Mr. Webster. He understood the history and character of the mother country and the common law which was the necessary outgrowth of that character and history. He looked into the very heart of the American people and realized our needs. He was able to point out the

path by which we could most wisely be led to our true growth and development. With unrivalled power for making hard places easy and dark things clear, he succeeded in impressing his own convictions upon the courts before which he practised.

In dealing even with the precision of mathematics, great minds can see what lesser minds fail to apprehend. What they see they can make clear. The truths which Newton and Laplace were the first to behold and develop can now be taught to our college students; and judges many times rightly and justly laid down as law what the genius of Webster perceived and demonstrated—what without the aid of that genius might have remained undetermined. Most important of all his public services was the part he took in demonstrating the true method of construing the Constitution of the country. The very fact that this was the supreme law of the land made it all the more important that its construction should be established on the right basis.

From the beginning there was a school of thinkers who sought to limit the scope of our great charter and restrain its plain provisions within narrow bounds. It is the most brief of constitutions. Its sections and articles never undertook to provide in detail for all emergencies which might arise, but established general provisions, which, fairly construed, should be adequate for every occasion. If the country were to be held in bondage to the letter, and disregard the spirit of the Constitution, the purpose stated in its preamble, "to form a more perfect Union," would fail of accomplishment.

No doubt there were thinkers who sought to give such a lax interpretation to its provisions that they might mean anything or nothing, as the immediate occasion might seem to require, and the strict constructionists did good service in restraining the vagaries of such reasoners. The merit of Mr. Webster lay in this, that he maintained the golden mean, and in numerous arguments pointed out clearly and convincingly the evils which led to the formation of the Constitution, the objects its founders sought to accomplish and the method by which they had, upon fair rules of construction, achieved the great end they had in view.

The celebration of the centennial of the accession of Chief Justice Marshall to the Supreme Court of the United States called attention to the leading part which the decisions of that Court have played in making the nation what it is. Side by side with the great name of Marshall should be placed that of Webster. The arguments of the one were as necessary as the decisions of the other. They combined to impress upon the American people a conviction of the possibilities of the country, of the fitness of the government which they had founded to enable them to make the most of these possibilities and, above all, the conviction that the thirteen Colonies had become blended into one indissoluble Union.

It is hard for us to realize in the days of our greatness the weakness and insignificance of our beginnings. It frequently happens under American institutions that a man born of the humblest

parents and amid the most adverse circumstances has become a man of wealth, power and influence. But the rise of the most remarkable of them all is not more extraordinary than the change which has taken place in the condition of the American people since the birth of Mr. Webster. He was born at the conclusion of the Revolutionary War and just before the treaty of peace was concluded between the thirteen Colonies and the United Kingdom of Great Britain and Ireland. His father was one of the hardy settlers who had not found scope for their energies in the surroundings of their childhood, and had gone into the forest, not only to discover, but really to create a new world. The little house in Salisbury, New Hampshire, where Daniel Webster was born on the 18th day of January, 1782, was on the border of colonial civilization.[1] The Colonies were scattered along the Atlantic coast and the eastern slope of the Alleghanies. They had neither money nor credit; were deeply in debt, with an army about to be disbanded, the meagre pay of which was long in arrears.[2] They lived under a Confederation which gave to the general government no real power, and which worked

[1] As Mr. Webster said in his speech at Saratoga, August 19, 1840 (Webster's *Works*, vol. ii., p. 30):

"Gentlemen, it did not happen to me to be born in a log-cabin; but my elder brothers and sisters were born in a log-cabin, raised amid the snow-drifts of New Hampshire, at a period so early that, when the smoke first rose from its rude chimney, and curled over the frozen hills, there was no similar evidence of a white man's habitation between it and the settlements on the rivers of Canada."

[2] See Stone's interesting *Life of John Howland*, a Rhode Island soldier, who, when his enlistment expired, was obliged to walk home from Yorktown.

so badly that it left the Colonies at the end of the war with actually less unity that they had at the beginning. The father of Daniel Webster had been a distinguished officer in the Revolution, and in common with his comrades had smarted under the weakness and incompetency and consequent injustice of the government of the Confederation, and he realized, therefore, the absolute necessity for a united and stable government, if the thirteen independent Colonies were ever to become a united nation.

The treaty of peace concluded at Paris, September 3, 1783, contained in its first article the following clause:

"His Britannic Majesty acknowledges the said United States, viz: New Hampshire, Massachusetts Bay, Rhode Island & Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina & Georgia."

In the breast of an American of the present day, this description of his country cannot fail to awaken amusement. But the description was accurate at the time. The necessity for something better led to the calling of the convention for the forming of a new Constitution for the United States. The preamble to this instrument, as finally adopted, uses very different language. There are no words there indicating that these "Independent States" were any longer to remain independent as between themselves. On the contrary, it begins as follows:

"We, the people of the United States, in order to form a more perfect Union, establish Justice, ensure domestic Tran-

quillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

In debates which took place in the conventions which were held in the different States to consider whether or not they would ratify this Constitution, the pivot on which the discussion turned was really whether this preamble expressed the national consciousness. Patrick Henry cried in Virginia: "Who gave them the right to say, — 'We, the people of the United States'?" True enough, that right had not been conferred upon the delegates. But they assumed it, and when this assumption of authority was ratified, that which at first was but a proposition became the Constitution of a nation. The student of the constitutional history of the United States from 1789 to 1861 knows well that there was a constant strife between those who adhered to the old notion that the States were still what the treaty declared them to be, and those who maintained that the Constitution had welded them into a nation.

As Mr. Webster himself said in the debate on the Force Bill, February 16, 1833[1]:

"The Constitution, Sir, regards itself as perpetual and immortal. It seeks to establish a union among the people of the States, which shall last through all time. Or, if the common fate of things human must be expected at some period to happen to it, yet that catastrophe is not anticipated.

[1] Webster's *Works*, vol. iii., p. 471.

"The instrument contains ample provisions for its amendment, at all times; none for its abandonment, at any time. It declares that new States may come into the Union, but it does not declare that old States may go out. The Union is not a temporary partnership of States."

One of the extraordinary statements in Senator Lodge's *Life of Webster* is that all the early fathers believed in the right of secession.[1] No doubt some of them did. But they were not the men who were responsible for the Constitution.

Rufus King, Roger Sherman, Alexander Hamilton and Benjamin Franklin knew very well what they were about when their great Constitution was published to the world.[2]

It found no warmer friends anywhere than among the old soldiers of the Revolution. These men realized the necessity of the change expressed in the preamble and rallied to the support of the Constitution which Washington signed, with as much unanimity as they had stood by him during the war. Among them, none was more resolute, more thoroughly in earnest, than the father of Daniel Webster, and the son grew up, amid the forests and mountains of his native State, impressed with

[1] Lodge's *Life of Webster*, pp. 176, 177.

[2] James Russell Lowell in his "Essay on Abraham Lincoln," *Prose Works*, vol. v., p. 201, states this well:

"Though it [secession] contradicts common-sense in assuming that the men who framed our government did not know what they meant when they substituted Union for Confederation; though it falsifies history which shows that the main opposition to the adoption of the Constitution was based on the argument that it did not allow that independence in the several States which alone would justify them in seceding."

See also the argument on this subject in Webster's Reply to Calhoun, *post*, pp. 102–107.

the conviction that he was the citizen of a nation. This conviction he finally impressed upon the great majority of his fellow-citizens in the Northern States and upon no small part of the people of the Southern States. It was this conviction that carried us through the Civil War. Without it, our success in that great struggle would have been impossible.

As well said by an American historian who himself lived through the war:

"For that magnificent popular enthusiasm for the Union—an enthusiasm the like of which for blended fury and intelligence, enlisted on behalf of an idea, the world had never before beheld; this, as history will explain, was by no means the birth of a moment—Fort Sumter fired it, but it was otherwise fuelled and prepared. Daniel Webster, by eminence, his whole life long, had been continuously at work. Speech by speech, year after year, the great elemental process went on. There men might scoff and here men might jeer, but none the less through jeer and scoff the harnessed Titan went steadily to his task. Three generations, at least, of his countrymen, he impregnated, mind and conscience and heart, with the sentiment of devotion to the Union. This in a great part accounts for the miracle in 1861." [1]

[1] *Scribner's Monthly*, vol. xii., p. 425; "Daniel Webster and the Compromise Measures of 1850," by William C. Wilkenson.

Another interesting statement of the influence of Webster's speeches upon the war for the Union is to be found in Mellen Chamberlain's *John Adams and Other Essays*, p. 355:

"The discourses at Plymouth Rock and at Bunker Hill were not for an hour, nor was the Great Reply. In the days of their utterance they were resplendent, unprecedented eloquence; but they spake truest when they became wisdom to Lincoln and valor to Grant; they rang loudest when heard along the front of battle, and inspired deeds of immortal heroism on a hundred fields."

See also Rhodes, *History of the United States*, vol. i., p. 161; Blaine, *Twenty Years in Congress*, vol. i., p. 94; and Joseph H. Choate's masterly oration on Rufus Choate, p. 23.

CHAPTER II

EARLY PROFESSIONAL LIFE—EXTENSION OF CONSTITUTION TO NEW STATES—TOWN OF PAWLET *vs.* CLARK—CRIMINAL JURISDICTION IN HARBORS—U. S. *vs.* BEVANS

So much has been written of the early life of Mr. Webster that it is unnecessary here to speak further of it. Three years after graduation and on the 24th July, 1804, being then twenty-two years of age, he became a student in the office of Christopher Gore in Boston. Mr. Gore had been a member of the United States Senate, and had been our Minister to England. Nothing shows more clearly the extraordinary effect which even then was produced by the personality of Mr. Webster, than the fact that he, without any introduction, an absolutely unknown young man, should have been admitted into the office of one of the leaders of the Massachusetts bar, and one of the first men in the United States.[1]

In March, 1805, Mr. Webster was admitted to the bar of the Suffolk Common Pleas. In the same month, he opened an office at Boscawen, N. H., near his father's home, where he remained

[1] Webster's *Writings and Speeches*, vol. xvii., p. 185.

until that father's death. In September, 1807, he removed to Portsmouth, N. H. He was married on the twenty-fourth of June, 1808. On the twelfth of November, 1812, he was elected to Congress from the Portsmouth District, and took his seat at the extra session in the following May. In August, 1814, he was reëlected to Congress.

At the February Term of that year, he appeared for the first time as counsel before the Supreme Court of the United States. He argued two prize cases at that Term and appeared in the same cases at the following Term, additional proofs having been ordered in both. At that time, the difficulties of travel were so great, and Washington was consequently so difficult of access, that the majority of cases in the Supreme Court of the United States were argued either by members of Congress or by counsel from neighboring States. Baltimore especially had a brilliant bar, and the names of Pinkney, Wirt and Martin appear very frequently in the reports of Cranch and Wheaton.

The first appeal of real importance that Mr. Webster argued in the Supreme Court was that of the Town of Pawlet *vs.* Clark.[1] In this case the construction of that clause of the Constitution which extended the judicial power of the United States to controversies between citizens of the same State claiming land under grants of different States was involved. Here the strict constructionist appears on the scene, and claims that this phrase of the Constitution meant the different States that

[1] 9 Cranch, 292.

framed the Constitution, and did not apply to any States that might subsequently be admitted. Webster convinced the Court without much difficulty that this construction was too narrow, and that this clause of the Constitution, and by inference all similar clauses in that instrument, referred not only to the thirteen States which framed the Constitution, but to all which they should subsequently admit as integral parts of the Union. This seems too plain for argument now, but in those early days, when everything was in a formative condition, the decision was important, and in its essence involved many of the subsequent decisions which did not appear, at the time they were made, to be so clear.

The rest of the case required a consideration of the character of the grants which had been made by the Colonial Governor of New Hampshire to the town of Pawlet, and which were precedents for the subsequent grants by the various States for educational purposes. This charter divided the land which was set apart to the town of Pawlet into sixty-eight shares, of which one was "for the incorporated Society for the propagation of the Gospel in foreign parts, one share for a glebe for the Church of England as by law established, one share for the first settled Minister of the Gospel, one share for the benefit of a school in said Town."

It was held after a very careful investigation of the English Ecclesiastical Law, that the town could take the land as trustee, and that where no Episcopal church was established before the Revolution

the State could appropriate the share which had been given for such purpose by the original charter and apply it to other public uses. In this case Vermont had appropriated to the use of public schools the glebe right which had not been taken up by the Episcopal Church, and the Supreme Court sustained the validity of this statute.

In a subsequent case in which Mr. Webster was counsel, — Society for the Propagation of the Gospel in Foreign Parts *vs.* Town of New Haven,[1]—the rights of this venerable Society came further under consideration by the Court. It was held that the charter which reserved to that Society a share of the town lands vested an interest in the Society which the Legislature of Vermont had no power to divest. This really was an application of the principles of the Dartmouth College case stated in Chapter III.

Mr. Webster does not appear to have argued any cases at the February Term in 1816. In 1817, he appeared in numerous prize cases. In 1818, he had to deal with the construction of that clause of the Constitution which described the judicial power and extended it to cases of admiralty and maritime jurisdiction.[2] Here it was held that the meaning of this article was a grant, not of territory, but of jurisdiction, and that the harbors in the different States, although within the admiralty jurisdiction of the Courts of the United States, were not withdrawn from the jurisdiction of the particular State in which they happened to be situated.

[1] 8 Wheat., 464.

[2] U. S. *vs.* Bevans, 3 Wheat., 336.

CHAPTER III

IMPAIRING OBLIGATION OF CONTRACTS—LAW OF THE LAND—CORPORATE FRANCHISES—DARTMOUTH COLLEGE CASE

AND now in order we approach the case of Dartmouth College *vs.* Woodward,[1] which has been cited nine hundred and seventy times in subsequent cases, more frequently than any other American decision.[2]

It is often said that the effect of subsequent constitutional amendments and general legislation has been to rob the doctrine announced in this case of much of its vitality. It is doubtless true that after this decision, in countless ways, public apprehension was aroused lest the corporations, charters for which were being granted by the Legislatures, or which were incorporated under general acts, should become too strong for the people; and lest, also, applicants might, through political favoritism, or even more ignoble methods, obtain franchises the grant of which would be injurious to the public. Laws were passed, and constitutional amendments were adopted, the object of which was to reserve

[1] 4 Wheat., 518.

[2] Alfred Russell, in *Dartmouth Centennial*, p. 282. The number is made up to the year 1901. It must now exceed one thousand.

to the Legislature the power to amend or repeal charters of corporations. For example, the Constitution of the State of New York, framed and adopted in 1846 (Article 8, Section 1), provides as follows:

"Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section, may be altered from time to time, or repealed."

But notwithstanding the endeavors that were thus made to weaken the effect and limit the scope of the decision in the Dartmouth College case, the principle upon which it was based, that of enforcing constitutional guaranties for the protection of vested rights, remains in full vigor, and has been not only a safeguard, but an important element in the growth and prosperity of the American people. Wretched, indeed, is the condition of any nation in which the peaceful citizen cannot enjoy in security the fruits of his honest labor. No system of government can justly be called a republic which does not secure to all its citizens, whether rich or poor, whether engaged in individual enterprise or united with others in partnership or corporation, the protection of the law for their lawful business. The danger in every Democracy has been, that in times of popular excitement this principle will be forgotten, and that the property acquired by industry and intelligence will be confiscated, wholly or in part, for the benefit of the idle and improvident.

With us it is otherwise. In a word, the people of this Republic are sovereign, but they are a constitutional sovereign. Their monarchy is a limited monarchy. They have freely chosen to limit their own power by Constitutions, which they justly hold sacred. They have entrusted to the courts of justice, which the tradition of our race leads us to reverence, the unique power of enforcing the mandate of the Constitution, and saying to the representatives of the people, whether in the executive chair, or in the Legislature, "Thus far shalt thou go and no farther."

The system which has thus been described has become incorporated in the mental constitution of the American people. They seldom realize the difference between this and other so-called republics. But when we come to trace the history of our system and observe the manner in which the scheme, which looked well on paper, came actually to be worked out and realized in action, we find that this was in great measure due to the argument of Mr. Webster in the Dartmouth College case and to the decision of the Supreme Court which crowned that argument.

The action in which that decision was rendered was begun in the Supreme Court of New Hampshire. The contention was between the trustees of Dartmouth College, appointed under the provision of its charter, and the trustees appointed by act of the Legislature, which changed that charter without the consent of the College.

In the argument before the Supreme Court of

New Hampshire, reference was made by the counsel for the College to the provisions of the Bill of Rights of that State, which were derived from Magna Charta,

"That no person shall be deprived of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate, but by judgment of his peers or by the law of the land."

The Supreme Court of New Hampshire decided that the trustees had no property, immunities, liberty or privilege in the corporation, within the scope of this prohibition in the Bill of Rights. Chief Justice Richardson went further and maintained "that the law of the land meant any law that the Legislature might choose to enact." In other words, he contended that the object of these provisions was to protect the people only against the arbitrary action of the executive.

It will at once be perceived that this question was fundamental. The Court of New Hampshire had said:

"How a privilege can be protected from the operation of the law of the land, by a clause in the Constitution declaring that it shall not be taken away, but by the law of the land, is not very easily understood."

The difficulty in the case as it was presented to the United States Supreme Court was this. That Court had no jurisdiction upon the writ of error to review the decision of the State Court upon its own Constitution. The writ of error was based solely upon the alleged invalidity of the act of the Legislature of New Hampshire under the Constitution

of the United States. The guaranty of the State Constitution was so much more explicit that to the ordinary lawyer it would appear a hopeless task to sustain the contention under the United States Constitution, when that of the State Bill of Rights had proved to be inadequate. It was the business of the great lawyer to go below the surface of his case and to show that the fundamental error of the opinion of the Court below, was equally, fatal to the validity of the act under either Constitution. To this end, and to this end only, it became important at the outset of Mr. Webster's argument in the Supreme Court to use the Constitution of New Hampshire as an illustration, and to show in fact that the method of reasoning which had been adopted by the Court below, was fatal to any constitutional guaranty either to person or to property. For if the act of the Legislature was in itself the law of the land, and its inscription on the statute-book was the limit of inquiry as to what the law of the land might be, the restraint of the Constitution upon the Legislature would be removed altogether.

The story is, that when the Chief Justice looked at the record his first impression was adverse to the plaintiffs in error. But it is related that although he and others of the Justices had prepared to take notes of the argument of Mr. Webster, yet it seemed so clear and convincing, as it flowed in its majestic course, that the paper remained blank.[1]

[1] At the time of the argument of this case printed briefs were not as now required to be filed.

After stating the facts of the case, Mr. Webster referred to the provisions of the State Constitution. He said:

"I am aware of the limits which bound the jurisdiction of the Court in this case, and that on this record nothing can be decided but the single question, whether these acts are repugnant to the Constitution of the United States. Yet it may assist in forming an opinion of their true nature and character to compare them with those fundamental principles introduced into the State governments for the purpose of limiting the exercise of the legislative power, and which the Constitution of New Hampshire expresses with great fulness and accuracy."[1]

He then proceeded to argue that a corporate franchise was property. He cited numerous English cases in which such franchise had been recognized as property, and had been held to confer rights which the courts were bound to respect. He showed that the word "liberties" used in Magna Charta included a franchise, and that this franchise could not be taken away by arbitrary government. He showed that while under the Roman law the will of the prince was paramount and he even had the right, by special decree, to interpret statutes in reference to pending cases[2]; with us, to use his own language,

"The power of the lawgiver is limited and defined; the judicial is regarded as a distinct independent power."[3]

[1] Webster's *Works*, vol. v., p. 468.

[2] Curiously enough in modern times this right was claimed by the President of the Boer Republic, and he removed a Judge who ventured to disagree with him.

[3] Webster's *Works*, vol. v., p. 486.

"That the Legislature shall not judge by act, it shall not decide by act, it shall not deprive by act, but it shall let all these things be tried and judged by the law of the land."

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land."[1] . . .

"If then the franchise of a corporation be property, this property is a creation of a grant. To this grant, there are two parties; the charter must be accepted, the acceptance of the grant constitutes the contract.

"There are, in this case, all the essential constituent parts of a contract. There is something to be contracted about, there are parties, and there are plain terms in which the agreement of the parties on the subject of the contract is expressed. There are mutual considerations and inducements. The charter recites, that the founder, on his part, has agreed to establish his seminary in New Hampshire, and to enlarge it beyond its original design, among other things, for the benefit of that Province: and thereupon a charter is given to him and his associates, designated by himself, promising and assuring to them, under the plighted faith of the state, the right of governing the college, and administering its concerns in the manner provided in the charter. There is a complete and perfect grant to them of all the power of superintendence, visitation, and government. Is not this a contract? If lands or money had been granted to him and his associates, for the same purposes, such grant could not be rescinded. And is there any difference, in legal contemplation, between a grant

[1] Webster's *Works*, vol. v., p. 486.

of corporate franchises, and a grant of tangible property? No such difference is recognized in any decided case, nor does it exist in the common apprehension of mankind."[1]

Then Mr. Webster proceeded to answer the argument, "That abuses might arise in the management of such institutions which the ordinary courts of law would be unable to correct." His reply is applicable in many another case:

"But this is only another instance of that habit of supposing extreme cases, and then of reasoning from them, which is the constant refuge of those who are obliged to defend a cause, which, upon its merits, is indefensible."[2]

This was the argument. The opinion of the court was delivered at the following Term, February, 1819.

It is related that the parties in New Hampshire and their friends in other States (for the questions had been perceived to be of general importance) were dissatisfied with the argument in support of the validity of the act which Mr. Holmes of New Hampshire and Mr. Wirt[3] had made, and that Mr. Pinkney had been retained to apply for a re-argument, before the opinion of the Court should be delivered.

The story goes that he was present in court at the opening of the term, but that Chief Justice Marshall designedly went on and delivered the opinion of the Court without giving to Mr. Pinkney

[1] Webster's *Works*, vol. v., p. 497.

[2] Webster's *Works*, vol. v., p. 498.

[3] An interesting unpublished letter of Webster to Wirt on this subject will be found at the end of the chapter.

the opportunity to make the motion. This may be one of the myths that are apt to cluster around important decisions. But the tradition referred to may be well founded. In any case, the opponents of the College took nothing by their motion. The opinion of the court follows closely the argument of Mr. Webster. It states at the outset:

"That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts than those that respect property, or some object of value, and confer rights which may be asserted in a court of justice."[1]

The court then proceeded to show that an educational institution founded by individuals and endowed by them is not a public institution. Its trustees are not public officers, its professors and students are not members of the civil government.

The Charter is "a contract to which the donors, the trustees and the crown (to whose rights and obligations New Hampshire succeeds), were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal property estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees, for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular

[1] Dartmouth College *vs.* Woodward, 4 Wheaton, 518–629.

exception, taking this case out of the prohibition contained in the constitution." [1]

The opinion then inquired as to the relation of the State of New Hampshire to the case, and held that this State succeeded to the rights of the crown in the grant and that all contracts and restrictions on property existing at the time of the Revolution were not affected by it. The franchises which had been granted to Dartmouth College remained the same under the new as they were under the old government, subject to the limitations found in the Constitution of the State and of the United States. It was then held that the act in question, if enforced, would substantially change the contract, and transfer the whole power of government of the College from trustees appointed according to the will of the founder, to the executive of New Hampshire.

Mr. Justice Story delivered an opinion to the same effect, which contains one passage of especial interest at the present time.

"It is a principle of the common law, which has been recognized as well in this as in other courts, that the division of an empire works no forfeiture of previously vested rights of property."

This maxim is equally consistent with the common-sense of mankind, and the maxims of eternal justice.

In this connection it should be added that the effect of the reservation by the State of the right

[1] 4 Wheaton, pages 518–644.

to alter, modify or repeal the charter of a corporation (which has since the Dartmouth College decision been frequent) has often become a subject of consideration by the courts. The limit of this reservation is well stated by the Supreme Court of the United States in Miller *vs.* The State[1]:

"Power to legislate, founded upon such a reservation in the charter of a private corporation, is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which by a legitimate use of the powers granted have become vested in the corporation."

In People *vs.* O'Brien[2] it was held by the New York Court of Appeals:

"That a franchise to construct and operate a railroad, was property, and transferable as such. That while the Legislature under the reservation under the constitution in the State of New York might repeal and dissolve the corporation, it could not deprive the creditors and stockholders of the corporation of their interest in this franchise, and that therefore this franchise would pass to a receiver of the corporation."

A curious illustration of Mr. Webster's argument, that if abuses were found to exist in corporate management the Legislature had ample power to deal with them, is to be found in the legislation of New York in reference to taxes upon corporate franchises.[3] No doubt in many cases such franchises have been granted upon an inadequate

[1] 15 Wallace, 478.
[2] 111 N. Y., 1.
[3] People *ex rel* Metropolitan St. R. Co. *vs.* Tax Commissioners, 174 N. Y., 417.

consideration. It is obvious that the smaller the consideration for a particular franchise, the greater is the value to the corporation possessing it. Therefore, the Legislature, by authorizing the taxing a franchise at its full value, can redress the injustice of the original grant.

In closing this chapter, two accounts of the argument in this case, hitherto unpublished, are given. The first is from a manuscript of Judge Story in the Congressional Library at Washington, apparently prepared as a review of a volume of Webster's speeches, published in 1830. The second is from a letter of Webster to Wirt, which the author has received from a descendant of the great Attorney-General.

"It was in the year 1818 that an occasion occurred, which is as memorable as any in the professional life of Mr. Webster, and brought him before the nation, if not in a new light, at least in a more striking light than any in which he had hitherto been seen. We allude to his argument in the case of the Trustees of Dartmouth College *vs.* Woodward, before the Supreme Court of the U. S. at the Jan'y Term of that year, which is reported in the volume now before us (pp. 110 *et seq.*). That case was in itself full of deepest interest, and as important in its principles as any which belongs to our judicial annals. Few cases are better known to the public; few are of more varied and general application; few at the time attracted a more intense attention, and probably few will retain, so long as law continues to be a science, a more permanent and enduring celebrity. It was originally commenced in the State Court of New Hampshire, and having received an adjudication there in the highest State tribunal unfavorable to the College, it was carried by a writ of error for a final decision to the Supreme Court. The pecuniary, and personal, and political

interests in it were of no small magnitude. But the extent to which the principles involved in it touched the rights of property, private and charitable, as well as the extent to which a claim to exercise legislation over literary and other corporations on the part of state sovereignty could be maintained with reference to the prohibitions of the constitution of the United States gave it an importance so paramount, that every other consideration seemed at the moment to be of no significance. The cause had been argued with uncommon ability in the state court, and a judgment supported with great ingenuity and strength had there been pronounced, which gave to the State Legislature an absolute discretionary control over all the corporate rights of the college. In the state court the cause had been argued by Mr. Webster in conjunction with very eminent associates—Mr. Jeremiah Smith, formerly Chief Justice of the State, (*clarum et venerabile nomen*) a man whose depth of research and sagacity had made him equal to the labors of any station, and Mr. Jeremiah Mason, a man of such rare endowments and acuteness, that it is not easy to pronounce who is his superior. Yet in the presence of such associates Mr. Webster (who was much their junior) was admitted by the common consent of the bar to have made a speech in the State Tribunal not unworthy to the place by the side of those of his colleagues. The argument was supposed to have been exhausted; and it was thought scarcely possible to give it in point of novelty or force an aspect more imposing than it had then assumed. And for Mr. Webster not to surpass his former exertions upon a re-argument, was, considering the excited state of the public mind, to hazard everything but the fruits of victory. Under such circumstances, it was not unnatural to suppose that Mr. Webster should have felt the discouraging influence of his prior fame travelling with him to Washington. He was not indeed a *novus hospes* in the Supreme Court, having (if our memory does not deceive us) argued, some years before, one or two causes there, which did not however bring into play the full powers of his mind (The Grotius, 9 Cranch R., 368, was argued by him in 1815).

"Public expectation was keenly alive; and accordingly on

the day set for the argument a large assemblage of ladies, of eminent lawyers, and of distinguished statesmen, filled the Court Room. Mr. Webster opened the cause for the plfs in error, giving to his accomplished colleague Mr. Hopkinson (now Judge Hopkinson) the close. Mr. Holmes and Mr. Wirt were the opposing counsel and in all respects adversaries worthy of the cause. The printed speech of Mr. Webster is now before the public; and it may be thought wholly unnecessary to describe its character.[1] But it is impossible in any written speech to give the form and impress, the manner and the expression, glowing zeal, the brilliant terms of diction, the spontaneous bursts of eloquence, the polished language of rebuke, 'severe in beauty,' the sparkling eye, the quivering lip, the speaking gesture, the ever changing, and ever moving tones of the voice, which add such strength and pathos, and captivating enchantment, to the orator as his words flow rapidly on during actual delivery. It is then that we hear, and see and feel the living and present power of his thoughts. It is then that he terrifies us by his instant appeals, or melts us by his touches of nature, and draws us down the willing slaves of his reasoning, or bears us aloft to contemplations which seem to reach the flaming boundaries of time and space. Those, who were present at the argument of which we are speaking, will readily understand our meaning. They cannot but remember with what decorous deference he began to unfold the topics of his arguments, and the lucid order and elegant arrangement, by which each progressive position sustained and illustrated every other. He began by unfolding the facts in that brief but exact manner, for which he is so remarkable; and arriving at the points, for which he meant to contend, he first presented them in their general bearing and aspect; and then proceeding to the more minute analysis, he brought out into singular felicity and clearness all the various learning, from judicial authorities, from historical archives, from parliamentary debates, from elementary writers, which could illustrate and fortify his grounds. As he went on he kindled into more

[1] The peroration of this argument as reported by Chauncey A. Goodrich is printed in vol. xv., Webster's *Writings and Speeches* p. 9.

energetic action, and if one may so say, he scintillated at every step. There was an earnestness of manner, and a depth of research, and a potency of phrase, which at once convinced you that his whole soul was in the cause; and that he had meditated over it in the deep silence of the night and studied it in the broad sunshine of the day. At times his voice rose almost into startling impetuosity. It was the struggle of the giant to relieve the incumbent pressure of his thoughts, to deliver over the strong workings of his soul, and to uproot the very foundations of the opposing argument. There was breathless silence in the audience. Even the eagerness to hear seemed at times checked by a present sense of overwhelming reasoning. It was a relief even to gain in his momentary pauses some short interval of repose from the intense stretch of thought, by which the mind was irresistibly driven. And when he came to his peroration, there was in his whole air and manner, in the fiery flashings of his eye, the darkness of his contracted brow, the sudden and flying flushes of his cheeks, the quivering and scarcely manageable movements of his lips, in the deep guttural tones of his voice, in the struggle to suppress his own emotions, in the almost convulsive clenchings of his hands without a seeming consciousness of the act, there was in these things what gave to his oratory an almost superhuman influence. There was a solemn grandeur in every thought, mixed up with such pathetic tenderness and refinement, such beautiful allusions to the past, the present, and the future, such a scorn of artifice, and fervor, such an appeal to all the moral and religious feelings of many, to the lover of learning and literature, to the persuasive precepts of the law, to the reverence for justice, to all that can exalt the understanding and sensify the heart, that it was impossible to listen without increasing astonishment at the profound reaches of the human intellect, and without a deep sense of the divinity that stirs within us. There was a painful anxiety towards the close. The whole audience had been wrought up to the highest excitement; many were dissolved in tears; many betrayed the most agitating mental struggles; many were sinking under exhausting efforts to conceal their own emotion. When Mr. Webster

ceased to speak, it was some minutes before any one seemed inclined to break the silence. The whole seemed but an agonizing dream, from which the audience was slowly and almost unconsciously awakening.

"Such were the circumstances under which Webster delivered his argument in the Dartmouth College case. The printed argument prepared months afterwards in the cold retirement of the closet, and with no assistance except the imperfect notes, and the faded memory of the speaker himself, gives no adequate idea of the eloquence, or sudden blazes of thought with which it abounded. It is true that the outline of the legal reasoning and authorities is there; and the general course of the topics is pursued with sufficient fidelity and exactness. But we miss everything that was peculiar to the scene and the occasion. We miss the spirit, the fervor, and the masculine earnestness, which gave to the very words a potency, and emphasis, before unknown.

"This argument was decisive of the future professional reputation of Mr. Webster. It elevated him at once to the first rank, and to the foremost competitors in that rank; the post which he has ever since maintained with increasing fame, and with an unquestioned title. It would not perhaps, be too much to say, that it gave a new direction to his own hopes and wishes. It probably led to the measure which he soon afterwards adopted of transferring himself to a wider sphere of professional exertion; and it gave to the metropolis of Massachusetts one whom she has been proud to honor with her confidence, and satisfied to claim as her advocate. It should perhaps be added for the benefit of distant readers, that the judgment of the state court was reversed in 1819, and the college reinstated in its original rights under its former charter.

"From this period, for it may be as well in this connection to follow out what we have to say in respect to Mr. Webster's professional career, his attendance on the Supreme Court was almost constantly secured by retainers in the most important causes. Up to this very hour in which we write, the circle of his business of this sort has been continually enlarging; and has never been exceeded, if it has been equalled by that of any

other lawyer in the national forum. He naturally succeeded to that place at the bar which was left vacant by the death of that very eminent lawyer, the late William Pinkney, in 1822."

This ends that portion of the manuscript which refers to the Dartmouth College argument. The following is Webster's letter to Wirt:

"BOSTON, April 5th, 1818.

"SIR—

"I returned recently from a little visit into N. Hampshire, where I learned the existence of a report which represented me as having said that the deficiencies in *my own* argument, in the cause about Dartm'o College were supplied by *your* argument.

"I hope you suppose me incapable of talking so ridiculously. I should have taken no notice of the silly falsehood, had I not learned that it had been made the subject of a communication to you. This induced me to write to you, for the purpose of giving it a direct and emphatic contradiction. No man ever heard such a remark from me, or any remark in any degree like it. I am sure, if our professional labors should bring us often together, I shall find enough to do to *answer* your arguments, and I am equally sure that I shall have no inclination to misrepresent them.

"I have, of course, been often asked about the argument of the Atty. Gen'l, in the case alluded to. I have spoken of it frankly, and on many occasions and to various people. It is the universal opinion, in this quarter, among all those who have inquired or heard about the cause, that that argument was a *full*, *able*, and most *eloquent* exposition of the rights of the Defendant. I must leave it to you to infer, whether this general sentiment is in concurrence with my own uniform declarations on the subject, or whether it contradicts them. I will add, that in my opinion, no future discussion of the questions involved in the cause, either at the Bar, or on the Bench, will bring forth, on the part of the Defendant, any important

idea which was not argued, expanded, and pressed, in the argument alluded to.

"I beg your pardon for the trouble of this letter, and hope you will ascribe it to my desire of not being misrepresented to you. I hope also you will think me not quite weak enough to depreciate the power of an adversary. If conquered, this would but increase the mortification of defeat. If conquering, it would take away the glory of victory.

"In victory, or defeat, none but a fool could *boast* that he was warring, not with giants, but with pigmies.

"Very truly,

"Yr. Ob't serv't,

"DAN'L WEBSTER.

"WILLIAM WIRT, Esquire,
"Attorney General of U. S.,
"Washington." [1]

[1] There are many other indications in Webster's correspondence of his cordial recognition and appreciation of the ability of his brethren of the bar. See his letter to Chief Justice Smith, January 9, 1818, *Private Correspondence*, vol. i., p. 268, and another letter describing the argument of this case, *ibid.*, p. 276.

CHAPTER IV

SUPREMACY OF THE NATIONAL GOVERNMENT—POWER TO CHARTER A BANK—McCULLOCH *vs.* MARYLAND

THE next case of great importance in which Mr. Webster appeared before the Supreme Court was McCulloch against the State of Maryland.[1] This case involved the consideration of the character of the Constitution. The question from the first had been whether it was to be construed liberally or strictly; whether it was the duty of a court, and indeed of all branches of the government, to deal with it as an instrument containing general grants of power for the purpose of endowing the new central government created by it with ample authority for all its needs, or whether it should be considered as a bargain between independent states, in which each had surrendered somewhat reluctantly a certain portion of power, but desired to retain as much as possible, and was, therefore, unwilling to admit that anything, not strictly nominated in the bond, was included in it.

At the second session of the first Congress [2] a National Bank was chartered. The act was ap-

[1] Reported 4 Wheaton, 316.

[2] Act of February 25, 1791, c. 84.

proved by Washington. The charter expired in 1811, and was not renewed.

During the War of 1812, the financial condition of the country became such that a central bank was a public necessity. Mr. Webster was then a member of the House of Representatives, and insisted strenuously that any bank which might be incorporated should be incorporated on sound financial principles, should be required to redeem its notes in specie, and should not be under obligation to loan fixed amounts in paper to the government. To use his own language in his speech in the House of Representatives, January 2, 1815[1]:

"Something must be discovered which has hitherto escaped the observation of mankind, before you can give to paper intended for circulation the value of a metallic currency, any longer than it represents that currency, and is convertible into it, at the will of the holder. The paper of this bank, if you make it, will be depreciated for the same reason that the paper of other banks that have gone before it, and of those which now exist around us, has been depreciated, because it is not to pay specie for its notes."

The bill was lost, and another bill introduced in the following Congress was amended so as to strike out the authority to the Bank to suspend specie payments. As amended, it passed, and thus, in 1816, the second Bank of the United States came into being. This Bank was authorized to establish branches in the different States, and it did establish a branch in Baltimore in 1817.

The State banks, some of which had been in-

[1] Webster's *Works*, vol. iii., p. 43.

corporated after the refusal of Congress to extend the charter of the first National Bank, found the competition of the new institution embarrassing. Accordingly, in February, 1818, the State of Maryland passed an act to tax all banks and branches of banks which were not chartered by that State, but did business within its borders. The tax was imposed in the form of stamps, which banks subject to its provisions were required to impress upon commercial obligations issued within the State of Maryland. McCulloch, the cashier of the Baltimore Branch Bank, was indicted and convicted for a violation of the provisions of the Maryland law. Its validity was sustained by the Maryland courts, and a writ of error was sued out from the Supreme Court of the United States. The case was argued by Webster, Wirt and Pinkney for the plaintiff in error, and by Hopkinson, Jones and Martin for the State. Martin was one of the most learned lawyers of his time, and Wirt and Pinkney two of the most eloquent. Hopkinson had been associated with Webster in the Dartmouth College case.

It was felt that this new cause was of importance equal to the last named. The discussion at the bar continued from the twenty-second to the twenty-seventh of February, and from the first to the third of March. Webster's argument is not contained in the first edition of his collected works, but an abstract of it is to be found in Wheaton's Reports, and it is now reprinted in the national edition of 1903.[1] It contains the statement of the

[1] Webster's *Writings and Speeches*, vol. xv., p. 261.

famous proposition that "an unlimited power to tax involves necessarily a power to destroy."[1]

To use Mr. Webster's phrase in his speech in the Senate on an amendment to the bill for renewing the charter of the Bank of the United States[2]:

> "A power of taxation without fixed limits and without guards, is a power to embarrass, a power to oppress, a power to expel, a power to destroy."

In support of the proposition that individual States had no power to tax an instrument of the national government, it was necessary to maintain, and Mr. Webster did maintain, that the powers of the separate States were not only limited by the express prohibitions of the Constitution, but that such limitation could be inferred, by fair implication, from the grant of powers to the general government which were inconsistent with the exercise of like authority by the States. It will be seen at once that this proposition was of the very first importance. For if it was within the lawful authority of the separate States, by adverse legislation, to limit, check and harass the exercise by the general government of the powers granted to it, the latter would be shorn of the authority necessary to its complete efficiency.

At first sight it would seem reasonably clear that an institution doing business in a State, and receiving the benefit of protection from the State government, should directly or indirectly pay its fair

[1] Webster's *Writings and Speeches*, vol. xv., p. 266.
[2] Webster's *Works*, vol. iii., p. 408.

proportion of the expenses of that government. As matter of equity, this is undoubtedly true, and when the act for the incorporation of national banks was passed during the Civil War in 1862, the consent of Congress was given to the taxation of the interest of the stockholders in the stock of each bank by the State in which it was located, provided such taxation was not at a greater rate than that imposed upon capital invested in other financial enterprises.

A proposition to authorize a tax upon the Bank itself or its branches was considered in Congress when the charter of the second Bank of the United States was before it for consideration. This was successfully opposed by Mr. Webster, but he conceded that the interest of stockholders might properly be taxed. To use his own words :[1]

"Every stockholder in the Bank is liable to be taxed for his property therein by the State of which he is a citizen."

The need of such a bank at that time was so pressing, and the disadvantages under which the country was suffering from the depreciation of local issues of circulating notes and the discounts to which they were subject at even a small distance from the place of issue were so great, that Congress was naturally reluctant to impose upon the new institution which it was creating, any burden that was not absolutely necessary. But it was of the first importance that the control over this subject should remain in the hands of Congress. If a

[1] Webster's *Works*, vol. iii., p. 411.

State might tax a bank incorporated by Congress, why might it not tax a post-office building, or a federal court-house? If it had the general power to tax property used for federal purposes, it could exercise that power to discriminate against the property of the federal government. In short, when the matter is carefully considered, it will appear that the whole character of the general government would have been altered, if the decision in M'Culloch against State of Maryland had been the reverse of what it was. It would have left the general government, what Calhoun afterwards claimed it to be, a mere agent of the State governments for a few specifically defined purposes, subject practically in most, if not all, respects to the control of its principals. As these principals were many, and often did not agree, such a conclusion would have left the Constitution a rope of sand. The question on the power of taxation was therefore really of much greater importance than the other which was also argued in the case, which was whether the Constitution conferred on Congress, by implication, the power to charter a bank.

Still, on the latter point also, the principle of construction which Mr. Webster advocated was fundamental. He states it thus[1]:

"Congress by the Constitution is invested with certain powers; and as to the objects and within the scope of these powers, it is sovereign. Even without the aid of the general clause in the constitution empowering Congress to pass all necessary and proper laws for carrying its powers into execution, the

[1] 4 Wheaton, p. 323; Webster's *Writings and Speeches*, vol. xv., p. 262.

grant of powers itself necessarily implies a grant of all usual and suitable means for the execution of the powers granted."

His argument on this occasion is better preserved in his speech delivered July 11, 1832, upon Jackson's veto of the bill to extend the charter of the Bank of the United States.

"According to that mode of construing the Constitution which was adopted by Congress in 1791, and approved by Washington, and which was sanctioned by the judgment of the Supreme Court, and affirmed by the practice of nearly forty years, the question upon the constitutionality of the bank, involve two inquiries. First, whether a bank, in its general character and with regard to the general objects with which banks are usually connected be, in itself, a fit means, a suitable instrument to carry into effect the powers granted to the government. If it be so, then the second, and the only other question is, whether the powers given in a particular charter are appropriate for a bank. If they are powers which are appropriate for a bank, powers which Congress may fairly consider to be useful to the bank or the country, then Congress may confer these powers; because the discretion to be exercised in framing the constitution of the bank belongs to Congress. One man may think the granted powers not indispensable to the particular bank; another may suppose them injudicious or injurious; a third may imagine that other powers, if granted in their stead, would be more beneficial; but all these are matters of expediency, about which men may differ; and the power of deciding upon them belongs to Congress." [1]

"The truth is, Mr. President, that if the general object, the subject-matter, properly belongs to Congress, all its incidents belong to Congress also. If Congress is to establish post-offices and post-roads, it may, for that end, adopt one set of regulations or another; and either would be constitutional. So the details of one bank are as constitutional as those of an-

[1] Webster's *Works*, vol. iii., p. 437.

other, if they are confined fairly and honestly to the purpose of organizing the institution, and rendering it useful. One *bank* is as constitutional as another *bank*. If Congress possesses the power to make a bank, it possesses the power to make it efficient, and competent to produce the good expected from it. It may clothe it with all such power and privileges not otherwise inconsistent with the Constitution, as may be necessary in its own judgment to make it what government deems it should be. It may confer on it such immunities as may induce individuals to become stockholders, and to furnish the capital; and since the extent of these immunities and privileges is matter of discretion, and matter of opinion, Congress only can decide it, because Congress alone can frame or grant the Charter." [1]

The case was so fully argued that the Court no doubt disposed of it immediately upon the conclusion of the argument. Four days after this, and on the 7th of March, 1819, the opinion of the Court was delivered by Chief Justice Marshall. Justices Washington, Johnson, Brockholst Livingston, Duval and Story concurred. The decision follows very closely Mr. Webster's argument. In the report the latter is stated concisely. The opinion elaborates. After pointing out that the Constitution was adopted by the people and not by the State legislatures, and that therefore it could not be said that the national government was the creature of the States, but that on the contrary it was the child of the people, the Chief Justice proceeds (p. 405):

"The government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all;

[1] Webster's *Works*, vol. iii., p. 441.

its powers are delegated by all; it represents all, and acts for all."

And then the Chief Justice quotes the section on the supremacy of the Constitution, and proceeds (p. 409):

"The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."

Again, in considering the meaning of the word "necessary," he says (p. 419):

"This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view."

Again (at p. 421) he proceeds:

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Having thus disposed of the arguments against the constitutionality of the charter, he deals with the question as to the power of the State, and concludes (p. 431):

"That the power to tax involves the power to destroy; that

the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied."[1]

The greater part of the banking business of the country is now carried on by national banks. For over forty years they have not only done this, but have furnished a circulating medium, equally good in every part of the country, and redeemable everywhere in legal tender, upon demand. No note holder has ever lost one dollar by the failure of one of these banks. Any one who remembers (as the author well does) the contrast between this orderly and well-regulated financial condition and the chaotic state of our currency before the war—notes of New York City banks not current in many parts of New England—discounts of one, two or three per cent. charged by brokers in handling in one State the notes issued in another—constant counterfeits, hard to detect and requiring the use of a large volume (known, if memory serves the author, as Thompson's *Counterfeit Bank-Note Detector*)—will in some degree appreciate the incalculable value of the service rendered to the country by Daniel Webster, in the masterly argument which led the court to this conclusion.

[1] This famous phrase of Webster's, "The power to tax is the power to destroy," was repeated by Mr. Justice Brewer in Fairbank *vs.* United States, 181 U. S., 283, 291. In this case the rule of construction applied in McCulloch *vs.* Maryland to the grant to Congress of certain powers, is extended to the prohibitions in the Constitution.

The question of taxation of the stock in national banks is one of such general interest that we conclude this chapter with two as yet unpublished documents, which throw light upon the principles which must control in dealing with the subject, and which have since been adopted by the Supreme Court in its decision upon the effect of the present national banking law.

The first is an opinion given by Mr. Webster to Enoch Parsons, July 29, 1830[1]:

"Tax on United States Bank Stock.

"In the case of M'Culloch *vs.* Maryland,[2] Judge Marshall in the conclusion of his opinion, says, 'We are unanimously of opinion, that the law passed by the Legislature of Maryland, imposing a tax on the Bank of The United States, is unconstitutional and void'; he then proceeds in the following words: 'This opinion does not deprive the States of any resources they originally possessed. It does not extend to a tax paid by the real property of the Bank, in *common* with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution in *common* with *other property* of the *same description* throughout the State.'[3]

"In the case of The City Council of Charlestown,[4] it was determined by The Sup. Court 'that a tax imposed by a law of any State of The United States, or under the authority of such a law on stock issued for loans made to The United States is unconstitutional.'

"It would seem from the above cases, that, if the Legislature of Connecticut have taxed the income of U. S. Bank

[1] The draft in Mr. Webster's own handwriting is in the collection of Websteriana, Library N. H. Hist. Soc., vol. v., p. 27.

[2] 4 Wheat., 316.

[3] 4 Wheat., 436.

[4] 2 Peters, S. C. Rep., 449.

Stock '*in common with other property of the same description throughout the State*' then the law authorizing such tax is not unconstitutional; but, if the law of the State specifies this particular property, stock in United States Bank, *eo nomine* and assesses a peculiar tax upon it, such a law is unconstitutional.—

"I have made inquiry of a gentleman, who was formerly assessor of Boston, respecting the practice in relation to assessing property in this city; he informed me that in estimating a person's property, stock in the United States Bank was always considered the same as any other stock, or personal property, and the income arising therefrom, assessed in common with all the other income of the persons to be taxed.—

"D. WEBSTER."

The second is the following letter from Chief Justice Marshall to Mr. Webster[1]:

"RICHMOND June 16th 1832.

"MY DEAR SIR

"I thank you very sincerely for the copy with which you have favored me of your speeches on the bill for renewing the charter of the bank of the United States. I need not say that I consider an accommodation of the tariff question itself as scarcely more interesting to our country than the passage of that bill. Your argument presents the subject in its strongest point of view, and to me seems unanswerable. Mr. Ritchie in his Enquirer informs the people of Virginia that Mr. Tazewell has refuted you completely. This he may have done in the opinion of Mr. Ritchie. I have not seen Mr. Tazewell's speech and do not understand from the Enquirer whether his refutation applies to your speech in favor of the bill or to that against the amendment offered by Mr. Moor. By the way, your argument against that amendment is founded on an idea which is to me quite novel. I had often heard it advanced that the states have no constitutional power to establish banks of circulation—but never that Congress might not introduce

[1] The original of this letter is in the Library of the New Hampshire Historical Society.

into the charter a restraining principle which might prohibit branches altogether, or require the assent of a state to their introduction; or a principle which might subject them to state taxation. This may be considered not as granting power of taxation to a state, for a state possesses that power; but as withdrawing a bar which the constitution opposes to the exercise of this power over a franchise created by Congress for national purposes, unless the constitution of the franchise, in its creation, has this quality ingrafted on it.

"I am however far from undertaking to dissent from your proposition. I only say it is new, and I ponder on it.

"With great and respectful esteem

"I am your obedt

"J MARSHALL

"I only meant to express my obligation for your attention and I have betrayed myself into the politics of the day."[1]

[1] As long ago as March 28, 1814, Webster wrote of the great Chief Justice: "I have never seen a man of whose intellect I had a higher opinion."

CHAPTER V

INTERSTATE COMMERCE—GIBBONS *vs.* OGDEN

IMPORTANT as were the cases to which reference has already been had, it may be doubted whether either of them was of more consequence to the country than the decision in Gibbons *vs.* Ogden.[1]

In 1807, Robert Fulton had constructed a steamboat named the *Clermont* (after Chancellor Livingston's country-seat on the banks of the Hudson), which made a successful voyage from New York to Albany, to the great astonishment of the people on the banks of the river. Afterwards, when slow communication by coach and sailing vessel had made the great event known abroad, it became the admiration of the civilized world.

John Fitch had previously made a small steamboat which had moved about on the Collect Pond in New York City, where now the City Prison is constructed. The Legislature, in 1787, granted to him the sole and exclusive right of making and using every kind of boat or vessel impelled by steam in all the waters within the jurisdiction of New York for fourteen years. But Fitch had not the capital, and perhaps not the skill, to develop his invention

[1] 9 Wheaton, 1.

and put it in practical operation. Meanwhile, Robert Fulton, a native of Pennsylvania, a son of an Irish immigrant, had been studying the question of the steamboat, and had gone to France and endeavored to interest the First Consul in his plan. This was referred to the Institute for examination, but that learned body did not seem to think the subject worth its attention. While Fulton was thus engaged, the United States sent Robert R. Livingston as Minister to France. He had been experimenting in New York in the same direction as Fulton. In 1798, he had obtained from the Legislature of that State an act which on the suggestion that "Fitch was dead or had withdrawn from the State without having made any attempt to use his privilege," repealed the grant to him and conferred a similar privilege on Livingston for the term of twenty years. Livingston met Fulton and the two inventors put their heads together, each benefited by what the other had done, and the result was an application to the Legislature of New York for an additional grant to them both. This was made on the 5th day of April, 1803, and gave to them both the monopoly of the use of the steamboat in New York and all its waters for twenty years from the passing of the act. After the successful trip of the *Clermont* in 1807, another act was passed extending the monopoly "five years for every additional boat," the whole duration, however, not to exceed thirty years; and forbidding any and all persons to navigate the waters of the State with any

steamboat or vessel impelled by steam, without a license from Livingston and Fulton, under penalty of forfeiture of the boat or vessel.

In April, 1811, a further act was passed providing more extensive remedies, both at law and in equity, for enforcing the monopoly which had been granted to Livingston and Fulton.

Gibbons undertook to challenge this monopoly. He built a steam ferry-boat which was duly enrolled and licensed by the United States for carrying on all coasting trade, and employed it in that trade between Elizabeth in New Jersey and the city of New York. Ogden, who had a grant from Livingston and Fulton, filed a bill in the New York Court of Chancery to restrain Gibbons from the use of the boat. The Chancellor and on appeal the Court of Errors held that the acts of the State of New York under which Ogden claimed title were valid.[1] Gibbons took the case to the Supreme Court of the United States. As Mr. Webster said at the beginning of his argument :

"The laws in question, I am aware, have been deliberately re-enacted by the Legislature of New York; and they have also received the sanction, at different times, of all her judicial tribunals, than which there are few, if any, in the Country, more justly entitled to respect and deference. The disposition of the Court will be, undoubtedly, to support, if it can, laws so passed and so sanctioned. I admit, therefore, that it is justly expected of us that we should make out a clear case; and unless we do so, we cannot hope for a reversal. It should

[1] The reasons for these decisions are concisely stated by Chancellor Kent, *Comm.*, vol. i., p. 433.

be remembered, however, that the whole of this branch of power, as exercised by this Court, is a power of revision. The question must be decided by the State Courts, and decided in a particular manner, before it can be brought here at all. Such decisions alone give this Court jurisdiction; and therefore while they are to be respected as the judgments of learned judges, they are yet in the condition of all decisions from which the law allows an appeal."

He then proceeded in words which cannot be abridged, to state the position of the controversy:

"By the law of New York, no one can navigate the Bay of New York, the North River, the Sound, the lakes, or any of the waters of the State, by steam vessels, without a license from the grantees of New York, under penalty of forfeiture of the vessel.

"By the law of the neighboring State of Connecticut, no one can enter her waters with a steam vessel having such a license.

"By the law of New Jersey, if any citizen of that State shall be restrained, under the New York law, from using steamboats between the ancient shores of New Jersey and New York, he shall be entitled to an action for damages, in New Jersey, with treble costs against the party who thus restrains or impedes him under the law of New York! This act of New Jersey is called an act of retortion against the illegal and oppressive legislation of New York; and seems to be defended on those grounds of public law which justify reprisals between independent States.

"It will hardly be contended, that all these acts are consistent with the laws and Constitution of the United States. If there is no power in the general government to control this extreme belligerent legislation of the States, the powers of the government are essentially deficient in a most important and interesting particular. The present controversy respects the earliest of these State laws, those of New York. On these, this Court is now to pronounce; and if they should be declared

to be valid and operative, I hope somebody will point out where the State right stops, and on what grounds the acts of other States are to be held inoperative and void.

"It may be well to state again their general purport and effect, and the purport and effect of the other State laws which have been enacted by way of retaliation.

"A steam vessel of any description, going to New York, is forfeited to the representatives of Livingston and Fulton, unless she have their license. Going from New York or elsewhere to Connecticut, she is prohibited from entering the waters of that State, if she have such license.

"If the representatives of Livingston and Fulton in New York carry into effect, by judicial process, the provisions of the New York laws, against any citizen of New Jersey, they expose themselves to a statute action in New Jersey for all damages, and treble costs."

"The New York laws extend to all steam vessels; to steam frigates, steam ferry-boats, and all intermediate classes. They extend to public as well as private ships; and to vessels employed in foreign commerce, as well as to those employed in the coasting trade.

"The remedy is as summary as the grant itself is ample; for immediate confiscation, without seizure, trial, or judgment, is the penalty of infringement." [1]

Mr. Webster then proceeded to argue that the power of Congress to regulate commerce was complete and entire and to a certain extent necessarily exclusive.

The argument had been that there was a concurrent power in the States until Congress should exercise the power, which might, when exercised, exclude State legislation. To this Mr. Webster replied:

"I do not mean to say, that all regulations which may, in

[1] Webster's *Works*, vol. vi., pp. 5–7.

their operation, affect commerce, are exclusively in the power of Congress; but that such power as has been exercised in this case does not remain with the States.

"Nothing is more complex than commerce; and in such an age as this, no words embrace a wider field than *commercial regulation*. Almost all the business and intercourse of life may be connected incidentally, more or less, with commercial regulations. But it is only necessary to apply to this part of the Constitution the well-settled rules of construction. Some powers are held to be exclusive in Congress, from the use of exclusive words in the grant; others, from the prohibitions on the States to exercise similar powers; and others, again, from the nature of the powers themselves. It has been by this mode of reasoning that the Court has adjudicated many important questions; and the same mode is proper here. And, as some powers have been held to be exclusive, and others not so, under the same form of expression, from the nature of the different powers respectively; so where the power, on any one subject, is given in general words, like the power to regulate commerce, the true method of construction will be to consider of what parts the grant is composed, and which of those, from the nature of the thing, ought to be considered exclusive. The right set up in this case, under the laws of New York, is a monopoly. Now I think it very reasonable to say, that the Constitution never intended to leave with the States the power of granting monopolies either of trade or of navigation; and therefore, that as to this, the commercial power is exclusive in Congress.[1]

"It is in vain to look for an exact and precise *definition* of the powers of Congress on several subjects. The Constitution does not undertake the task of making such exact definitions. In conferring powers, it proceeds by the way of *enumeration*, stating the powers conferred, one after another, in few words; and where the power is general or complex in its nature, the extent of the grant must necessarily be judged of, and limited, by its object, and by the nature of the power."[2]

[1] Webster's *Works*, vol. vi., p. 8.

[2] *Ibid.*, vol. vi., p. 9.

Again he adds :

"This doctrine of a general concurrent power in the States is insidious and dangerous. If it be admitted, no one can say where it will stop. The States may legislate, it is said, wherever Congress has not made a plenary exercise of its power. But who is to judge whether Congress has made this plenary exercise of power? Congress has acted on this power; it has done all that it deemed wise; and are the States now to do whatever Congress has left undone? Congress makes such rules as, in its judgment, the case requires; and those rules, whatever they are, constitute the system.

"All useful regulation does not consist in restraint; and that which Congress sees fit to leave free is a part of its regulation, as much as the rest." [1]

He further argued that the obvious intent of the legislation referred to was to give preference to the citizens of some States over those of others :

"I do not mean here the advantages conferred by the grant on the grantees; but the disadvantages to which it subjects all the other citizens of New York. To impose an extraordinary tax on steam navigation visiting the ports of New York, and leaving it free everywhere else, is giving a preference to the citizens of other States over those of New York. This Congress could not do; and yet the State does it; so that this power, at first subordinate, then concurrent, now becomes paramount.

"The people of New York have a right to be protected against this monopoly. It is one of the objects for which they agreed to this Constitution, that they should stand on equality in commercial regulations; and if the government should not insure them that, the promises made to them in its behalf would not be performed." [2]

It was always Mr. Webster's manner, in cases involving constitutional questions, to argue them at

[1] Webster's *Works*, vol. vi., p. 13. [2] *Ibid.*, vol. vi., p. 18.

the outset on broad grounds. Thus having clearly stated and defined the principles which should control the Court in deciding the case before it, he proceeded on a narrower line of argument which was open to him, namely: the contention that the license under the coasting laws which the United States had given to Gibbons was inconsistent with the legislation of New York, and that the latter must therefore give place to the former. It was on this ground that the case was finally decided, and yet the argument of the Court follows very closely that of Mr. Webster and adopts its fundamental propositions. To use the language of the Court:

"The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States. They are said to be repugnant.

"1. To that clause in the constitution which authorizes congress to regulate commerce. . . .

"As preliminary to the very able discussions of the constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States, anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

"This instrument contains an enumeration of the powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, congress is authorized to make 'all laws which shall be necessary and proper for the purpose.' But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution which has been pointed out by the gentlemen at the bar, or which we have been able to discern, that prescribes this rule."

. . . . . .

"The words are: 'Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.'

"The subject to be regulated is commerce; and our Constitution being, as was aptly said at the Bar, one of enumeration and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce undoubtedly is traffic but it is something more, it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter." [1]

"The subject is transferred to Congress and no exception

[1] Gibbons *vs.* Ogden, 9 Wheaton, pp. 186–190.

to the grant can be admitted which is not proved by words or the nature of the thing." [1]

The latest statement by the court of the rule established in Gibbons *vs.* Ogden is to be found in the case of Atlantic & Pacific Tel. Co. *vs.* Philadelphia,[2] in which the opinion was delivered June 1, 1903:

"The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation" [3]

Mr. Webster's own opinion of his argument in Gibbons *vs.* Ogden is to be found in a very interesting conversation reported by Harvey [4]:

"'Mr. Webster, your speech in answer to Hayne has been read, I think, by more intelligent persons than any speech in the English language.'

"'Oh, no,' replied he, 'I think you must be mistaken about that. You must remember the speeches of English orators and

[1] Gibbons *vs.* Ogden, 9 Wheaton, p. 215.

[2] 190 U. S., 160–162 (1903).

[3] In accordance with this rule it is held that no State or municipality can levy any tax, whether by license fee or otherwise, upon the doing of business in one State, by the citizens of another,—Caldwell *vs.* North Carolina, 187 U. S., 622 (1903);—nor in any form upon traffic from one State to another —interstate commerce as it is called,— Hanley *vs.* Kansas City Southern R. Co., *ibid.*, 617 (1903). On the other hand a State may impose ordinary property taxes upon property within its territory, belonging to non-residents,—Atlantic & Pacific Tel. Co. *vs.* Philadelphia *supra*;—and may exercise police power over the same, and tax it to provide funds for such exercise,—Western Union Tel. Co. *vs.* Borough of New Hope, 187 U. S., 419,(1903).

[4] *Reminiscences of Daniel Webster*, p. 140.

statesmen were not reported as ours are; neither were the English, to a great extent, a reading people. Everything that is worth reading and is eloquent, our people read.'

"After a pause, he went on:

"'Well, I don't know; you may be right in that. But that was not my best speech.'

"I said, that, if it was not the best speech, it had the greatest fame.

"'Well,' said he, 'I suppose it has. Nevertheless, it was not, in my judgment, the best speech I ever made; but, as a popular effort, it was undoubtedly more read than any other speech.'

"'What do you regard as your greatest speech?' I asked.

"'My forensic efforts have been those which have pleased me most. The two arguments that have given me the most satisfaction were the arguments in the "steamboat case" and the Dartmouth College argument. The steamboat case, you remember, was a question of the constitutionality of the right of New York State to give a monopoly to Fulton and his heirs forever, of the privilege of plying the waters of the Hudson with his steamboats. The value of such a right was not then and could not have been, from the nature of the case, fully understood. But it seemed to me to be against the very essence of State rights, and a virtual dissolution of the Union in a commercial sense. If New York had a right to lay tolls upon her rivers for everybody that should pass, then all the other great international rivers and lakes would have the same right, and we could not be one as a commercial people. The people of New York felt that their rights were at stake in the contest; and their great lawyers—and they had many of them—were engaged on that side; the Livingstons and Clintons and others of like calibre. Mr. Wirt and myself were employed against the monopoly. When the case came to be argued before the Supreme Court at Washington, Chief Justice Marshall presiding, Mr. Wirt and myself met for consultation. Mr. Wirt asked me upon what grounds I based my case, upon what clause of the Constitution. He had a right to ask, as he was my senior in years and professional fame. My reply was, that

the clause of the Constitution which ceded to the general government the right to regulate commerce was that upon which I based my defence. Mr. Wirt's reply to that was, that he did not see, in that line of argument, any ground for our case to rest upon. I said: "Very well; what is yours?" So he told me. I do not recollect what it was, but it was a totally different clause in which he found the ground of his argument. I said to him: "Mr. Wirt, I will be as frank with you as you have been with me, and say that I do not see the slightest ground to rest our case upon in your view of it." "Very well," replied Mr. Wirt, "let us each argue it in our own way, and we will find out which, if either, is right."

"'The case came on for argument. Mr. Wirt made one of his brilliant arguments before the Court. I followed with my view.

"'I can see the Chief Justice as he looked at that moment. Chief Justice Marshall always wrote with a quill. He never adopted the barbarous invention of steel pens. That abomination had not been introduced. And always, before counsel began to argue, the Chief Justice would nib his pen; and then, when everything was ready, pulling up the sleeves of his gown, he would nod to the counsel who was to address him, as much as to say, "I am ready; now you may go on."

"'I think I never experienced more intellectual pleasure than in arguing that naval question to a great man who could appreciate it, and take it in; and he did take it in, as a baby takes in its mother's milk.

"'The result of the case was this: the opinion of the Court, as rendered by the Chief Justice, was little else than a recital of my argument. The Chief Justice told me that he had little to do but to repeat that argument, as that covered the whole ground. And, which was a little curious, he never referred to the fact that Mr. Wirt had made an argument. He did not speak of it once.'

"Then Mr. Webster added:

"'That was very singular. It was an accident, I think. Mr. Wirt was a great lawyer, and a great man. But sometimes a man gets a kink and does n't hit right. That was one of the occasions. But that was nothing against Mr. Wirt.'"

It is not often that we have a description of a great legal argument by two of the judges who heard it. In the present case we have this rare good fortune. In the unpublished manuscript from which we have before quoted, Mr. Justice Story thus describes Webster's argument in Gibbons *vs.* Ogden:

"Of Mr. Webster's argument in the opening of this case (for it was closed by Mr. Wirt in a speech of great splendor and force) it may be said to furnish as good a specimen of the characteristics of his mind, as any which could be named. We have here in as favorable a light as we could desire, his clearness and downright simplicity of statement, his vast comprehensiveness of topics, his fertility in illustrations drawn from practical sources; his keen analysis, and suggestion of difficulties; his power of disentangling a complicated proposition, and resolving it in elements so plain as to reach the most common minds; his vigor in generalizations, planting his own argument behind the whole battery of his opponents; his wariness and caution not to betray himself by heat into untenable positions, or to spread his forces over useless ground. Everywhere we see him, as it were, fortifying himself on all sides within the narrowest limits for his cause with all the limitations and qualifications belonging to it; yet still ready at every moment to center, like a skillful general, at the weak points of his adversary's position. Whoever with a view to the real difficulties of the case and the known ability of his opponents, shall sit down to the task of perusing this argument will find, that it is equally remarkable for profoundness and sagacity, for the choice, and comprehensiveness of the topics, and for the delicacy and tact, with which they are handled. The reader goes on and so naturally falls into the current of the argument, that he thinks all quite plain and indisputable, until shutting the book, he attempts to frame an argument for himself on the same topics and to answer his adversaries. Like Partridge in *Tom Jones*, when he saw Garrick act, all seemed

so natural, and without effort, that he is convinced that there can be neither art nor address, nor genius in the affair. Yet it is this very power, this naturalness and plainness of remark, which makes Mr. Webster so irresistible to a jury."

It is our good fortune to have another account of this argument from Mr. Justice Wayne. When Mr. Webster was in Savannah, in 1847, a public reception was given him. Mr. Justice Wayne presided and addressed Mr. Webster. In the course of this address he said:

"From one of your constitutional suggestions, every man in the land has been more or less benefited. We allude to it with the greater pleasure, because it was in a controversy, begun by a Georgian in behalf of the constitutional rights of the citizen.

"When the late Mr. Thomas Gibbons determined to hazard a large part of his fortune in testing the constitutionality of the laws of New York, limiting the navigation of the waters in that State to steamers belonging to a company, his own interest was not so much concerned as the right of every citizen to use a coasting license upon the waters of the United States, in whatever way his vessel was propelled. It was a sound view of the law, but not broad enough for the occasion. It is not unlikely that the case would have been decided upon it, if you had not insisted that it should be put upon the broader constitutional ground of commerce and navigation. The court felt the application and force of your reasoning, and it made a decision releasing every creek and river, lake, bay, and harbor in our country from the interference of monopolies, which had already provoked unfriendly legislation between some of the States, and which would have been as little favorable to the interest of Fulton as they were unworthy of his genius."[1]

Two years later, in the course of his opinion in

[1] Webster's *Works*, vol. ii., p. 399.

the Passenger cases,[1] Mr. Justice Wayne thus spoke of the prior decision :

"The case of Gibbons *v.* Ogden, in the extent and variety of learning, and in the acuteness of distinction with which it was argued by counsel, is not surpassed by any other case in the reports of courts. In the consideration given to it by the court, there are proofs of judicial ability, and of close and precise discrimination of most difficult points, equal to any other judgment on record. To my mind, every proposition in it has a definite and unmistakable meaning. Commentaries cannot cover them up or make them doubtful.

"The case will always be a high and honorable proof of the eminence of the American Bar of that day, and of the talents and distinguished ability of the judges who were then in the places which we now occupy.

"There were giants in those days, and I hope I may be allowed to say, without more than judicial impressiveness of manner or of words, that I rejoice that the structure raised by them for the defence of the Constitution, has not this day been weakened by their successors."

Chief Justice Marshall concluded his opinion in Gibbons *vs.* Ogden with the following remarkable statement :

"Powerful and ingenious minds, taking as postulates that the powers expressly granted to the government of the Union, are to be contracted by construction into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well-digested but refined and metaphysical reasoning founded on these premises, explain away the constitution of our country, and leave it a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles which were before thought quite plain, and induce doubts, where, if the

[1] 7 Howard, 437.

mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined."[1]

The rule for deciding constitutional questions thus laid down is a concise repetition of the more elaborate statement at the beginning of the opinion. It is a fundamental rule. It is not too much to say that the application of the rules of construction which we have quoted from this opinion has given to our country that government which we now enjoy, and that we owe it to Mr. Webster that the conscience and judgment of the Supreme Court became satisfied that the rule referred to was the one unfailing test of the validity of any constitutional argument. This contention became a part of the national consciousness and sustained the nation in its great struggle from 1861 to 1865.

[1] Gibbons *vs.* Ogden, 9 Wheaton, p. 222.

CHAPTER VI

THE SLAVE TRADE—"LA JEUNE EUGENIE"

THE next case of magnitude which deserves commemoration is that of *La Jeune Eugenie*.[1] To us who live in the day when not only the slave trade but slavery itself has been abolished, it is strange there ever could have been a question whether the trade in slaves was in violation of the law of nations. But that question was raised and came for decision at about the same time before those two great men who simultaneously adorned the bench of England and America, Lord Stowell and Judge Story. Their respective decisions illustrate what we have said as to the functions of the judge and the advocate, and the essential part the latter plays in the drama of justice.

There had been a time when all nations were engaged in this traffic. Afterwards many of them passed laws forbidding it to their own citizens. The question arose, whether the court could take these isolated enactments and construe them as in the aggregate forming a general law enforcible by the cruisers, and in the courts of all nations which had adopted similar laws.

[1] 2 Mason, 409 (1822).

This was a question of vital importance to the world. The suppression of the slave trade had become of international importance. But it was a very profitable trade and the cupidity of those engaged in it led to constant contrivances for the evasion of the laws against it. The nations which had passed these laws kept naval vessels on the African coast for the capture of slavers. But if each vessel had the right to capture only slave ships of its own nationality, the slavers would fly the French flag in the presence of an American frigate, and when the latter was out of sight would hoist the stars and stripes as a French frigate approached. As Commodore Stockton wrote Mr. Webster (February 5, 1821), in reference to this very case:

"If the Flag of nations who have prohibited the Trade shall yet cover it so as that it can't be questioned by another, for ourselves we had better keep our business at home. It is perfectly well known at what rate Americans can be turned into Frenchmen or Spaniards in the West Indies." [1]

La Jeune Eugenie was a slaver, flying the French flag, which was captured by an American frigate and brought into Boston for adjudication.

William Sullivan, one of the most brilliant lawyers of that day, argued that an American frigate had no right to seize a French vessel for the violation of the law of France,[2] and that the American

[1] 15 Webster's *Writings and Speeches*, 279.

[2] It is interesting to note in this connection that the first law of France prohibiting French vessels from engaging in the slave trade was a decree of Napoleon, dated March, 1815, soon after his return from Elba. Louis

law was not binding on French vessels. Mr. Webster argued "that most all of the civilized nations of the globe had declared their sense of the illegality of this trade, by enacting laws to suppress it, and by various other public acts, treaties and declarations. And that it might now therefore be considered as contrary to the conventional law of nations." [1]

Judge Story in his opinion characterizes the arguments of the counsel as "very able, eloquent and learned," [2] and he decided in favor of the position maintained by Mr. Webster. As Commodore Stockton in the letter before quoted justly said:

"If you can maintain the great point you have taken, you will have done more for the cause of humanity than all the societies in the U. S. put together." [3]

Unfortunately for this cause, other courts, which did not have the aid of Webster's "able, eloquent and learned" argument, decided differently. In the case of the *Antelope* [4] the Supreme Court of the United States ordered restitution to a Spanish subject of negroes captured from his slave ship by an American frigate. This was, it is true, by an equally divided Court, which because of such division affirmed the decree of the Court below. And at an earlier date (December 15, 1817), Lord

XVIII. declared this like all the other laws of the Hundred Days (of "the usurper" as Talleyrand called him) to be void. But in 1817 Louis made a decree of somewhat similar purport. 2 Dodson, Adm. Rep., 5.

[1] 15 Webster's *Writings and Speeches* (Ed. 1903), 280.

[2] 2 Mason Rep., 463.

[3] Webster's *Writings and Speeches* (Ed. 1903), vol. xv., p. 279.

[4] 10 Wheaton, 66 (1825).

Stowell, the great English Admiralty Judge, held that the slave trade was not contrary to the law of nations.[1]

It is, however, to be noted that public opinion, both in the United States and Great Britain, had already become so strong against the slave trade, that British courts had sustained the seizure by a British frigate of a slaver flying the American flag.[2] These courts seem to have considered that these two commercial nations had at least made a law for themselves.

At a later date, in order to meet the need occasioned by these adverse decisions, and in consequence of that progressive public opinion which finally caused the abolition of slavery, civilized nations gradually came to an express agreement by virtue of which the slave trade was suppressed. The last cargo of negro slaves successfully landed was in 1860. But this was an exception. Few indeed were the slavers who escaped the vigilance of American and British cruisers during the two previous decades.

[1] *Le Louis*, 2 Dodson Adm., 210.

[2] The *Amedie*, 1 Acton, 240 (1810), High Court of Appeals. The case is also reported in note to 1 Dodson, Adm., 84. To the same effect is the *Fortuna*, 1 Dodson, 95 (1811), decided by Sir Wm. Scott, afterwards Lord Stowell. It is hard to reconcile this with his later decision in *Le Louis*. In Madrazo *vs.* Willes, 3 Barn. and Ald, 358 (1820), Mr. Justice Best, in the King's Bench (p. 359), said that if the law of Spain prohibited this trade, a Spanish slaver could lawfully be captured by a British cruiser. But as the law of Spain did not at the time of capture (1818) prohibit the trade, damages were awarded for such capture.

CHAPTER VII

STATE INSOLVENT LAWS—OGDEN *vs.* SAUNDERS

THE next case of importance that Mr. Webster argued in the Supreme Court was that of Ogden *vs.* Saunders.[1]

The question involved in this case was as to the validity of the insolvent laws of the several States. There was no federal bankruptcy act in force.

The severe financial distress which began with the restrictions upon our commerce created by the embargo before the War of 1812, and which was intensified by the suspension of specie payments and by the disorganized condition of the currency at the close of that war, had led many of the States to pass insolvency laws. It was contended that these laws were contrary to that provision of the Constitution which prohibited a State from impairing the obligation of contracts. Mr. Webster's conviction was that the whole subject could best be dealt with by Congress, and that the condition of trade between the different States would be benefited by the passage of a national bankruptcy act, which should protect the rights of creditors from

[1] 12 Wheat., 213. Mr. Webster's argument is in Webster's *Works*, vol. vi., p. 24.

every State, and at the same time furnish to an unfortunate debtor the opportunity of beginning business again.

In April, 1830, Mr. Webster wrote a letter to the Prison Discipline Society of Boston, advocating the mitigation of the laws for the imprisonment of debtors.[1] He always favored the enactment of a national bankruptcy law. But when the validity of the State insolvent laws came before the courts, he argued earnestly that the Constitution had deprived the States of the power of legislation on this subject.

The case was argued at the February term in 1824, was continued for advisement until the January term of 1827, when a reargument was ordered, and at the conclusion of the argument of this and other cases which were pending, involving the question in different forms, a divided Court decided that an insolvent law of a State was valid so far as it affected contracts which were entered into after the enactment of the law. In other words, it held that a contract must be presumed to be made with reference to the law of the State within whose limits the contract itself was agreed to, and became binding upon the parties. But the previous decision in Sturges *vs.* Crowninshield,[2] that the contract could not be affected, or its validity impaired by subsequent legislation, was reaffirmed. By a divided Court it was also held that this legislation could not affect the rights of creditors who were, when the contract was made, citizens of a State other than

[1] *Letters of Webster*, Van Tyne, pp. 155–157. [2] 4 Wheat., 122.

that enacting the State law. These decisions deprived the State insolvent laws of much of their value, and no doubt were powerful factors in inducing Congress to pass the national bankruptcy law of 1841. That law was passed in a time of general financial distress, and it might almost be said of general insolvency. Its object was mainly to relieve unfortunate debtors. It failed properly to recognize the rights of creditors, and for that reason mainly its life was short. Subsequently a national bankrupt act more carefully considered has become a law, and seems likely to remain as a portion of our national legislation. And thus it has come to pass that the argument which Mr. Webster addressed to the Court, and which, like all his arguments in cases of public importance, was read by the people and reached their judgment, has finally become a part of our jurisprudence, though it failed to convince the Court to which it was first addressed. The old maxim is that "hard cases make shipwreck of the law." The insolvent condition of the debtors who were trying to begin business life again, and the hardship to them if no legal method existed by which an honest insolvent could make a new start, no doubt had much to do with the decision in Ogden *vs.* Saunders.

CHAPTER VIII

ACQUISITION OF NEW TERRITORY—AMERICAN INSURANCE COMPANY *vs.* CANTER

THE question of the authority of Congress over territory acquired by the United States in pursuance of treaty with a foreign country, either as the result of war or of peaceful negotiations, has attracted recent attention in consequence of the war with Spain and the cession by that kingdom to the United States of the Philippine Islands and Porto Rico. Justices of the Supreme Court differed greatly in regard to the disposition of particular cases in which this question was argued. But the principles, upon the application of which depended the decision of what have been known as the Insular cases, are drawn from the decision of the United States Supreme Court in the case of the American Insurance Company *vs.* Canter.[1] Curiously enough, in this case also, the territory in question had been purchased from Spain. It was the peninsula of Florida, which was acquired by the United States by purchase under the treaty of 1819. In this treaty, however, unlike that of 1898, the Spanish Government stipulated that the in-

[1] 1 Peters, 511 (1828).

habitants of the territories ceded should possess certain definite civil rights. The clause of the treaty referred to will be quoted hereafter. After the treaty, and in 1823, Congress passed an act providing for a legislature in the new territory, and giving to that legislature power to establish inferior courts. Pursuant to this provision the legislature did establish a court, consisting of a notary and five jurymen, who should have jurisdiction to determine the amount of salvage which should be payable to the salvors of property. Wrecks on the Florida keys have always been frequent, and the Court at Key West has always been busy with salvage questions. In the case under consideration, cotton was saved from a wreck, was carried into Key West, the Court there ordered it sold and the purchaser claimed a valid title under the judgment of this Court. It was contended on the other side that the Admiralty courts of the United States had exclusive jurisdiction of salvage cases, and that the court created by this act of the territorial legislature was without jurisdiction. Mr. Webster's argument is not contained in his published works, and is briefly given in the report in Peters (p. 538). The following extract from this report will give the reader some conception of his position :

"What is Florida? It is no part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions.

"The territory and all within it, are to be governed by

the acquiring power, except where there are reservations by treaty.

"By the law of England, when possession is taken of territories, the King, *Jure Coronæ*, has the power of legislation until Parliament shall interfere. Congress have the *Jus Coronæ* in this case, and Florida was to be governed by Congress as she thought proper.

"What has Congress done? She might have done anything —she might have refused trial by jury and refused a legislature. She has given a legislature to be exercised at her will; and a government of a mixed nature in which she has endeavored to distinguish between State and United States jurisdiction, anticipating the future erection of the territory into a State.

"Does the law establishing the court at Key West come within the restrictions of the Constitution of the United States? If the Constitution does not extend over this territory the law cannot be inconsistent with the national Constitution."

The decision of the Court followed this argument very closely. It is on the following passage in the opinion delivered by Chief Justice Marshall that the decisions in the Insular cases are really based.[1]

"The course which the argument has taken will require that in deciding this question, the court should take into view the relation in which Florida stands to the United States.

"The constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory either by conquest or by treaty.

"The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms submitted in the

[1] 1 Peters, 541, 542.

treaty of cession, or on such as its new master shall impose. On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the state.

"On the 2nd of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provision—'The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the federal constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.'

"This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges rights and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the meantime, Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.'

"Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In

execution of it, Congress in 1822, passed 'an act for the establishment of a territorial government in Florida,' and on the 3rd of March, 1823, passed another act to amend the act of 1822. Under this act the territorial jurisdiction enacted the law now under consideration."

It is not within the scope of this work to consider in detail the decisions in the Insular cases. To do so would require a volume. But in general it may be said that they establish two propositions:

1. Territory acquired by the United States by purchase is not "a foreign country," nor are its citizens aliens.

2. It is subject only to the law-making power of Congress, and the restrictions of the Constitution of the United States do not limit this power.[1]

This question became important with reference to the subject of slavery. It was claimed by Calhoun, in opposition to the decision of the Supreme Court in the case just referred to, that the various provisions of the Constitution of the United States in regard to the rights of their citizens were in force throughout all the territory belonging to the United States. He further contended that the Constitution recognized the rights of citizens of the several States to hold slaves, and that consequently until a territory was admitted into the Union and thereby

[1] For convenience of the reader, reference is made to the leading decisions on this subject: De Lima *vs.* Bidwell, 182 U. S., 1 (1901); Downes *vs.* Bidwell, *ibid.*, 244 (1901); Huus *vs.* N. Y. and Porto Rico SS. Co., *ibid.*, 392 (1901); Dooley *vs.* United States, 183 U. S., 151 (1901); Fourteen Diamond Rings, *ibid.*, 176 (1901); Hawaii *vs.* Mankichi, 190 U. S., 197 (1903); Gonzales *vs.* Williams, 192 U. S. 1 (1904).

vested with the exclusive control over its legal affairs, citizens of those States within which slavery was authorized by law had the right to take their slaves into all parts of the United States territory, not admitted into the Union as a State.

On the other hand, Mr. Webster maintained, as he did in the Canter case, that the only clause of the Constitution which by its own force was applicable to the territories was that which provides that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property, belonging to the United States." Congress, therefore, had the right to exclude slavery from the territories, and to make all needful provision for their government until they should be admitted as States.[1]

[1] The debate between Webster and Calhoun on that subject in the Senate in February, 1849, states the argument on both sides clearly and has an important bearing on the relation of the United States to its Insular possessions. The editor of the last edition of Webster's *Writings and Speeches* has done public service in reproducing it (vol. xiv., pp. 323–335).

CHAPTER IX

THE UNITED STATES NOT A CONFEDERACY BUT A UNION—REPLY TO MR. HAYNE—CARVER *vs.* ASTOR'S LESSEE

THERE is one case of a purely technical nature, having no connection whatever with constitutional law, which will yet be forever associated with that one of Mr. Webster's speeches in Congress which at the time of its delivery probably produced the greatest impression of any of his speeches. This was his reply to Hayne.

There was under consideration in the Senate a resolution introduced December 29, 1829, by Mr. Foot, a Senator from Connecticut, instructing the Committee of Public Lands to consider the expediency of limiting for a certain period the sales of public lands. Mr. Benton, of Missouri, took up the resolution as an affront to the new States of the West, and Mr. Hayne, of South Carolina, on the 19th day of January, 1830, made it the occasion for an attack upon the East.

The argument of the case of Carver against John Jacob Astor's Lessee and others[1] involved, on the other hand, the construction of a marriage set-

[1] Reported 4 Peters, 1.

tlement and the old English law of shifting uses and executory limitations. It also involved questions purely technical, as to the delivery of a deed and the effect of recitals in it. The argument in the Supreme Court was commenced on the 20th of January, 1830. Mr. Webster was in court the day before waiting for the case to come on. After the adjournment he went into the Senate and heard the greater part of Mr. Hayne's speech. He rose to reply as soon as it was completed, but the Senate adjourned without hearing him, and he spoke the following morning. Mr. Hayne's attack was entirely unexpected, and Webster's speech on his first reply was made with no opportunity of preparation. It was, however, an effective defence of New England, and showed the great benefits that a citizen of Massachusetts, Nathan Dane, the author of the celebrated ordinance of 1787, for establishing a government in the territory northwest of the Ohio, had conferred upon that portion of the West by this admirable constitutional instrument.[1]

The next day some of Mr. Webster's friends endeavored to obtain an adjournment of the Senate until after the completion of the argument of Carver against Astor's Lessee, but Mr. Hayne refused to consent. He said: "He would not deny that some things had fallen from him [Mr. Webster] which rankled here [touching his breast] from which he would desire at once to relieve himself. The

[1] Those who are fond of coincidences may be interested to note that this first reply to Hayne was delivered on the same day as Chatham's speech for the Colonies in 1775—January 20th.

gentleman had discharged his fire in the presence of the Senate. He hoped he would now afford him an opportunity of returning the shot."

Thereupon Mr. Webster arose and said:

"Let the discussion proceed. I am ready. I am ready *now* to receive the gentleman's fire."

A member of Congress from the South, who was present, said it was impossible to describe "the true grandeur that then marked his manner and countenance."[1]

As soon as Mr. Benton had finished the speech upon the resolution, which he had begun the day before, Mr. Hayne arose and spoke for about an hour. By this time, presumably, his emotions had somewhat relieved themselves, and the Senate granted the courtesy which its great member had requested and adjourned until the following Monday. So Mr. Webster went back to the Supreme Court. He delivered his own argument there in the Carver case on the 22d, and on Monday, the 25th, Mr. Hayne completed his speech.

Beside the attack on New England, which has no longer anything but a remote historical interest, this speech contained a statement of the argument which had by this time come to be an article of faith in South Carolina, and was obtaining credence in other parts of the country, namely, that the Constitution was a compact between sovereign States, that there was no power supreme over these sovereigns to determine whether or not a particular act of Congress was an infraction of the

[1] March, *Reminiscences of Congress*, 115.

compact; that each State, therefore, must judge for itself, and that if, in the exercise of this sovereign right and judgment, it came to the conclusion that a particular act was in violation of the compact, and therefore void, it could lawfully refuse obedience to the obnoxious statute, or, in other words, nullify it. This argument was advanced with especial reference to the tariff laws which had been passed in 1824 and 1828, and which were avowedly intended to encourage the development of American manufactures by the imposition of duties upon the importation of foreign goods. Mr. Calhoun had originally favored this so-called protective system[1] and Mr. Webster had opposed it.[2] At the beginning of the tariff controversy it seems to have been supposed that manufactures might be introduced successfully in the South. At that time practically the entire commerce of the country was carried on by New England ships and sailors, and anything that tended to impose shackles upon this commerce was naturally obnoxious in the New England States. But when the policy of a high protective tariff was decided upon, and bills for that purpose were passed, in 1824 and 1828, large amounts of capital in New England were invested in manufactures.

[1] See extracts from his speeches in House of Representatives in April, 1816, Webster's *Works*, vol. iii., pp. 348–351.

[2] His reasons for this are fully stated in his speech in the House of Representatives, April, 1824 (Webster's *Works*, vol. iii., p. 94). See also his second speech on the tariff, delivered in the Senate May 9, 1828 (*Ibid.*, pp. 228–231). I know of nothing on the subject of a protective tariff better worth study than those two speeches. The argument for free wool, for example, has never been better or more temperately stated than at p. 135 of the same volume.

The Hope Mills, in Rhode Island, for example, were originally built at that time, and were named for the ship *Hope*, which the original proprietors of those mills owned, and which they sold for the purpose of investing the proceeds in the manufactures which were then being encouraged by acts of Congress.

On the other hand the business of the South remained agricultural. The system of slavery did not lend itself to any other kind of business activity. The Southern planters discovered that the effect of the tariff laws was to increase the prices of the goods which they had to buy for their own families and for their negroes, and a great change of sentiment took place in the South, very naturally, on the subject of the tariff laws.

An examination of the Constitution showed plainly enough that the power to impose tariff duties for a purpose other than that of revenue was not specifically granted. The strict constructionists therefore denied the validity of the tariff laws, and the State of South Carolina passed acts intended to prevent their enforcement at the port of Charleston.

The question of secession had not yet come to the front. The burdens which the embargo imposed upon the commerce of New England had indeed led some of the New England people, before the War of 1812, to consider the expediency of a dissolution of the Union.[1] But still the right of

[1] It is worth noting, however, that when, in 1811, one of the New England representatives spoke of secession as a probable consequence of the

secession, as it was subsequently discussed and advocated, can hardly be said to have been brought prominently to the public attention during the years before 1830. Nullification was the most prominent claim at that time. It seemed less drastic, and was maintained by its advocates to be consistent with the continuance of the union of the States. Hayne had put the argument for it with great plausibility, and a certain apprehension created by his speech spread rapidly through the country.[1]

It was on the 26th of January that Mr. Webster rose to reply. He spoke in what was then the Senate Chamber, and is now the court-room of the Supreme Court of the United States. The news that he was to speak, and on such a topic, had spread abroad, and the room was crowded almost to suffocation. Indeed to any one now standing in the room, it seems impossible that even with the former gallery, it could have ever contained so many people, as those who are said to have assembled to hear Webster's speech in reply to Hayne. That speech is so familiar, that it is unnecessary here to quote from it at length. It is really a statement, in eloquent and popular form, of propositions that

passage of the bill for the admission of Louisiana as a State, the Speaker, Joseph B. Varnum, of Massachusetts, a soldier of the Revolution, held that "it was not in order to use words in debate which threaten the stability of the Union."—March, *Reminiscences of Congress*, 202.

[1] A curious instance of this is to be found in a letter to Mr. Webster, dated March 10, 1830, from George Hay, Judge of the United States Court for the Eastern District of Virginia, in which he considers the constitutional rights of the general government in case of secession, and what would constitute treason. The original letter is in the Congressional Library.

Mr. Webster had frequently argued in the Supreme Court of the United States.

What Chancellor Kent said of it in the city of New York at a public dinner given on the 10th of March, 1831, "to express the sense of our citizens of the importance of Mr. Webster's Congressional argument" is strictly true.[1]

"The consequences of that discussion have been extremely beneficial. It turned the attention of the public to the great doctrines of national rights and national union. Constitutional law ceased to remain wrapt up in the breasts and taught only by the responses of the living oracles of the law. Socrates was said to have drawn down philosophy from the skies and scattered it among the schools. It may with equal truth be said that constitutional law, by means of those senatorial discussions, and the master genius that guided them, was rescued from the archives of our tribunals and the libraries of lawyers, and placed under the eye and submitted to the judgment of the American people. *Their verdict is with us and from it there lies no appeal.*"

In Mr. Webster's speech at this dinner, he gives an admirable summary of the questions which had been under consideration in Congress, and of the debate upon them. He shows very clearly, that

"the judicial power under the Constitution of the United States was made co-extensive with the legislative power. It was extended to all cases arising under the Constitution and the laws of Congress. The Judiciary became thus possessed of the authority of deciding in the last resort, in all cases of alleged interference between State laws and the Constitution and laws of Congress. Gentlemen, this is the actual Constitution, this is the law of the land."

[1] Webster's *Works*, vol. i., p. 194.

He then proceeds to show, in language which it is almost impossible to abbreviate, that the argument to the contrary is a perverse construction of plain language in the body of the Constitution itself, and then goes on:

"At the very moment when our Government was quoted, praised, and commended all over the world, and when the friends of Republican liberty everywhere were gazing at it with delight and were in perfect admiration at the harmony of its movements, one State steps forth, and by the power of nullification, breaks up the whole system and scatters the bright chain of the Union into as many sundered links as there are separate States.

"Seeing the true grounds of the Constitution thus attacked I raised my voice in its favor, I must confess, with no preparation or previous intention. I can hardly say that I embarked in the contest from a sense of duty. It was an instantaneous impulse of inclination, not acting against duty, I trust, but hardly waiting for its suggestions. I felt it to be a contest for the integrity of the Constitution, and I was ready to enter into it, not thinking or caring personally how I might come out."

He then proceeds to express what must have been to him an almost inexpressible satisfaction at the success of the argument:

"The doctrines of nullification have received a severe and stern rebuke from public opinion. The general reprobation of the country has been cast upon them. Recent expressions of the most numerous branch of the national legislature are decisive and imposing. Everywhere the general tone of public feeling is for the Constitution."[1]

Perhaps there is no more terse expression of the great effect of this speech than is to be found in a

[1] Webster's *Works*, vol. i., pp. 209–211.

letter from a leading citizen of Richmond, John H. Pleasants.[1] It is dated Richmond, 4th March, 1830:

"DEAR SIR:

"Permit me to congratulate you on the speech, on the great sensation it has produced in this quarter, so flattering to your feelings, and the effect so honorable to the consistency of your public conduct and your ability to defend it. The knowledge that you have completely vindicated yourself, floored your antagonist, and gained a complete victory so far as argument goes, is nearly universal."

In our day it would be thought that this letter was somewhat remote in date from the speech. But in 1830 there were neither telegraphs nor railroads. The circulation of the speech was necessarily slow. No doubt the readers had more leisure to examine it and meditate upon it, and probably in the end the results were as great as those which are produced by our immediate telegraphic reports.[2]

The comparison between the language of the speech as Webster uttered it (or at least as it was taken down by the shorthand reporter), and that in which he printed the speech for circulation, is so interesting that I cannot refrain from giving them both. The first is as follows[3]:

"While the nation lasts we have a great prospect of prosperity, and when this Union breaks up there is nothing in

[1] Curtis's *Life of Webster*, vol. i., p. 370.

[2] The great impression which this reply produced upon Mr. Lincoln is described in Herndon's *Lincoln* (Ed. 1889), pp. 400, 478; Thorpe, *Const. Hist. U. S.*, vol. ii., p. 396.

[3] *Webster Centennial*, Dartmouth, p. 135.

prospect for us to look at, but what I regard with horror and despair. God forbid; yes sir, God forbid that I should live to see this cord broken; to behold the state of things which carries us back to disunion, calamity and civil war. When my eyes shall be turned for the last time on the meridian sun, I hope I may see him shining bright upon my united, free and happy country. I hope I shall not live to see his beams falling upon the dispersed fragments of the structure of this once glorious Union. I hope I may not see the flag of my country with its stars separated or obliterated, torn by commotion, smoking with the blood of civil war. I hope I may not see the standard raised of separate state rights, star against star, and stripe against stripe; but that the flag of the Union may keep its stars and its stripes corded and bound together in indissoluble ties. I hope I shall not see written as its motto '*First* Liberty and *then* Union.' I hope I shall see no such delusive and deluded motto on the flag of that country. I hope to see spread all over it, blazoned in letters of light, and proudly floating over land and sea, that other sentiment, dear to my heart, 'Union *and* Liberty, Now and Forever, One and Inseparable.' ''

As the speech was published, the peroration was in the following form [1]:

"While the Union lasts, we have high, exciting, gratifying prospects spread out before us, for us and our children. Beyond that I seek not to penetrate the veil. God grant that in my day at least that curtain may not rise. God grant that on my vision never may be opened what lies behind. When my eyes shall be turned to behold for the last time the sun in heaven, may I not see him shining on the broken and dishonored fragments of a once glorious Union; on States dissevered, discordant, belligerent; on a land rent with civil feuds or drenched, it may be, in fraternal blood. Let their last feeble and lingering glance rather behold the gorgeous ensign of the republic, now known and honored throughout the

[1] Webster's *Works*, vol. iii., p. 342.

earth, still full high advanced, its arms and trophies streaming in their original lustre, not a stripe erased or polluted, nor a single star obscured, bearing for its motto, no such miserable interrogatory as 'What is all this worth ? ' nor those other words of delusion and folly, ' Liberty first and Union afterwards '; but everywhere, spread all over in characters of living light, blazing on all its ample folds, as they float over the sea and over the land, and in every wind under the whole heavens, that other sentiment, dear to every true American heart— ' Liberty *and* Union, Now and Forever, One and Inseparable.' "

An illustration of the careful way in which Mr. Webster prepared the oration for publication is to be found in a letter of Edward Everett, dated January 26, 1830[1]:

"When you come to the ' standard of the Union ' in the peroration, look at what was floating in your mind—Milton's description of the infernal banner in the lower regions, floating across the immensity of space, which is in turn borrowed from Tasso's description of the banner of the Crusades, when first unfolded in Palestine."

Another reference to the revision for the press of the shorthand notes is to be found in a letter from Mr. Webster to his old friend, Jeremiah Mason, written in Washington, February 27, 1830:

"The press has sent abroad all I said in the late debate, and you will have seen it. I have paid what attention I could to the reporter's notes; but in the midst of other pressing engagements, I have not made either speech what it ought to be; but let them go. The whole matter was quite unexpected. I was busy with the Court, and paying no attention to the debate, which was going on sluggishly in the Senate, without

[1] *Letters of Webster*, Van Tyne, p. 146.

exciting any interest. Happening to have nothing to do for the moment in Court I went into the Senate and Mr. Hayne, so it turned out, just then rose. When he sat down, my friends said he must be answered, and I thought so too, and being thus got in, thought I must go through. It is singular enough, though perhaps not unaccountable, that the feeling of this little public is all on our side. I may say to you that I never before spoke in the hearing of an audience, so excited, so eager and so sympathetic." [1]

In a brief reply to Mr. Hayne's rejoinder, Mr. Webster summed up the argument in a speech comprising only five pages of his printed works, from which we must quote briefly, for it summarizes the argument on both sides in masterly fashion. Of Mr. Hayne's argument he says:

"His propositions are:

"1. That the Constitution is a compact between the States:

"2. That a compact between two, with authority reserved to one to interpret its terms, would be a surrender to that one of all power whatever.

"3. Therefore (such is his inference,) the general government does not possess the authority to construe its own powers."

To this Webster replies:

"The Constitution, it is said, is a compact *between States*. The States then, and the States only, *are parties* to the compact. How comes the general government itself *a party*. Upon the honorable gentleman's hypothesis, the general government, is the result of the compact, the creature of the compact, not one of the parties to it. Yet the argument as the gentleman has now stated it, makes the government itself one of its own creators. It makes it a party to that compact to which it owes its own existence. . . .

[1] Webster's *Private Correspondence*, vol. i., p. 488.

"While the gentleman is contending against construction, he himself is setting up the most loose and dangerous construction. The Constitution declares that the *laws of Congress passed in pursuance of the Constitution, shall be the supreme law of the land.* No construction is necessary here. "It declares also, with equal plainness and precision, *that the judicial power of the United States shall extend to every case arising under the laws of Congress.* This needs no construction. Here is a law, then, which is declared to be supreme; and here is a power established, which is to interpret that law. Now Sir, how has the gentleman met this? Suppose the Constitution to be a compact, yet here are its terms, and how does the gentleman get rid of them? He cannot argue the *seal off the bond*, nor the words out of the instrument. Here they are. What answer does he give to them? None in the world, Sir, except that the effect of this would be to place the states in a condition of inferiority; and that it results from the very nature of things, there being no superior, that the parties must be their own judges. . . .

"So then, Sir, even supposing the Constitution to be a compact between the states, the gentleman's doctrine nevertheless, is not maintainable, because—first, the general government is not a party to that compact, but a *government* established by it and vested by it with the powers of trying and deciding doubtful questions; and secondly, because, if the Constitution be regarded as a compact, not one state only, but all the states, are parties to that compact, and one can have no right to fix upon it her own peculiar construction. . . .

"But Sir, the gentleman has failed to maintain his leading proposition. He has not shown—it cannot be shown that the Constitution is a compact between state governments. The Constitution itself, in its very front, refutes that idea; it declares that it is ordained and established *by the people of the United States.* . . . The gentleman says, it must mean no more than the people of the several states. Doubtless, the people of the several states, taken collectively, constitute the people of the United States; but it is in this, their collective capacity, it is as all the people of the United States, that they

establish the Constitution. So they declare; and words cannot be plainer than the words used.

"When the gentleman says the Constitution is a compact between the States, he uses language exactly applicable to the old Confederation. He speaks as if he were in Congress before 1789. He describes fully that old state of things then existing. The Confederation was, in strictness, a compact; the States, as states, were parties to it. We had no other general government. But that was found insufficient, and inadequate to the public exigencies. The people were not satisfied with it, and undertook to establish a better. They undertook to form a general government, which should stand on a new basis; not a confederacy, not a league, not a compact between States, but a *Constitution;* a popular government founded in popular election, directly responsible to the people themselves, and divided into branches with prescribed limits of power, and prescribed duties. They ordained such a government, they gave it the name of a *Constitution*, and therein they established a distribution of powers between this, their general government, and their several State governments. When they shall become dissatisfied with this distribution, they can alter it. Their own power over their own instrument remains. But until they shall alter it, it must stand as their will, and is equally binding on the general government and on the states."[1]

In an unpublished letter to William Pope, of Virginia, written April 13, 1830, occurs the following passage which may be compared with Webster's statement in the Senate twenty years later (*post*, p. 172). During all these twenty years he never wavered in his devotion to the spirit of nationality, felt and expressed alike at forty-eight and at sixty-eight.

The letter itself illustrates very well the cor-

[1] Webster's *Works*, vol. iii., pp. 343, 346.

respondence occasioned by the great reply to Hayne:

"WASHINGTON, April 13, 1830.

"MY DEAR SIR:

"I thank you for your kind and friendly letter of the 12th inst. The incidents you narrate, relative to the campaign of 1781, are interesting, and excite strong patriotic feeling. Indeed, my dear Sir, of all unnatural things, spleen and jealousy, between the Southern States and New England, are the most unnatural. They have been excited, *ex industria*, for paltry party purposes.

"I hope you will obtain Mr. Wirt's consent to publish parts of his letter. *He is a great favorite with us in New England.* In truth there is not a distinguished Virginian in being, Mr. Madison, Mr. Jus. Marshall, Mr. Wirt, or any other prominent man, who has kept clear of the topics of modern strife, who is not as highly regarded in New England, as in Virginia herself. And why should it not be so? Why should we *localize* our feelings? Why should we cut up and divide our patriotism as we do the public lands, into sections, half sections, quarter sections, and half quarter sections?

"*For my part Americanus sum et nihil Americanum mihi alienum puto.*

. . . . . .

"I am with much regard,

"Yours,

"DANL. WEBSTER.

"WM. POPE, Esq.

"I believe some of our friends intend to send you a dozen copies of my speech, for any of yr. neighbors who may desire to read it."

The practice of circulating speeches, printed at a government printing-office, had not at that time begun. Congressmen or their friends printed any speeches they chose to pay for. Of this second

speech the *National Intelligencer* alone printed forty thousand copies, and twenty editions were printed by other papers.

A curious illustration of the effect upon the minds of the young men of America produced by these speeches on Foot's resolution, is to be found in a letter from Webster's son, Fletcher, to his father, dated March 23, 1830:

"I never knew what the Constitution really was till your last short speech. I thought it was a compact between states. I like that last reply better than all the rest, for it comes out so a propos and conclusive, that Mr. Hayne has nothing more to say. It is the coup de grace. It winds him up, as we boys used to say."[1]

At this same January term of the Supreme Court, Mr. Webster argued twelve other cases, involving a great variety of questions, besides constant attention to his duties as a Senator.

Nothing illustrates more vividly the extraordinary variety of Mr. Webster's acquirements and powers, than a comparison between his legal arguments and his speeches in Congress. The former related to every branch of the law, even to that involving the validity and construction of patents. The latter related not only to the Constitution of his country, but to her foreign relations, the tariff, finance, public improvements. He touched no subject that he did not illumine. He was in truth a myriad-minded man, and of all the lawyers and statesmen of his time left the most permanent impression. Every

[1] *Letters of Webster*, Van Tyne, p. 151.

student of the political questions of to-day should consult his works.

In the latest of his cases at this term, he appeared for his old client "The Society for the Propagation of the Gospel in Foreign Parts."[1] In this case he maintained successfully that a foreign corporation, all the members of which are beyond seas, is within the exception of the statute of limitations. Reference is made to this here, as it was to the case of Carver against Astor's Lessee, solely for the purpose of drawing attention to the fact that Webster was not only a constitutional lawyer and statesman, but a thoroughly trained and equipped master of all branches of his great profession.

[1] Society, etc. *vs.* The Town of Pawlet, 4 Peters, 480.

CHAPTER X

THE UNITED STATES A UNION, NOT A CONFEDERACY—SUBJECT CONTINUED—REPLY TO CALHOUN

CHANCELLOR KENT, on the tenth of March, 1831, expressed the sentiment of probably a majority of the American people when he addressed Mr. Webster in the language already quoted (*ante*, p. 82).[1] His concluding sentence (referring to the American people): "Their verdict is with us, and from it, there lies no appeal," was unfortunately too optimistic. If we may follow the Chancellor's example, and adopt a legal figure, the nullifiers moved for a new trial. The States' Rights party in South Carolina held a celebration on the Fourth of July, 1831, in which their claims were stoutly maintained. The agitation continued in other States besides South Carolina. As Webster wrote Clay from Boston, on the fifth of October (1831), in reference to the approaching session of Congress:

"The Constitution itself in its elementary and fundamental provisions will be assailed with talent, vigor and union. Everything is to be debated as if nothing had ever been settled.

[1] Webster's *Works*, vol. i., p. 194.

. . . Everything valuable in the Government is to be fought for, and we need your arm in the fight." [1]

Unfortunately, Clay's arm at this time was employed in the task of compromise. Although he was the father of the so-called "American protective system," yet he was willing to give it up, in order to pacify the nullifiers. In 1833, he did frame a tariff bill in which provision was made for a gradual reduction of the tariff to a revenue basis only.

Meanwhile, in November, 1832, the State of South Carolina adopted what was commonly called the Nullification Ordinance. This declared that the tariff acts of 1828 and 1832 were null and void, and named the first day of February, 1833, as the day when they should cease to be "binding upon this State, its officers or citizens." On the tenth day of December, 1832, Andrew Jackson, who was then President of the United States, issued a proclamation, in which he declared that this Nullification Ordinance would be entirely disregarded by the federal authorities, and that he would enforce the laws for the collection of duties upon imports in South Carolina, in spite of it. Of the effect of this proclamation, Mr. Webster writes to William Sullivan, January 3, 1833[2]:

"At the present moment it would seem that public opinion, and the stern rebuke by the executive government, had, in a great measure, suppressed the immediate danger of nullification. As far as we see the results of the legislation of South Carolina, her laws limp far behind her ordinance. For aught that appears, nothing will interrupt the ordinary collection of

[1] Clay's *Works*, vol. iv., p. 318. [2] *Private Corr.*, vol. i., p. 328.

duties after February 1st, unless some individual chooses to try the nullifying remedy."

Shortly before this, Colonel Hayne had resigned his seat in the Senate and been elected Governor of South Carolina. Calhoun, who had been elected Vice-President on the same ticket with Jackson in 1828, but had broken off friendly relations with his chief, resigned the Vice-Presidency, was elected Senator from South Carolina and took his seat January 4, 1833. It was felt by his friends that he was the ablest advocate of the States' Rights doctrine, and that he could measure swords with Webster without fear of defeat. He opened fire on the Administration on the sixteenth of January. On the twenty-first of that month, Mr. Wilkins, of Pennsylvania, the Chairman of the Judiciary Committee, introduced in the Senate a bill to enlarge the power of the Executive in enforcing the laws for the collection of duties on imports. This bill was commonly known as the Force Bill. Calhoun was the leader of the opposition. He introduced in the Senate resolutions expressing his theory of the nature of our government, and delivered an acute and skilfully reasoned speech in their support. In reply to him, and on the sixteenth of February, 1833, Webster made one of his most carefully considered and effective arguments, of which the following brief extract will give the main points as Webster himself stated them:

"The gentleman's resolutions, then, affirm in effect that these twenty-four United States are held together, only by a

subsisting treaty, resting for the fulfilment and continuance on no inherent power of its own, but on the plighted faith of each State.[1] . . .

"And now, Sir, against all these theories and opinions, I maintain:

"1. That the Constitution of the United States is not a league, confederacy or compact between the people of the several States in their sovereign capacities; but a government proper, founded on the adoption of the people, and creating direct relations between itself and individuals.

"2. That no State authority has power to dissolve these relations; that nothing can dissolve them but revolution; and that consequently there can be no such thing as secession without revolution.

"3. That there is a supreme law, consisting of the Constitution of the United States, acts of Congress passed in pursuance of it, and treaties; and that in cases not capable of assuming the character of a suit in law or equity, Congress must judge of and finally interpret this supreme law so often as it has occasion to pass acts of legislation; and in cases capable of assuming, and actually assuming, the character of a suit, the Supreme Court of the United States is the final interpreter.

"4. That an attempt by a State to abrogate, annul, or nullify an act of Congress, or to arrest its operation within her limits, on the ground that, in her opinion, such law is unconstitutional, is a direct usurpation on the just powers of the general government, and on the equal rights of other States, a plain violation of the Constitution, and a proceeding essentially revolutionary in its character and tendency."[2]

He puts the questions thus:

"The people have ordained a Constitution: can they reject it without revolution? They have established a form of government; can they overthrow it without revolution? These are the true questions."

[1] Webster's *Works*, vol. iii., p. 457.

[2] Webster's *Works*, vol. iii., pp. 464, 465.

There still remains in Mr. Webster's own handwriting his brief for this speech.[1] It is perhaps the most elaborate brief, now extant, of any of his arguments, and deserves to be printed in full.

"Two first Resolutions affirm these propositions.

"1. That the system, under which we live, and under which Congress is assembled, is a compact, to which the people of the several States, as separate and sovereign communities, are the parties.

"2. That these Sovereign Parties have a right to judge, each for itself, of any alleged violation of the Constitution by Congress, and to choose their own mode of redress.

"☞ '*Constitutional Compact.*' '*Accede*' . . . a compact between Sovereign Communities, however qualified as being a constitutional compact, is, after all, but a *league*. As between communities, entirely sovereign, there is no difference between, a compact, a confederacy, and league. They all rest on plighted sovereign faith. A league is no more than a continuing, subsisting treaty.

". . . The Resolutions, then, affirm, 1st that these U. States are connected together solely, by a continuing, or subsisting treaty . . . by a *league*.

". . . The next proposition is, that as sovereigns are subject to no superior power, they must of course judge, and decide, each for itself, of any alleged violation of the obligations subsisting between them; and if such violation be supposed to have occurred, each may adopt any mode or measure of redress, which it thinks proper.

"If a league, between sovereigns, have no limitation, in point of time, and contain nothing making it perpetual, it subsists only during the good pleasure of the parties, altho no violation of it be complained of.

". . . If, in the opinion of either party it be broken, then the injured party has a right to say, he will not perform any or see her own obligations under it; or to consider

[1] Library N. H. Historical Soc., Websteriana, vol. xvi., pp 40–43.

altogether at an end, tho' it were professsed to be perpetual; so Congress considered the French Treaty, in 1798. . . .

". . . And if this violation of the league be accompanied with serious and aggravated injuries, the suffering party has a right to make reprisals, and to make war; because he is himself to judge of his own mode and measure of redress.

" The plain and necessary import of the Resolutions, then, is,

" That the States are connected only by a league; that any State may determine when the league is violated; and that she may redress the violation herself, in any way, fit for a sovereign power; and an equally plain consequence from the Resolutions is, that the league may be abandoned w't. cause, at the pleasure of either party. So. Carolina may make reprisals on Georgia; and seize g'l. p'py of all the States.

". . . If this be our political condition, it is time the people knew it. Secession is one mode of redress.

". . . One State, holding the embargo law unconstitutional, may so declare her opinion, and *withdraw:* she *secedes*, and makes reprisal, another, having the same opinion of the revenue laws, withdraws, for the same reason. . . . She *secedes*, and makes reprisals for '*Robbery*.'

". . . But, the Constitution, in the opinion of a third State, may be violated by omitting to pass laws. She may say, she went into the Constitution, and gave up her own power over imposts, *because* Genl. Govt. undertook to exercise, *for protection*. This was the clear opinion of Congress. Constitutional law is broken by the relinquishment of this power . . . and so, *she secedes*.

". . . No law, therefore, can be binding on all the States, the constitutionality of which is not admitted by all the States.

" Under the old Confederation, all the States were bound, by the decision of *9*, on any question under it. Under this 'more perfect union,' the consent of all, on constitutional questions, is necessary to bind all.

". . . Va. may secede, and hold the fortress in the Chesapeake.

". . . Mass. may secede, and hold the forts in her harbours and the public arsenals and armories . . .

". . . The Western States may secede, and hold the public lands.

". . . Louisiana may secede, and *hold the mouth of the Mississippi.*

"If one State may secede, ten may — 20 may . . . Twenty-three may. What constitutes, then, the U. S.? Where will be the army? where the Navy? . . . If So. Carolina goes off, does she mean to demand partition, and take a *schooner* and a *sloop with her?* Who will pay the debts? Who fulfil the public Treaties? We have treaties, by which the ports of Carolina, are open, on specific terms, to the nations of Europe. Who fulfils them, after secession?

" *Who will guaranty to S. Carolina a Republican Govt.?*

"Everybody must see, that these are questions which *arise only after a Revolution.* Nothing but a Revolution can give rise to them. Secession, THEREFORE, IS REVOLUTION: *admitted, I think.*

"NULLIFICATION is REVOLUTIONARY. What is Revolution? That which overturns, or controls, the existing public authority; that which arrests the exercise of the supreme power; that which introduces a new permanent power, into the rule of the State.

"Now, this is the object of *nullification.*

"It supersedes the Supreme Legislative Authority. It arrests the arm of Executive officers. . . . It interrupts the operation of the judicial powers?. . . . Is not this Revolutionary? *Within So. C.* it accomplishes, portends, a Revolution.

"Alter sec., U. S. Legislation, in its principal pt. has no favor there . . . nor the Prest. nor the Courts.

" ☞So soon as ordinance executed, as complete a Rev. as American Rev. . . .

"And its direct tendency is to break up the *whole union.*

"Constitution of U. S. was accepted *as a whole.* On the whole Instrument, as a whole, a majority of the people and of the States have given an interpretation.

". . . S. C. opposes this. She opposes what the majority says is the Constitution, and the laws. . . .

". . . She resists, as to herself, an Act of Congress, bearing on all the States, as well as herself.

"☞. . . If unconstitutional, as to her, the same as to the rest. She construes the law for all, *and breaks it for all.*

"If successfully resisted by So. Carolina, it must be surrendered everywhere. This plain. And it is the whole Revenue of U. S.

"She aims a blow, therefore, at the vitality of the whole system.

"The direct tendency of her act, is to overthrow the Govt.

"If her ordinance and law are not suppressed, they necessarily produce *a Revolution.*

"☞ What shows this more clearly, still, is, that So. Carolina nullifies, that very precise power, for which the Const. was formed, viz.: *the levying of imposts, independent of the will of the States.*

"Nullification is Revolutionary, because Nullification by force (and this, as will appear is by force) is treason. In what does treason consist?

"These are plain results of the principles of the Rev. altho So. Carolina complains that *she* is misunderstood; and Va. *resolves* that *she* is misunderstood.

". . . A right to judge, by a State, for itself, necessarily leads to force.

". . . Because every State must have the same right, and they will differ in their contentions.

". . . Each State, on entering into the Union, gave up a part of its own exclusive power over itself. . . .

". . . The consideration for this, was, that it gained a partial power in legislating for other States.

". . . Mass. gave up the right to levy imposts; because she claimed the right of uniting with others, in levying imposts, for the whole union. . . .

". . . *If So. Carolina denies this, she breaks the condition only on which Mass. entered into the union.*

". . . If one State may declare a *law unconstitutional* another may declare it *constitutional* . . . if each may claim its own mode of redress . . . each may make war.

" No *presumption*, in favor of *unconstitutionality*.

". . . This doctrine, instead of being favorable to *minorities* is destructive of their rights . . . because it *ultimately refers to some*. *Polyglot*.

" Two sides of the Union:

" Mr. Calhoun's proposition: States may judge of extent of individual *obligation*.

" If so, then of *Individual Right*. STATE RIGHT—Guaranty and State OBLIGATION. *Laws imposing contracts*. Bills of credit . . .

" *It annihilates the whole list of prohibitives*.

" *This is a controversy between States . . . 23 vs. one*.

" *One State may sue another and might under the confederation*.

" Is she here, *to be own judge*.

" I maintain

" 1. That the Constitution of U. S. is not a league, confederacy, or compact between the States, in their sovereign capacities; but a Government, proper; founded on the adoption of the People, and creating direct relations between itself and individuals.

" 2. That no State authority has power, to dissolve these Relations; that nothing can dissolve them, but Revolution; and that consequently there can be no such thing as secession, without Revolution.

" 3. That there is a Supreme Law, consisting of the Constitution of the U. S. Acts of Congress passed in pursuance of it, and Treaties; and that in cases, not capable of assuming the character of a suit, in law or equity, Congress must judge of, and interpret this paramount law; and in cases capable of assuming, and actually assuming, that character, the Supreme Court of the U. S. is the final interpreter.

" 4. That an attempt by a State to abrogate, annul, or nullify an Act of Congress, or to arrest its operation within her limits, on the ground that in her own opinion such law is unconstitutional, is a direct usurpation upon the just powers of the Genl.

Government, a plain violation of the Constitution, and a proceeding essentially Revolutionary, in its character and tendency . . .

I.

"No compact between States, but a Govt. creating direct relations with individuals . . .

"☞. . . Must be argued, mainly on face of Constitution itself.

". . . We must not turn our backs to the light.

"All agree, that it speaks with authority and is, some how adopted.

"Great question is, *what does it say of itself? what does it purport?*

"It is to be remembered, that it speaks only, after its adoption.

"Till ratified in 9 States, it was but a *proposal*, a *draft.*

"Convention framed the Const. . . . laid it before Old Congress . . . Congress transmitted it to the Legislatures of the States, to be laid before Conventions of the People—St. Legis. called these Conventions . . .

"As yet, it was but a *proposal.* It spake no language . . . when 9 States ratified, it then spake, authoritatively.

"*What it says of itself is as conclusive, as what it says on any other subject.*

"What does it say of itself?

"I. It is a *Constitution;* not a compact, not a confederacy, not a league, but a *Constitution.*

[On the margin is written, "No State shall enter into a compact."]

"*What is a Constitution?* Do we need information on this point? Public law. *Vattell. Locke.*

"*What is the Constitution* of one of our own States?

"Constitution of U. S. speaks of itself, *in same sense.* 6 Art. 2 section.

[On margin "Vid So. Carolina Ratification, p. 409 and N. C. p. 452."]

"And it speaks for *itself* in contradistinction to confederation. Art. 6.

"☞ *Between States ratifying* Constitution is a *law.* It is

assumed to be the *Supreme Law.* What is a law? . . . not a *compact* . . . but a rule, prescribed by a Supreme power, commanding what is right, etc.

"Mr. Madison

"MS. The Constitution, then, is the prescribed *Supreme rule.* As if People had said, 'We, the People of U. S. prescribe the following *Supreme law.*'

"Is a law, a *contract*, or *compact?*

"Again; the language, it is *ordained* . . . *established.* This not the language of *compact.*

"☞ The great difference is; a Constitution, a law, acts by its own power of execution. A compact is between superior powers.

"II. The Constitution speaks of the political system which it establishes, as 'the Govt. of the U. S.'

"*What is a Govt.* Is a league, a compact between Sov. States a *Govt.*

"Is a treaty, however close, a Gov.?

"A Govt. of a State is the Supreme power of that State. It is that precisely which constitutes sovereignty . . .

"'Every nation, or State, that governs itself, is a sovereign State.'

"Vattell p. 60. It is the frame of political power which, prescribes the laws etc. . . .

"☞ Difference between a Govt. . . . and a treaty or compact . . . Consolidation.

"III. What are its sanctions? Does it rest in *plighted faith*, Does it operate *proprio vigore.* Mr. Bibb says the *former.* But not *so.* vid Arts of *Confederation.*

"Constitution operates, by its *own means*, and own power. It has its own *Legislature* . . . *Executive* . . . and *Judicature.* It enforces its own decisions, by its own proper power. This is not *compact*, but *Govt.* Vid *prohibitions* on Congress.

". . . No answer, to say the Constitution is founded, on restraints or powers of Govt. in the *consent* of the people. So it is; but when so founded, it becomes law, not compact. It is contract, executed. Statutes are founded on

the *agreement* of ye Senate and House; but when passed, they are no longer agreements, but *law*.

"It defines *treason*. It tries for treason, and punishes for treason, *by its own authority*.

"How can there be treason agt. a *compact*, a league. It incorporates the States, as a sovereign power; by name 'U. S.' 'treason agt. U. S.' 'U. S.' 'Several States.'

"IV. It creates a direct relation, between itself, and individuals. This has been denied, but is true.

"*Contracts*.

"It has a corporate character. 1. It punishes him for treason, and all other crimes in the code.

"2. It taxes him, directly and indirectly, and in all forms.

"3. It demands of him military service; and subjects him to the rules of war. . . .

"Are not these direct relations? Can closer relations, exist, between any man, and his Govt. . . .

"It protects him, also.

"1. It makes war, for his protection; and no other Govt can do it.

"2. It makes peace, for his protection; and no other Govt. can do it.

"3. It maintains armies and navies, for his protection; and no other Govt. can maintain them.

"4. He sails under its flag, and can sail under no other . . . In every thing, that connects him with foreign States it is his only Govt.

"He can be known abroad, only as its citizen . . . Suppose a S. Carolinian to go abroad. He rejects the character of Am. citz.

"V. If this be nothing but a compact between sovereign States, *or parties*, where are the rights and duties of these parties pointed out. What are the rights of parties. What have the States *promised to do?* Nothing. What *promised not to do?* Nothing. They do not *promise* to appoint Electors, and Senators; they are directed to do it. . . .

"They do not *stipulate*, they will not make war, nor coin money: . . . they are prohibited from doing it.

"They are spoken to by a Superior power, *the People*. There is no one portion of compact, a contract by the States, *in the whole instrument*.

"Constitution does not rely on the *compact*, for the fulfilment of her duty by the *State*. It requires no State pledge. It requires *INDIVIDUAL OATHS*.

"VI. Still reverting to the terms of the Constitution, we find that its great apparent purpose is, to unite the people of all the States, under one Govt. for certain purposes and to the extent of this union, to abrogate the separate authority of the State Govts.

"1. In foreign relations.

"Congress only can declare war. Ergo, when citizens of one State at war, *all must be*. In this respect, one people.

"2. Prest. and Senate only *can make Peace*. . . . A State cannot continue in war. In this respect, *one people*.

"3. Common coin? *Citizens of each State to have privileges of citizens in all others*.

"4. In all that relates to common defence, *one*. Ergo, in the common defence . . . in Peace . . . in war . . . in common—in coin and standard, and in mutuality of rights of citizenship, THE PEOPLE OF ALL THE STATES ARE ONE PEOPLE.

"Proclamation rights, ergo, in them. *Mr. Monroe* . . . Nobody disputed *Mr. Monroe*. Even Va. did not complain. . . .

"VII. The very object of the Constitution was, to get rid of a league, and make a Govt. This very matter of revenue and imposts formed the difficulty. The States cd. not comply with the requirements of Congress. All was capricious, from beginning of Confd. . . .

"Mr. Monroe's Rep't. July 1785, read. p. 50, 52.

"*First Resolution of Convention p. 134, 19 June 1787.*

"Here is a Govt. a national Govt. with power to execute itself. This Reso. always the basis of all subsequent proceedings. *always at the head* vid. p. 207. *Vid: Journal.* Mr. Patterson's proposition to *mend the league* rejected. Confederacy is a league, and so called. Here, Resolved to have

a *Govt.* . . . The very object was, *to get rid of the power of State Votes.*

"Under Confederacy, Congress advised the States; they might act or not.

"If they *refused, no remedy but war.*

"However inexpedient, this remedy did *exist* and *did alone exist.* MR. JEFFERSON.

"The Constitution has reversed this whole state of things. We cannot now, make war on the States. We cannot blockade Chstn [Charleston] We can only execute *the laws.*

"Constitution has given power to make laws, binding on individuals. To execute these laws, to make it criminal to oppose them . . . and to punish opposers . . . The plain object was, to avoid collision with States.

"Mr. Ellsworth. . . . and *Johnson.*

"Look to all contemporary history . . . the Federalist . . . Debates in the States etc.

"On one side, object was, to prove necessity of turning league into a Govt.

"On the other, this necessity denied.

"*All agreed, that this precise thing was done.*

"In all Debates, in all propositions to amend; not one suggestion, anywhere, that this was a compact between States.

"Elliotts Deb. 286, 7, 8. Judge Wilson.

"Fed. No. 22 p. 139. read. *Mr. Madison* on population.

"Why is secession Revolutionary . . .

"VIII. History and form of ratification, shows it to be a Govt. and not a league.

"States do not plight faith, *as under Confederacy.* But people of the States *adopt, consent to, ratify.* Not one single case, in which the State *accedes to the compact.*

"Accede wd. be a proper word, if it were a league . . . was proper, in case of *Canada* . . . and perhaps of N. O. The States have done nothing, of which *secession* is the converse. . . .

"They never *acceded* to the union; and can never secede *from it.*

"The People must *reject*, what they have *adopted;* they must break up, what they have *ratified.*

"☞ His. of 10 Art. of Amendment. 1 vol. S. Journal. Report 64–73.

"IX. Finally the People, of each and all the States, adopted the Constitution, as an act binding upon all.

". . . Not that States lines were broken down, and the whole people in mass. . . .

"Not that Va. could outvote Maryland, and leg' her in. . . .

"Question put was, 'will you form a new Govt. over all the people . . . with certain powers . . . as far as this new Govt. extends, will you all become one people.'

"'Instead of the States creating this Govt. will you create it yourselves, on yr. own authority?

"'If you say yes, here is the Instrument. Agree to this, and it is done. . . .'

"It was ratified by the people. St. Govts. would not agree to it, beyond their power . . . tho they agreed to old Confederacy.

"'Shall the Instrument itself contain a declaration that it is *ordained*, not by States, but by the People? *it shall.*'

"Here, then is the declaration.

"Contemporary history shows this to have been the understanding. *Fed. 22. Mr. Madison 104.*

"All agreed, it was founded, if at all, in a grant by the people. . . .

"Some approved this; and some disapproved it. *Mr. Henry.* Va. RATIFICATION. *Giles-Tyler.*

"Lastly, these very words, 'We the people.'

"This, then, is *not* a league, compact, or confederacy, between States, in their separate and sovereign capacities . . .

"It is a *Constitution.* It is a Govt., proper: with Legislative, Executive, and Judicial powers, of its own. It is founded on the adoption and ratification of the People. It creates direct relations, of protection on one side, and obedience on the other, between itself, and individuals.

II.

"No State can dissolve these relations; nor anything but Revolution. Can be no secession without Revolution.

"This follows, of course, if there be an individual *tie.*

"The people live under two Govts. . . . owe allegiance and obedience to each . . . One cannot break up the other. Both are popular and elective. The people rely on themselves, to keep each in its sphere. Both created by the people . . . both constantly maintained by the People—both responsible to the People.

"The People cannot break up this Govt., but by Revolution.

"Constitution is without limitation of time.

". . . Intended to be perpetual . . . Even Confederacy called *perpetual* . . . this stronger, or meant to be; its objects were of a permanent nature. Adopted for the People, and their posterity. It lasts thro all time.

". . . There are provisions for its *amendment;* none for its *abandonment.* . . .

". . . Provision for letting *new States in;* none for letting *old States out.*

"It was intended that under this Constitution, Govt. should enter into permanent arrangements with Foreign States; and for our commerce. If Congress makes war; may one State secede, and make peace. . . .

"If Prest. makes peace, may one State continue the war.

"Secession, as a Revolutionary Right, is intelligible.

"As a right under the Constitution, it is a plain absurdity.

"Even if Cons. a compact between States, there could be no legal or *moral right to secede.*

"It wd. only be a right, because there wd. be no power but that of war, to restrain it.

"*We hear much of the Reserved Rights of the States.* What are they? Proclamation is right; to know what is reserved, we must see what is given.

"Powers are given; and no right reserved to withdraw, but by amendment. Govt. power to retract what? Negation. . . .

"Allegiance is given; and no right reserved to withdraw it.

"The *right of secession*, is a right to break up the Govt. It wd. destroy all its great objects.

"How could we carry on war . . . how make treaties? Who wd. treat with us? Who credit us?

"All the pretence for secession is, that States, by reserved power may judge of infraction of Consn.

"She has reserved no such power. No proof, or intimation of any such *reservation.*

"Not the slightest evidence, that any such intention was entertained by people; but e contra.

III.

"There is a Supreme law, consisting of Constitution, Acts of Congress, and Treaties; and in cases, not assuming Judicial form etc., Congress is the judge; where Judicial form is assumed, Judiciary is Judge.

"I. It was intended to make Congress, and the Nat. Judiciary final arbiters . . .

"Resolution . . . Supreme Legislature etc. p. 134. 13 Reso. p. 137. . . .

"1. It was universally understood they had done that. Both friends and foes sd. that. . . .

"Fed. 3 No. p. 20 as to treaties and laws of nations, read No. 39. p. 241; read. No. 80. p. 495.; read, as marked.

"2. Elliot's Deb. 390. *Mr. Madison* 3 Do. 44.5 Yates minutes. Grimke 86.7 . . . *Mr. Martin* . . . Mr. Pinkney friends and foes, then, told the People, that this power *was* in the Constitution.

"☞ WHAT WAS THE JUD. POWER CREATED FOR?

"☞ *Vid.: Negative of State Laws etc.*

"3. It *is* in the Constitution. of necessity it is in every Govt.

"French Treaty. It is in every State Constitution. It is an attribute of *Govt.* It is a part of the old *question* . . . if a league, St. continues. If a Govt. Govt. continues.

"There can be no govt. wt. it. whoever acts, must judge of their authority.

"Govt. will act only on one side of the question.

"This is the alternative; either this Govt. must decide on its own power, or those powers must be judged of by 24 States . . .

"Which is fittest? That the agents of all, should decide for all, or that one shd. decide for all?

"Every agt. that refers acts of Congress to State judgt, *appeals from the majority to the minority . . . Appeals from a common int. to a particular int.*

"The right is sd. to be limited to cases of deliberate palpable and dangerous violation . . . And this is thought to make it safe. But who judges of all this? What proof is reqd. of such violation? . . . It is all opinion, and the opinion of one State, *by a small majority.*

"The agt. always takes for granted, that in a disputed case, the State must be *right*, and Congress *wrong*.

"But suppose the State *wrong*, what *then?* Must 23 yield to *one?*

"Questions, not assuming a Jud. shape, must be decided, and ought to be, by Congress: on the common principle, *that A MAJORITY MUST GOVERN.*

". . . Like cases cited by Mr. Bill; and apportionment Bill.

"'Majority Govt.'

"Cases assuming Jud. shape must be, and ought to be, judged by Sup. court. Ellsworth . . .

"No better mode of establishing a final interpretation (?) . . . nominated by the Prest. . . . approved by the Senate.

"The very first Congress passed laws, providing for the exercise of this jurisdiction. . . .

"The provisions of the Con. are plain . . . *Con. and laws, and treaties are supreme . . .*

". . . *President shall execute them . . .*

"*And Jud. power shall extend to every case occurring under them.*

"The whole argt. assumes, always, that Congress acts wt. *responsibility* . . . It will not admit that we are Reps . . . It thinks only of State power.

"Members of Congress are amenable to their constituents. The remedy for any evil, lies in election, and in amendment . . .

"If the proved intention of the Convention proves anything . . .

"Or the contemporary admission, of friends and foes . . .

"Or a course of Jud. decisions, acquiesced in by all the States, for 40 years. . . .

"Or the present opinion of a great majority of the whole Country . . .

"Or the plain words of the Constitution itself.

"*Then there is a Supreme law and a final interpretation.*

IV. Nullification.

"An attempt by a State to abrogate, annul, or nullify an act of Congress etc., or arrest it etc. . . . is a usurpation on the genl. Govt.—violates the Constitution and is Revolutionary . . .

"If the Govt. were a *compact*, the tendency of this proceeding would be to break it up; *because*, *if one St. not bound*, *others not bound.*

"If one State resists one law, others may resist others.

"But it is a direct attack on the authority of Govt. It is overturning the Govt.

"To resist the execution of the laws, by force is treason. 'Can a State commit treason'—no . . . nor authorize others.

"Treason may be committed agt. So. Carolina? cd. U. S. justify it.

"Nullification is the same in principle, but less respectable, in its general character than entire *Secession.* It seeks to keep in the Govt. while it destroys it. . . .

". . . It enjoys its benefits, while it rejects its burdens . . .

". . . It partakes of the common counsels, but will not submit to their results.

". . . It acts as a suspension, over laws of Congress and accepts and rejects what it pleases . . .

"So. Carolina herself hardly pretends it is a Constitutional right. vid. address to People of S. Ca. p. 46.

"*These very Resolutions show it no constitutional right.*

"Why is secession *Revolutionary?*

"*Because there* is *a Govt.*

"But to overturn Govt. by Nullification is Equally *Revo.*

NIAGARA.

"What justification *for this Revolution*, who does it? *half a dozen Gent.* On what ground?

"That protection laws are *unconstitutional*, plain, deliberate . . . palpable, dangerous.

"*Who entertains this opinion.*

"☞ Paper marked 'What cause.'

"If friends of Nullification could succeed, would prove themselves '*Architects of Ruin*,' and blasters of human hope.

"They stand up to undeceive the world . . . to pronounce the weakness of our system. . . .

"They declare, that seeds of dissolution are in the Govt. —and that it is wonderful it has lasted so long.

"They deceive themselves. The evil tendency of this doctrine is understood. They cannot but see how the current of opinion sets . . . Who is for Nullification, one out of 24 . . . and that only by a small majority.

"No man cheers it. no one cries God save it.

"It is a subject, either of deep dislike, or habitual ridicule, with 9-10ths of the People.

"This tone of public opinion, and the stand taken by the Executive Govt. have annihilated it . . .

"People will perceive this *intention* It is not *liberty*, but American Liberty. Liberty bringing with it recollections. . . .

"Rescue."

It is interesting to compare the actual peroration with the notes at the end of this brief. As a prophecy of the uprising of a great people in 1861 it is one of the most notable in history.

Mr. Webster concluded his speech as follows:

"But, Sir, if the government do its duty, if it act with firmness and with moderation, these opinions cannot prevail. Be assured, Sir, be assured, that, among the political sentiments of this people, the love of union is still uppermost. They will stand fast by the Constitution, and by those who defend it. I rely on no temporary expedients, on no political combination; but I rely on the true American feeling, the genuine patriotism of the people, and the imperative decision of the public voice. Disorder and confusion, indeed, may arise; scenes of commotion and contest are threatened, and perhaps may come. With my whole heart, I pray for the continuance of the domestic peace and quiet of the country. I desire, most ardently, the restoration of affection and harmony to all its parts. I desire that every citizen of the whole country may look to this government with no other sentiments than those of grateful respect and attachment. But I cannot yield even to kind feelings the cause of the Constitution, the true glory of the country, and the great trust which we hold in our hands for succeeding ages. If the Constitution cannot be maintained without meeting these scenes of commotion and contest, however unwelcome, they must come. We cannot, we must not, we dare not, omit to do that which, in our judgment, the safety of the Union requires. Not regardless of consequences, we must yet meet consequences; seeing the hazards which surround the discharge of public duty, it must yet be discharged. For myself, Sir, I shun no responsibility justly devolving on me, here or elsewhere, in attempting to maintain the cause. I am bound to it by indissoluble ties of affection and duty, and I shall cheerfully partake in its fortunes and its fate. I am ready to perform my own appropriate part, whenever and wherever the occasion may call on me, and to take

my chance among those upon whom blows may fall first and fall thickest. I shall exert every faculty I possess in aiding to prevent the Constitution from being nullified, destroyed, or impaired; and even should I see it fall, I will still, with a voice feeble, perhaps, but earnest as ever issued from human lips, and with fidelity and zeal which nothing shall extinguish call on the PEOPLE to come to its rescue."[1]

The Force Bill passed the Senate on the 20th of February, 1833. It is not too much to say that the success of that measure was due to the support of Mr. Webster.

The debate on this measure, its adoption, and the well-known character of the President, convinced the nullifiers that they would have to reckon with the whole power of the general government if they should persist in their refusal to obey the laws for the collection of duties on imports. Mr. Clay's compromise tariff law, which was passed just before the end of the session, no doubt made it easier for them to yield, and they yielded. Mr. Clayton, of Delaware, insisted that it should not pass unless Mr. Calhoun himself and all his associates voted for it, and vote for it they did.[2]

Andrew Jackson's opinion of the situation created by the passage of the two bills is contained in the following letter to his wife's nephew:

"PRIVATE.

"WASHINGTON, May 1st, 1833.

"MY DR. SIR,

"I have just received your letter of the 6th ultimo, and have only time, in reply, to say that Genl. Coffee well under-

[1] Webster's *Writings and Speeches*, vol. vi., p. 237.

[2] A very interesting account of the framing of this compromise is contained in Benton's *Thirty Years' View*, vol. i., pp. 313, 334.

stood Mr. Shackleford, and urged your nomination in his stead. I had nominated you, but on the serious importunity of Col. King, your Senator, with Genl. Coffee, the change was adopted, and you nominated for the office you now fill. Before the receipt of yours Genl. Coffee had written me and requested that I would appoint you to the office vacated by Mr. Shackleford—if we had a Senate on whose principles we could rely, this would have been done, but I did not believe it would be prudent to bring your name before the Senate again, and am happy you are content where you are.

"The Senate can not remove you, and I am sure your faithfulness and honesty will never permit you to do an act that will give good cause for your removal, and if Moor and Poindexter discovered that you were related to me, that would be sufficient cause for them to reject you, therefore it is that I let well enough alone, altho' I know it would be a convenience to you to be located where you are. Still a rejection by the Senate might prove a greater inconvenience, and for the reasons assigned it was not done.

"I have had a laborious task here, but nullification is dead, and its actors and abettors will only be remembered by the people to be execrated for their wicked designs to sever and destroy the only good government on the globe, and that prosperity and happiness we enjoy over every other portion of the world. Haman's gallows ought to be the fate of all such ambitious men who would involve their country in civil war and all the evils in its train, that they might reign, and ride on the whirlwind and direct the storm. The free people of these United States have spoken, and consigned these wicked demagogues to their proper doom. Take care of your nullifiers, you have them amongst you—let them meet with the indignant frowns of every man who loves his country.

"The Tariff, it is *now* well known was a mere pretext—its burthen was on your coarse woollens—by the law of July, 1832 —coarse woollens was reduced to five per cent. for the benefit of the South. Mr. Clay's bill takes it up and drops it with woollens at 50 per cent.—reduces it gradually down to 20 per cent., and there it is to remain, and Mr. Calhoun and all the

nullifiers agree to the principle. The cash duties and home valuation will be equal to 15 per cent. more, and after the year 1842 you pay on coarse woollens 35 per cent.—if this is not protection I cannot understand, and therefore the tariff was only the pretext, and disunion and a Southern Confederacy the real object—the next pretext will be the negro or slavery question. My health is not good but is improving a little. Present me kindly to your lady and family, and believe me to be your friend. I will always be happy to hear from you.

"ANDREW JACKSON.

"The Revd. ANDREW J. CRAWFORD."[1]

Nothing is more honorable in Mr. Webster's career than the courage and determination with which he went to the support of the President of the United States in the emergency created by the Nullification Ordinance. Webster had been one of the most formidable opponents of Jackson's arbitrary policy. He had especially condemned in the most vigorous and effective language the presidential veto of the bill to continue the charter of the Bank of the United States. The President's course in reference to this bank led to great financial suffering throughout the whole Union. His re-

[1] This letter is published at length, because of its intrinsic interest. It was made public by Charles Sumner in December, 1860. Its publication caused Mr. Crawford, who still resided in the South, so much annoyance, that he destroyed it. Before its destruction a few fac-similes were made. One was presented by Charles Francis Adams to the Massachusetts Historical Society. Another is in the author's possession. Pierce, *Life of Sumner*, vol. iv., pp. 18, 19. *Mass. Hist. Soc. Proceedings*, vol. xiv. (Second Series), p. 370.

The way in which the duty on coarse woollens, referred to in the letter, came to be inserted in the bill, is related in Benton's *Thirty Years' View*, vol. i., p. 319. It was done to favor two or three manufacturers in Connecticut, and thereby to get votes from that State. It shows that tariff bills were arranged in 1833 much as they were in 1897, except that the rates are much higher now than they were in 1833.

moval of the government deposits from that bank was an act of arbitrary power. The Whig party opposed these measures, both in Congress and out of it. (Yet we find the great Whig leader, when the nation's life was in peril, hastening with all his resources to the support of a political opponent.) It is a melancholy reflection that at a later period of the history of the United States, when President Cleveland was confronted with the emergency caused by the constant withdrawals of gold from the treasury, to an extent which within three weeks would have depleted the treasury of gold and put the country upon a silver basis, he was obliged to exert the powers conferred by a previous statute without any support from his political opponents in Congress. Nothing in their whole course was more discreditable to them than this absolute refusal to aid the President in his struggle to maintain the honor and good faith of their common country.[1]

[1] A just tribute from a political opponent to Mr. Webster's patriotism, in this emergency, is to be found in Benton's *Thirty Years' View*, vol. i., p. 333.

CHAPTER XI

POWER OF THE UNITED STATES OVER ACQUIRED TERRITORY WHEN ADMITTED AS A STATE— NEW ORLEANS *vs.* UNITED STATES

In 1836, Mr. Webster argued successfully one other case in which the effect of cession of territory to the United States was involved. This was the case of New Orleans *vs.* The United States.[1] When Napoleon ceded Louisiana to the United States it was declared in the treaty (Article Second) that "in the cession are included the adjacent islands belonging to Louisiana, and all public lots and squares, vacant lands and all public buildings." In the city of New Orleans there was a strip of vacant land between the buildings of the city and the river. This was used as a quay. It was protected from the waters of the Mississippi by a levee. This strip became very much enlarged by alluvial deposits. Mr. Webster, in his argument, states the facts clearly[2]:

"The sinking of a frame of lumber, at the expense of the inhabitants of New Orleans, at a particular place in the river, opposite to the city, for the protection of the ground, has contributed to the rapid and extensive enlargement of the open

[1] Reported 10 Peters, 662 (1836).

[2] 10 Peters, 672.

space in front of the City. This enlargement has placed the levee, used for the purposes of trade farther in advance of the City, and has left the ground now in controversy, in such a situation as not to be required for the uses of commerce. The corporation of New Orleans therefore proposes to sell and dispose of it, to be occupied and improved by those who may desire to purchase it."

The United States claimed the title to this strip of land under the treaty before mentioned. It was clearly shown that the Spanish government, and afterwards the French government, had exercised authority over this quay. To quote again from Mr. Webster's argument (p. 673):

"The plans referred to show that there was always an open space fronting on the river, and the uses of it were only such as were consistent with the public use. A custom house; a parade ground for the military; barracks for the soldiers, were erected upon it. These were permitted; but they did not destroy the title of the citizens to it, nor did such uses convert it into public domain."

With this statement of facts it is easy to appreciate the force of Mr. Webster's argument (p. 674) upon the law:

"The sovereignty of Spain over this property existed before the cession, for the sole purpose of enforcing the uses to which it was appropriated. This right and the obligations imposed upon it became vested in the State of Louisiana and did not continue in the United States after the State was formed. Acquiesced in by the United States under the treaty in the first instance, it necessarily afterwards passed to the State. The United States cannot now enforce this use and could not take the quay and dispose of it; and unless this can be done there is nothing to support this action. The preservation and

the enforcement of the use must be by the state government. By the act of Congress incorporating the City of New Orleans all the use of property became vested in the city."

The Supreme Court held that the federal jurisdiction could not be enlarged by the treaty-making power, and that when the State of Louisiana was admitted into the Union she was admitted on the same footing as the original States. Consequently whatever general jurisdiction over localities had been vested in Spain or France, was then vested in the State of Louisiana and not in the federal government.

CHAPTER XII

EFFECT OF GRANT OF ONE FRANCHISE UPON POWER TO GRANT RIVAL FRANCHISE—THE CHARLES RIVER BRIDGE CASE

In the January term of 1837, the case of the Charles River bridge was decided.[1] As long ago as 1826, Webster had been consulted in reference to a bill pending before the Legislature of Massachusetts, for the construction of a new bridge over the Charles River. At that time he declined to give an opinion, though he called attention to some of the difficulties in the case.[2]

The case was this. Even before 1640, a ferry had been maintained between Boston and Charlestown over the Charles River. This continued, until, in 1785, a corporation was incorporated by the Commonwealth of Massachusetts with authority to build a bridge in the place where the ferry was then run, and to take tolls. It was accordingly built, and was opened for passengers on the 17th of June, 1786. In 1792, the charter was extended to seventy years from the opening of the bridge, and it was enacted that at the expiration of that time the bridge was to belong to the Commonwealth.

[1] Charles River Bridge *vs.* Warren Bridge, 11 Peters, 420.

[2] Webster's *Letters*, Van Tyne, p. 117.

In 1828, the Legislature of Massachusetts incorporated a new company for the purpose of building a bridge, near that of the old company, to be known as the Warren bridge.

"The Warren bridge, by the terms of its charter, was to be surrendered to the State as soon as the expenses of the proprietors in building and supporting it should be reimbursed, but this period was not in any event to exceed six years from the time the Company commenced receiving toll. . . ."

"In the argument here," said Chief Justice Taney, "it was admitted that since the filing of the supplemental bill a sufficient amount of toll had been received by the proprietors of the Warren bridge to reimburse all their expenses, and that the bridge is now the property of the State and has been made a free bridge, and that the value of the franchise granted to the proprietors of the Charles River bridge has by this means been entirely destroyed."[1]

Mr. Webster's argument was based upon two propositions. First, that the grant to the proprietors of the Charles River bridge was a contract and that it could not be impaired by subsequent legislation. Second, that to destroy the value of the franchise was to take the franchise itself, and that the State could not do this without making compensation.

The Supreme Court did not deny the soundness of the first proposition, but held that the contract involved in that grant was to be strictly construed and that the grantee could claim nothing that was not clearly given by the charter. The conclusion was drawn that as no express grant was made of an exclusive privilege, none was to be implied.

[1] 11 Peters, 537, 538.

This was the first important constitutional argument in which Mr. Webster was unsuccessful. The case itself was both important and difficult. The Massachusetts Supreme Judicial Court was equally divided upon the questions involved, and for that reason the original suit brought by the Charles River Bridge Company to enjoin the construction of a parallel bridge from Boston to Charlestown was dismissed. In the Supreme Court of the United States three of the Justices thought the right of the plaintiff to an injunction clear. Four were of the opinion that the act of the legislature of Massachusetts, authorizing the construction of a new bridge, did not impair the obligation of the contract contained in the charter of the old bridge company, and for that reason, affirmed the judgment of the court below.

CHAPTER XIII

RIGHTS OF CORPORATIONS IN OTHER STATES—COMITY BETWEEN STATES—BANK OF AUGUSTA *v.* EARLE

THERE are many other causes which will be forever associated with the name of Webster and to which he gave the full force of his keen logic, the vivid clearness of his masterly analysis, the picturesque beauty of his felicitous statement, which in itself was argument, and above all, the power of that eloquence which he has himself so perfectly described,—"The clear conception outrunning the deductions of logic, the high purpose, the firm resolve, the dauntless spirit." But the scope of this volume is limited mainly to his arguments on questions of constitutional and international law. One of the most notable is The Bank of Augusta against Earle, as it is reported[1]; The Bank of the United States against Primrose, as his argument is entitled in his public speeches.[2] The cases involved the same questions, were argued in succession in February, 1839, and decided simultaneously.

The judgments of the courts below were reversed, and the right of a corporation chartered under the laws of one State of this Union to do business in any other State was sustained. Thus

[1] 13 Peters, 519.

[2] Webster's *Works*, vol. v., p. 106.

was associated enterprise freed from unjust discrimination. To curb the unlawful ambition of these associations has fallen to the lot of a later generation. In Webster's day the country needed strength. To-day it needs restraint. The power and authority which he vindicated are adequate to this restraint.

It is to be observed that the effect of this decision is not to deprive the several States of the right to regulate corporations doing business within their limits, because they are incorporated under the laws of another State. On the contrary, State legislation regulating the transaction within such State of banking, insurance and other business, by corporations of other States, is very common and is constitutional.[1]

Were it otherwise, a corporation incorporated under the laws of New Jersey might be more free from restraint in New York than one of its own corporations. This, certainly, was not the intention of the Constitution. Indeed, in many respects these intangible beings, the creation of law, are subject to more varied regulation by the State than are the individuals who compose them. This is but just, for their actual powers are far greater; and in many cases their charters are perpetual.

The decisions of the courts in Alabama had been that a corporation incorporated under the laws of one State had no right to do business in another. Corporations had not then attained the proportions they have since reached. But, nevertheless, the advantages derivable from corporate

[1] Diamond Glue Company *vs.* United States Glue Co., 187 U. S. Rep., 611 (1903).

franchises were appreciated and the importance of this question attracted public attention and gave to the review in the Supreme Court the name of "The Great Appeal Case from Alabama."

Mr. Webster argued, in the first place, that the right of a citizen of one State to sue citizens of another State in the federal courts was secured by the Constitution; that the Supreme Court had held that under this provision a corporation incorporated under the law of one State might sue in another; that to bring a suit was certainly a corporate act, and that the right to do business in one State, of the citizens of another who had become stockholders in a corporation incorporated under the laws of the latter, was not divested because of the corporate form under which they acted.

Secondly, he argued that independently of specific constitutional guaranties the courts must hold that at least the same comity existed between the several States of the Union as that between them and foreign nations; and that by this comity a corporation incorporated in one State could make a contract in another.

To quote briefly from this argument:[1]

"The law of comity is a part of the law of nations; and it authorizes a corporation of any State to make contracts beyond the limits of that State.

"How does *a State* contract? How many of the States of this Union have made contracts for loans in England! A State is sovereign, in a certain sense. But when a State sues, it sues as a corporation. When it enters into contracts with the citizens of foreign nations, it does so in its corporate character.

[1] Webster's *Works*, vol. vi., pp. 120, 122.

I now say, that it is the adjudged and admitted law of the world, that corporations have the same right to contract and to sue in foreign countries that individuals have. By the law of nations, individuals of other countries are allowed in this country to contract and sue; and we make no distinction, in the case of individuals, between the right to sue and the right to contract. Nor can any such distinction be sustained in law in the case of corporations. Where, in history, in the books, is any law or *dictum* to be found, (except the disputed case from Virginia,) in which a distinction is drawn between the rights of individuals and of corporations to contract and sue in foreign countries in regard to things generally free and open to everybody? In the whole civilized world, at home and abroad, in England, Holland, and other countries of Europe, the equal rights of corporations and individuals, in this respect, have been undisputed until now, and in this case; and if a distinction is to be set up between them at this day, it lies with the counsel on the other side to produce some semblance of authority or show of reason for it.

. . . . . .

"The term 'sovereignty' does not occur in the Constitution at all. The Constitution treats States as States, and the United States as the United States; and, by a careful enumeration, declares all the powers that are granted to the United States, and all the rest are reserved to the States. If we pursue to the extreme point the powers granted and the powers reserved, the powers of the general and State governments will be found, it is to be feared, impinging and in conflict. Our hope is, that the prudence and patriotism of the States, and the wisdom of this government, will prevent that catastrophe. For myself, I will pursue the advice of the court of Deveaux's case; I will avoid nice metaphysical subtilties, and all useless theories; I will keep my feet out of the traps in general definition; I will keep my feet out of all traps; I will keep to things as they are, and go no farther to inquire what they might be, if they were not what they are. The States of this Union, as States, are subject to all the voluntary and customary law of nations."

The opinion of the court in the case of the Bank of Augusta *vs.* Earle was delivered by Chief Justice Taney, who had been appointed by President Jackson to succeed Chief Justice Marshall. The court sustained the position secondly maintained by Webster in the following language:

"It has, however, been supposed that the rules of comity between foreign nations do not apply to the states of this Union; that they extend to one another no other rights than those which are given by the Constitution of the United States; and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a state has adopted the comity of nations towards the other states, as a part of its jurisprudence; or that it acknowledges any rights but those which are secured by the Constitution of the United States. The Court thinks otherwise. The intimate union of these States, as members of the same great political family; the deep and vital interests which bind them so closely together, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen), the interest or policy of any State requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this Court refuse to administer the law of international comity between these States? They are sovereign States; and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent."[1]

[1] 13 Peters, 590. This opinion was in 1903 quoted and applied by the New York Court of Appeals to support the validity of a statute punishing as perjury the making in New York of a false affidavit required by the laws of another State. People *vs.* O'Farrell, 175 N. Y., 323.

CHAPTER XIV

GIRARD WILL CASE—RHODE ISLAND BOUNDARY CASE —CASE OF "THE LEXINGTON"

During the administration of Harrison and Tyler, Mr. Webster rarely appeared in the Supreme Court. During most of that time he was Secretary of State, and was negotiating the Ashburton treaty with Great Britain. When he resigned and returned to Boston, he was engrossed with his practice in Massachusetts.

There were three cases decided at the January term of 1841 in which he appeared, one in 1842, one in 1843 and two in 1844. In one of these latter, the Girard Will case,[1] he made his famous argument in support of the proposition that a will, which by necessary effect compelled the instruction of young men without any religious teaching whatever, was opposed to public policy, and invalid. The Court, however, construed the will differently, so as to hold that no such prohibition was to be implied, and the main question which he argued was not decided.[2]

Another of the cases argued during this time was the boundary controversy between the State of

[1] Vidal *vs.* Girard's Executors, 2 How., 127.

[2] His speech is in 6 Webster's *Works*, p. 133.

Rhode Island and the Commonwealth of Massachusetts.[1] The final argument in this case was at the December term of 1845.[2] In this case Webster and Choate were together, and succeeded in defeating the claim of the State of Rhode Island to a revision of the boundary line which had been run by Joint Commission in 1711. This was the case in which Rufus Choate gave the famous description of the line as laid down by the original charter: "beginning at a hive of bees in swarming time and running thence to a hundred foxes with firebrands tied to their tails."

In 1845, Webster succeeded Choate as Senator from Massachusetts. Two years later, he argued for the libellants the famous case of the New Jersey Steam Navigation Company against the Merchants Bank of Boston, decided early in 1848.[3] In this case his contention was sustained by the Court, and it was held that the Admiralty jurisdiction of the courts of the United States extended to a libel *in personam* upon a contract for the transportation of specie upon the waters of Long Island Sound, from New York to Stonington, and thence by land to Boston, and that an agreement in the bill of lading, purporting to exempt the carrier from the consequences of negligence, was void, as against public policy; although it was conceded in the opinion delivered by Mr. Justice Nelson that the

[1] 15 Peters, 233. [2] 4 Howard, 591.

[3] 6 Howard, 344. It may be noted here for the benefit of the lay reader, that in the Admiralty courts the plaintiff is known as libellant. He files his libel at the beginning of the suit.

exemption would be valid if the loss had not been occasioned by negligence.

This litigation grew out of the burning of the steamboat *Lexington*, upon Long Island Sound. The evidence showed that the vessel was improperly constructed, and inadequately equipped, that no safeguards were used against overheating of the smokestacks, that the combustible cargo was stowed in dangerous proximity to them, and that there were no suitable appliances for extinguishing the fire which broke out. In fact, the only buckets that appeared to be available were the little barrels in which the silver dollars of the libellant were packed. These were broken open, the contents emptied and the barrels filled with water, which was thrown on the flames. But these gained too rapidly, the boat herself was consumed, and most of her passengers suffocated, or drowned. In such a case even the statute for the limitation of the liability of carriers would have been no defence.

Mr. Webster's argument in this case is not contained in any edition of his works, and the report in Howard[1] is meagre. But enough appears to show that he illuminated the grant in the Constitution of Admiralty jurisdiction to the courts of the United States by a clear exposition, not only of the English, but of the European Admiralty law, and a demonstration of the importance to the commerce of the country of a liberal interpretation of the grant. Mr. Justice Daniels was at that time the adversary of the Admiralty, and in several dissenting

[1] 6 Howard, 344.

opinions did his best to convince the Court that the jurisdiction of the Admiralty ought to be restricted within the narrowest limits. Lord Coke himself could not have done better.

But Webster's argument prevailed. A portion of this argument should be quoted here. The principles stated in it, which the reporter says he "illustrated" in his argument, have been followed by the Supreme Court ever since:

"The court having decided that the constitutional grant of admiralty and maritime jurisdiction to the government of the United States is not to be limited by the rules which restrained the English admiralty in 1789, it follows of course, that the jurisdiction of the courts of the United States should naturally be coextensive with the granted power, unless Congress has otherwise declared; and as the Judiciary Act of 1789, section ninth, expressly vests in the District Courts of the United States original cognizance of all civil causes of admiralty and maritime jurisdiction, then whatever this court adjudges to be a case of admiralty and maritime jurisdiction belongs originally to the District Court, and invests that court necessarily with the power of all process and proceedings fit and proper for the exercise of its jurisdiction, subject to regulation by Congress.

"It is not, probably, doubted that the grant of admiralty and maritime jurisdiction to the government of the United States is exclusive, or that no State now retains any such power; and so absolutely indispensable has such a jurisdiction been found to be on the interior lakes and rivers, that Congress has been obliged to provide, and has provided, for its exercise on those waters. See Act of 1845.

"The only objection to this necessary law seems to be, that Congress, in passing it, was shivering and trembling under the apprehension of what might be the ultimate consequence of the decision of this court in the case of the *Thomas Jefferson*. It pitched the power upon a wrong location.

"Its proper home was in the admiralty and maritime grant, as in all reason, and in the common sense of all mankind out of England, admiralty and maritime jurisdiction ought to extend, and does extend, to all navigable waters, fresh or salt."[1]

From the time of the decision of this case to the present, most maritime causes have been brought in the federal courts of Admiralty. Their decisions constitute a body of commercial law, relating especially to bills of lading, charter parties, marine insurance and collisions, which is liberal in its charter, harmonious in most respects with the jurisprudence of England and the continent of Europe and which has played no small part in the expansion of American commerce. It is true that the more narrow spirit which has prevailed in federal legislation forbids American citizens to buy foreign-built ships. But their charter is not forbidden, and American citizens, under foreign flags, and in chartered vessels, already reap their share of the harvest of ocean commerce. That their business has not been restricted by the conflicting decisions of the courts of different States, is due in large degree, not only to Mr. Webster's argument in this case of the *Lexington*, but to the canons of interpretation, just, because broad and liberal, which, more than any other man, he aided to establish.

[1] 6 Howard, U. S. Rep. 378.

CHAPTER XV

EMINENT DOMAIN OVER FRANCHISE — WEST RIVER BRIDGE CASE

At the December term, 1847, Mr. Webster argued the case of the West River Bridge Co. *vs.* Dix and the Towns of Brattleboro and Dummerston.[1] In this case it was held that the constitutional power of eminent domain extended to a franchise which had been given by the State to a private corporation, and that therefore the State could take a toll-bridge which had been built by a private corporation, appropriate it to the public use, and make it a free bridge, upon making the original owner compensation in the manner regulated by law, and that this did not impair the obligation of the contract between the State and the original grantee.

In this case the judgment of the Supreme Court of Vermont was affirmed. The Supreme Court of the United States was of opinion that the rights of the citizen were sufficiently protected by the provisions of the statute for ascertaining and paying the value of the franchise. Webster's argument, which is not included in his published works, puts the case so clearly that it deserves to be extracted

[1] 6 Howard, 507.

from the volume of the reports in which it is now laid away.[1]

"All the power of the States, as sovereign States, must always be subject to the limitations expressed in the United States Constitution, nor can they any more be permitted to overstep such limitations of power by the exercise of one branch of sovereignty than another. What is forbidden to them, and which they cannot do directly, they should not be permitted to do by color, pretence, or oblique indirection. Among other matters limiting and restricting State sovereignty is this:—No State shall pass 'any law impairing the obligation of contracts.' The power of eminent domain, like every other sovereign power in the State, is subject to this limitation and prohibition. Laws creating corporations, with powers for the benefit of the individual corporators, even though for public purposes, like turnpikes, railroads, toll-bridges, etc., have always, and by almost every court in the Union, and by this court, been decided to be contracts between the government and the corporators. The plaintiff's grant and franchise was a contract of the State for one hundred years, and by this act of 1839, and the proceedings under it, that contract is not only impaired, but utterly destroyed; and this a State can no more do under the power of eminent domain, than under the law-making power, or any other power of sovereignty. It is said, the citizen is safe, because, under the exercise of the eminent domain, he is to receive compensation for whatever is taken. That furnishes no security, for the mode and amount of compensaion is fixed *ex parte* by the government and its agents; and, besides that, the prohibition of the Constitution is general, and contains no exception for this exercise of this power of eminent domain as to contracts.

"If the provision of the Constitution, which forbids the impairing of contracts, does not extend to the contracts of the State governments, and they are left subject to be destroyed by the eminent domain, then there is an end of public faith. It is said, by every writer, and by almost every court which

[1] 6 Howard U. S. Rep., 517.

has passed on this subject, the eminent domain, that it must rest with 'the legislative power to determine when public uses require the assumption of private property,' and to regulate the mode of compensation. (2 Kent's Comm., 340.) If to this it be holden that this extends even to contracts of the government itself, then it follows, that the State of Mississippi, or any other State indebted, has but by law to declare that the public good requires that the State debts, bonds, etc., shall be taken for the public use, and appoint commissioners to fix their present market value to the holders, and, on payment thereof, declare them extinguished. Such is the real character of this transaction."

CHAPTER XVI

POWER TO REORGANIZE STATE GOVERNMENTS—DORR REBELLION

The Colonial Charter of Rhode Island had, in 1841, become in many particulars inapplicable to the changed conditions of the State. Attempts to amend it, in the manner prescribed by law, had failed. Then those who were dissatisfied attempted to establish a new government by calling a constitutional convention without any express authority of law. A constitution was framed and submitted to the people at an election. The opponents of the new constitution refused to recognize the election or to vote. An election did, however, take place, which was claimed to be valid by the parties interested in it, and at which they claimed that a majority of male citizens of twenty-one years of age voted for the new constitution. They elected a new set of officials, Governor, Legislature and all. Thomas W. Dorr was the head of the new government, and from him it took its name. The government under the old charter maintained its own authority, declared martial law, suppressed the new government and Dorr himself was tried for treason in 1844, in

the Supreme Court of Rhode Island, was convicted and sentenced to imprisonment for life.[1] The President of the United States recognized the old and not the new government. Nevertheless, Dorr's adherents finally tested the question as to the validity of their proceedings, in an action of trespass brought in the Circuit Court of the United States, and reviewed on writ of error in the Supreme Court in 1848.[2]

That court followed Webster's argument and held that the determination of what was the duly constituted government of a State was a political and not a judicial question; that Congress by the Act of February 28, 1795, had authorized the President to decide this question, and that his decision was final. It further held that a State Legislature, in the presence of armed rebellion, had the power to declare martial law, and that it was for the Legislature to judge whether the exigency was such as to require this declaration.[3]

Mr. Webster's argument in this case is included in his published works.[4] A brief extract from it will show his mastery of the principles underlying the case and which were decisive of the controversy. Equally decisive were they of the later controversy

[1] Dorr was a member of one of the old patrician families of Rhode Island. His zealous advocacy of the popular cause alienated his friends and kinsfolk, and although he was pardoned, after a short imprisonment, he died soon after, a heartbroken man.

[2] An interesting account of this "Dorr Rebellion" is to be found in a speech of Henry Clay, delivered at Lexington, Ky., June 9, 1842. Clay's *Works*, vol. vi., p. 380.

[3] Luther *vs.* Borden, 7 How., U. S. Rep., 1 (1848).

[4] Webster's *Works*, vol. vi., p. 217.

between North and South. As his argument is reported by Howard, he said[1]:

"This is an unusual case. During the years 1841 and 1842, great agitation existed in Rhode Island. In June, 1842, it subsided. The Legislature passed laws for the punishment of offenders, and declared martial law. The grand jury indicted Dorr for treason. His trial came on in 1844, when he was convicted and sentenced to imprisonment for life. Here is a suit in which the opposite counsel say that a great mistake has happened in the Courts of Rhode Island; that Governor King should have been indicted. They wish the Governor and the rebel to change places. If the Court can take cognizance of this question, which I do not think, it is not to be regretted that it has been brought here. It is said to involve the fundamental principles of American liberty. This is true. It is always proper to discuss these, if the appeal be made to reason, and not to the passions. There are certain principles of liberty which have existed in other countries, such as life, the right of property, trial by jury, etc. Our ancestors brought with them all which they thought valuable in England, and left behind them all which they thought were not. Whilst colonies, they sympathized with Englishmen in the Revolution of 1688. There was a general rejoicing. But in 1776 the American people adopted principles more especially adapted to their condition. They can be traced through the Confederation and the present Constitution, and our principles of liberty have now become exclusively American. They are distinctly marked. We changed the government where it required change; where we found a good one, we left it. Conservatism is visible throughout. Let me state what I understand these principles to be.

"The first is, that the people are the source of all political power. Every one believes this. Where else is there any power? There is no hereditary legislature, no large property,

[1] 7 Howard, U. S. Rep., 29. Whether this abstract was prepared by Webster himself cannot be ascertained. But it is a fair summary of his argument.

no throne, no primogeniture. Everybody may buy and sell. There is an equality of rights. Any one who should look to any other source of power than the people would be as much out of his mind as Don Quixote, who imagined that he saw things which did not exist. Let us all admit that the people are sovereign. Jay said that in this country there were many sovereigns and no subject. A portion of this sovereign power has been delegated to government, which represents and speaks the will of the people as far as they chose to delegate their power. Congress have not all. The State Governments have not all. The Constitution of the United States does not speak of the government. It says the United States. Nor does it speak of State governments. It says the States; but it recognizes governments as existing. The people must have representatives. In England, the representative system originated, not as a matter of right, but because it was called by the king. The people complained sometimes that they had to send up burgesses. At last there grew up a constitutional representation of the people. In our system it grew up differently. It was because the people could not act in mass, and the right to choose a representative is every man's portion of sovereign power. Suffrage is a delegation of political power to some individual. Hence the right must be guarded and protected against force or fraud. That is one principle. Another is, that the qualification which entitles a man to vote must be prescribed by previous laws, directing how it is to be exercised, and also that the results shall be certified to some central power so that the vote may tell. We know no other principle. If you go beyond these, you go wide of the American track. One principle is, that the people often limit their government; another, that they often limit themselves. They secure themselves against sudden changes by mere majorities. The fifth article of the Constitution of the United States is a clear proof of this. The necessity of having a concurrence of two thirds of both houses of Congress to propose amendments, and of their subsequent ratification by three fourths of the States, gives no countenance to the principles of the Dorr men, because the people have chosen so to limit themselves. All

qualifications which persons are required to possess before they can be elected are, in fact, limitations upon the power of the electors; and so are rules requiring them to vote only at particular times and places. Our American mode of government does not draw any power from tumultuous assemblages. If anything is established in that way, it is deceptive. It is true that at the Revolution governments were forcibly destroyed. But what did the people then do? They got together and took the necessary steps to frame new governments, as they did in England when James the Second abdicated. William asked Parliament to assemble and provide for the case. It was a revolution, not because there was a change in the person of the sovereign, but because there was a hiatus which must be filled. It has been said by the opposing counsel, that the people can get together, call themselves so many thousands, and establish whatever government they please. But others must have the same right. We have then a stormy South American liberty, supported by arms to-day and crushed by arms to-morrow. Our theory places a beautiful face on liberty, and makes it powerful for good, producing no tumults. When it is necessary to ascertain the will of the people, the legislature must provide the means of ascertaining it. The Constitution of the United States was established in this way. It was recommended to the States to send delegates to a convention. They did so. Then it was recommended that the States should ascertain the will of the people. Nobody suggested any other mode."

A curious reference to this case, and to Mr. Webster's practice in the Supreme Court, is to be found in a letter to his son, dated Washington, January 29, 1848[1]:

"Neither the Senate nor the court sit to-day; so I am at home all day, preparing for a long cause from Mississippi,

[1] *Private Correspondence*, vol. ii., p. 267. His argument was made the day before.

which comes on for argument on Monday morning. I believe we have pretty effectually suppressed the Rhode Island insurrection.

"It so happens that I have a great deal more to do in court this year than at any time since I went into the Department of State. The work is hard, not so much in the preparation of causes, as in sitting and taking notes of arguments for seven or eight days, as sometimes happens. I do not see that I shall be able to be out of Court much for a month to come.

"I attend to causes pretty closely, although, now that I am sixty-six years old, I take it for granted that people begin to say, 'He is not the man he was.' In some respects it is certainly true, perhaps in many."

It should be noted that the Dorr rebellion, with its unsuccessful military attempt, in May, 1842, to get possession of the State Arsenal, did lead, in the following year, to the making of a new constitution in the manner authorized by law. This relieved much of the inequality and injustice of the old charter. This new constitution was framed by a convention called by the charter government and ratified by the people. All of which happened before the argument and decision of the Supreme Court. Such is "the law's delay." The truth is that, under our system of jurisprudence, the decision of important cases is vastly more important to the public than to the litigants. There is some excuse, therefore, for the deliberation with which they are commonly brought to a final hearing in the courts of last resort. This is eminently true of the case under consideration. The rules established in it are often invoked, and make continually for order and obedience to law.

CHAPTER XVII

STATE POWER OVER FOREIGN COMMERCE—PASSENGER TAX CASES

At a later period in his life, and when that sun was drawing near the horizon, which was at meridian when Gibbons and Ogden was argued, Mr. Webster, with equal force of logic and power of conviction, vindicated the right of our foreign commerce to be free from the exactions of the several States. The Passenger Tax cases, as they are called, were appeals from judgments sustaining the power of the States to impose taxes upon immigration. Massachusetts and New York had enacted statutes levying a tax upon every immigrant coming into their ports. The amount was not great,—neither was the tax on tea. But the importance of the principle was supreme. One main object in the formation of our government was that commercial intercourse between this country and foreign countries should be open alike to all, and that no citizen or State should directly or indirectly acquire a monopoly of it.

The position of the controversy in these cases was this:

In New York *vs.* Miln, the Supreme Court had held that it was competent for a State Legislature,

in the absence of Congressional legislation on the subject, to require each master of a vessel, arriving in a port of the United States, to make to the local authorities of the State a report giving the names of the passengers on board, with sundry particulars concerning them. Mr. Justice Story dissented from the decision, and stated that Chief Justice Marshall, who had died since the appeal was first argued, concurred in this dissent.[1]

After this, New York and Massachusetts claimed that this decision of the court permitted the several States to regulate the entrance of passengers into their respective ports, until Congress should provide to the contrary. Accordingly, they imposed a tax upon each foreigner entering the United States, and applied the proceeds of the taxes thus levied to the maintenance of their immigration offices.

The shipowners contested the validity of these laws. The New York appeal[2] was argued by Mr. Webster at the December term, 1845, and again at the December term, 1847. He argued the Massachusetts case[3] at the December term, 1846, and again in December, 1848. These re-arguments were required by the diversity of opinion that developed among the judges. The constitutional law of the country was still in process of formation. Only two judges, McLean of Ohio and Wayne of Georgia, were left of those who sat with Marshall.

[1] 11 Peters, 161.

[2] Smith *vs.* Turner, Health Commissioner of the Port of New York.

[3] Norris *vs.* The City of Boston.

Jackson and Van Buren had placed some strict constructionists upon the bench. It was well that the commanding genius of Webster remained, to maintain the principles of construction which he and Marshall had united to establish. Taney, who had been chosen by Jackson as his Attorney-General, and was appointed by him Chief Justice, when Marshall died, led the new school that was aiming to limit and explain away the long series of decisions to which we have already called attention. He maintained that the power to regulate commerce remained in the States, and could be exercised until Congress should intervene, and that passenger travel was not commerce, but that this word in the Constitution applied only to traffic in goods.

The only part of Webster's argument that is preserved in the reports of Mr. Howard is the brief statement of points then required by the rules of the Court, which is as follows:

"Norris *v.* City of Boston.[1]

"On the part of the plaintiff in error it will be contended:

"1. That the act in question is a regulation of commerce of the strictest and most important class, and that Congress possesses the exclusive power of making such a regulation.

"And hereunder will be cited 11 Pet. 102; 4 Wash. C. C. 379; 3 How. 212; 14 Pet. 541; 4 Met. 285; 2 Pet. 245; 9 Wheat. 1; 12 Wheat. 436; Federalist, No. 42; 3 Cow. 473; 1 Kent, 5th ed.; 2 Story's Com. on Const. 506; 15 Pet. 506; 3 N. H. 499.

"2. That the act is an impost or duty on imports, and so expressly prohibited by the Constitution, or is in fraud of that prohibition.

[1] 7 Howard, 288, 289.

"And hereunder will be cited 4 Met. 285; 12 Wheat. 436; Dig. Lib. 1, tit. 3, De Leg. et Senat. Cons. Sect. 29; 3 Cow. 738; 14 Pet. 570.

"3. That it is repugnant to the actual regulations and legally manifested will of Congress. 9 Wheat. 210; 4 Met. 295; 11 Pet. 137; 12 Wheat. 446; 5 Wheat. 22; 6 Pet. 515; 15 Pet. 509; 14 Pet. 576; Laws U. S. 1799, c. 128, Sec. 46; 1 Story's Laws, 612, 1819, c. 170; 3 Story's Laws, 1722, Laws of Naturalization, 1802, c. 28; 1816, c. 32; 1824, c. 186.

"D. WEBSTER,
"R. CHOATE."

There is also a brief newspaper account of the argument, reprinted in the last edition of his *Works*.[1]

In a letter written to Mr. Blatchford from Washington, on Saturday, the third of February, 1849, Mr. Webster thus speaks of the cases and his share in them[2]:

"There is great interest here to hear the opinions of the judges on Tuesday. I wish you could be here. Several opinions will be read, drawn with the best abilities of the writers. In my poor judgment, the decision will be more important to the country than any decision since that in the steamboat cause. That was one of my earliest arguments of a constitutional question. This will probably be, and I am content it should be, the last. I am willing to confess to the vanity of thinking that my efforts in these two cases have done something toward explaining and upholding the just powers of the Government of the United States on the great subject of commerce. The last, though by far the most laborious and persevering, has been made under great discouragements and evil auspices. Whatever I may think of the ability of my

[1] Webster's *Writings and Speeches*, vol. xv., p. 402.
[2] Curtis's *Life of Webster*, vol. ii., p. 373.

argument, and I do not think highly of it, I yet feel pleasure in reflecting that I have held on and held out to the end."

A majority of the Court, Justices McLean (Ohio), Wayne (Georgia), Catron (Tennessee), Grier (Pennsylvania) and McKinley (Alabama), concurred in holding that the transportation of passengers was commerce, and that the acts in question were both unconstitutional.

The Chief Justice (Maryland), and Justices Nelson (New York), Daniels (Virginia) and Woodbury (New Hampshire) dissented. Daniels was the strictest of strict constructionists. Calhoun must have felt that this Virginia judge was as strenuous as himself. They maintained that the acts in question were a valid exercise of the police power and also of the power of taxation, both of which, they said, remained in the States, unimpaired by the Constitution of the United States, except where it contained a specific prohibition. In opposition to this the Court held, as stated by Mr. Justice Wayne[1]:

"1. That the acts of New York and Massachusetts imposing a tax upon passengers, either foreigners or citizens, coming into the ports in those States, either in foreign vessels or vessels of the United States, from foreign nations or from ports in the United States, are unconstitutional and void, being in their nature regulations of commerce contrary to the grant in the constitution to congress of the power to regulate commerce with foreign nations and among the several States.

"2. That the States of this Union cannot constitutionally tax the commerce of the United States for the purpose of paying any expense incident to the execution of their police laws;

[1] 7 Howard, 283, 412.

and that the commerce of the United States includes an intercourse of persons, as well as the importation of merchandise.

"3. That the acts of Massachusetts and New York in question in these cases conflict with treaty stipulations existing between the United States and Great Britain, permitting the inhabitants of the two countries 'freely and securely to come, with their ships and cargoes, to all places, ports, and rivers in the territories of each country to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of said territories, respectively; also, to hire and occupy houses and warehouses for the purposes of their commerce, and generally the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries respectively'; and that said laws are therefore unconstitutional and void.

"4. That the congress of the United States having by sundry acts, passed at different times, admitted foreigners into the United States with their personal luggage and tools of trade, free from all duty or imposts, the acts of Massachusetts and New York, imposing any tax upon foreigners or immigrants for any purpose whatever, whilst the vessel is in transitu to her port of destination, though said vessel may have arrived within the jurisdictional limits of either of the States of Massachusetts and New York, and before the passengers have been landed, are in violation of said acts of congress, and therefore unconstitutional and void.

"5. That the acts of Massachusetts and New York, so far as they impose any obligation upon the owners or consignees of vessels, or upon the captains of vessels or freighters of the same, arriving in the ports of the United States within the said States, to pay any tax or duty of any kind whatever, or to be in any way responsible for the same, for passengers arriving in the United States, or coming from a port in the United States, are unconstitutional and void, being contrary to the constitutional grant to congress of the power to regulate commerce with foreign nations and among the several States, and to the legislation of congress under the said power, by which the

United States have been laid off into collection districts, and ports of entry established within the same, and commercial regulations prescribed, under which vessels, their cargoes and passengers, are to be admitted into the ports of the United States, as well from abroad as from other ports of the United States. That the act of New York now in question, so far as it imposes a tax upon passengers arriving in vessels from other ports in the United States, is properly in this case before this court for construction, and that the said tax is unconstitutional and void. That the 9th section of the 1st article of the constitution includes within it the migration of other persons, as well as the importation of slaves, and in terms recognizes that other persons, as well as slaves, may be the subjects of importation and commerce.

"6. That the 5th clause of the 9th section of the 1st article of the constitution, which declares that 'no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another State; nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another,' is a limitation upon the power of congress to regulate commerce for the purpose of producing entire commercial equality within the United States, and also a prohibition upon the States to destroy such equality by any legislation prescribing a condition upon which vessels bound from one State, shall enter the ports of another State.

"7. That the acts of Massachusetts and New York, so far as they impose a tax upon passengers, are unconstitutional and void, because each of them so far conflicts with the 1st clause of the 8th section of the 1st article of the constitution, which enjoins that all duties, imposts, and excises shall be uniform throughout the United States; because the constitutional uniformity enjoined in respect to duties and imposts is as real and obligatory upon the States, in the absence of all legislation by congress, as if the uniformity had been made by the legislation of congress; and that such constitutional uniformity is interfered with and destroyed by any State imposing any tax upon the intercourse of persons from State to State, or from foreign countries to the United States.

"8. That the power in congress to regulate commerce with foreign nations and among the several States, includes navigation upon the high seas, and in the bays, harbors, lakes, and navigable waters within the United States, and that any tax by a State in any way affecting the right of navigation, or subjecting the exercise of the right to a condition is contrary to the aforesaid grant.

"9. That the States of this Union may, in the exercise of their police powers, pass quarantine and health laws, interdicting vessels coming from foreign ports, or ports within the United States, from landing passengers and goods, prescribe the places and time for vessels to quarantine, and impose penalties upon persons for violating the same; and that such laws, though affecting commerce in its transit, are not regulations of commerce prescribing terms upon which merchandise and persons shall be admitted into the ports of the United States, but precautionary regulations to prevent vessels engaged in commerce from introducing disease into the ports to which they are bound; and that the States may, in the exercise of such police power, without any violation of the power in congress to regulate commerce, exact from the owner or consignee of a quarantined vessel, and from the passengers on board of her, such fees as will pay to the State the cost of their detention and of the purification of the vessel, cargo, and apparel of the persons on board."

After this decision, the New York lawyers endeavored to find, and did suggest, what was certainly a very ingenious device for the purpose of evading the force of the decision. An act was passed, requiring every captain to report to the mayor the name, last residence and occupation of every alien passenger. It directed the mayor to require the owner or consignee of the ship to give a bond with sureties in a penalty of $300—to indemnify the State against any such person becoming

a public charge. From this onerous requirement, the owner could be relieved by paying a dollar and a half for each passenger, within twenty-four hours after he landed.

The shipowners submitted to this system for twenty years. They then decided to contest it. In 1875, in the case of Henderson against the Mayor of New York,[1] it was unanimously held that the transportation of passengers was as much a part of commerce as that of goods; that a tax upon passengers was a tax on commerce, and that the Court would look through the device by which the city apparently only required a report and security against pauperism. "In whatever language," said Mr. Justice Miller, "a statute may be framed, its purpose must be determined by its natural and reasonable effect." And the Court concludes (p. 274):

"We are of opinion that this whole subject has been confided to Congress by the Constitution; that Congress can more appropriately and with more acceptance exercise it than any other body known to our law, state or national; that by providing a system of laws in these matters, applicable to all ports and to all vessels, a serious question, which has long been matter of contest and complaint, may be effectually and satisfactorily settled."

Congress adopted the suggestion, and in 1882 passed an act[2] to regulate immigration. This levied a tax of fifty cents upon each alien passenger who should enter any United States port by steam or sail vessel. The proceeds of this tax

[1] 92 United States Rep., 259.

[2] 22 U. S. Stat. at Large, 214.

constitute an immigrant fund, which is used to defray the expense of regulating immigration, and for the care of immigrants and the relief of such as are in distress. This act was held constitutional in the Head money cases, decided in 1884.[1] Thus the question was finally set at rest. Uniformity in the administration of immigration throughout our ocean frontier has been found to be of great public advantage. It is the natural development of the principle of national control over national commerce, for which Mr. Webster contended in Gibbons *vs.* Ogden, as well as in the Passenger Tax cases. Without it, we should not be a Nation. It is interesting to trace the gradual extinction of the doubts on this subject, which had been raised by acute and vigorous advocates of the rights of the States. Chief Justice Taney had maintained[2] that passengers were not imports, that the word "imports" in the Constitution, must be given a meaning, restricted to its common use, at the time the Constitution was adopted, and that therefore Congress could not, and the several States could impose a tax upon passengers. He adds:

"And if it is to be hereafter the law of this Court, that the power to regulate commerce has abridged the taxing power of the States upon the vehicles or instruments of commerce, I cannot foresee to what it may lead; whether the same prohibition, upon the same principle, may not be carried out in respect to ship owners and merchandise in a way seriously to impair the powers of taxation, which have heretofore been exercised by the States."

[1] 112 U. S., 580.

[2] 7 Howard, 477–482.

But the vague evils, the extent of which the Chief Justice could not foresee, have proved to be imaginary. In one of the later cases,[1] in which another attempt of the State of New York to levy a tax on commerce under guise of a harbor regulation was frustrated, Mr. Justice Swayne well expresses the result of our national experience:

"The commerce clauses of the Constitution had their origin in a wise and salutary policy. They give to Congress the entire control of the foreign and interstate commerce of the country. They were intended to secure harmony and uniformity in the regulations by which they should be governed. Wherever such commerce goes, the power of the nation accompanies it, ready and competent, as far as possible, to promote its prosperity and redress the wrongs and evils to which it may be subjected. It was deemed especially important that the States should not impose tonnage taxes. Hence the prohibition in the Constitution, without the assent of Congress previously given. The confusion and mischiefs that would ensue if this restriction were removed are too obvious to require comment. The lesson upon the subject taught by the law before us is an impressive one."

[1] Inman S. S. Co. *vs.* Tinker, 94 U. S., 238, 245.

CHAPTER XVIII

EXTENSIVE RANGE OF WEBSTER'S LEGAL ACQUIREMENTS—VAN RENSSELAER TITLE—VAN RENSSELAER *vs.* KEARNEY

THE last case argued by Mr. Webster in the Supreme Court was Van Rensselaer *vs.* Kearney.[1] It was argued by him February 11, 1851. It is noted here because it illustrates what has been already referred to—the extent of Webster's legal acquirements, and the thoroughness with which he did his work.

The case involved the title to the great Van Rensselaer estate in New York. In 1782, John Van Rensselaer made a will by which he entailed the whole manor, comprising 34,000 acres, to the oldest son of his grandson, and his male descendants, or failing them, to the male descendants of his other sons. The Legislature of New York, in 1782, and again in 1786, enacted statutes by which entailed estates were converted into an absolute fee. This grandson, John J. Van Rensselaer, claimed that this law gave him an absolute title, and proceeded to make sales of the estate. Subsequently, however, it was held that he and his pro-

[1] 11 Howard, 297.

fessional advisers were mistaken in supposing that the statute vested the absolute title in him, and that he had only a life estate. His oldest son died before his father, leaving no children, and the second son, Jeremiah, claimed that it was in him that the absolute title vested, and brought an action of ejectment against the grantees of his father. His first suit in the Supreme Court of New York was decided against him, and he acquired citizenship in New Jersey, and brought an action in the Circuit Court of the United States, in a different form, for the purpose of raising the question of title before the United States Supreme Court. That Court followed the New York decisions upon the title, and held that the absolute title vested in the grandson when his oldest son died, and that this title thereupon passed to the previous grantees, and that the other heirs of the grandson could not claim it.

The late John Jay was in this case. When Mr. Webster began his argument and proceeded to state the differences between the case as presented to the Supreme Court, and the former case in New York, Mr. Jay thought the statement erroneous and asked Mr. Wood, the senior counsel (who was one of the leaders of the New York bar), to correct him. Mr. Wood replied: "I do not know any man who would venture to interrupt Mr. Webster." Mr. Jay said, "I will," and he did.[1] Webster

[1] The author's authority for this statement is Mr. Jay himself. He seemed to be as proud of this success of his youth as of any achievement of his long and useful life.

Mr. Webster's notes of his argument in this case are in the Library of

frowned at his young opponent, but the latter held to his point and, as he was right, carried it, to the great surprise of the Court and bar.

the New Hampshire Historical Society. They are detailed and thorough, written in the neat and compact hand which characterizes his notes and briefs, and on the square letter paper with which practitioners in the Supreme Court are familiar.

CHAPTER XIX

THE CONSTITUTION AND SLAVERY—SEVENTH OF MARCH SPEECH

MR. WEBSTER'S position on the seventh of March, 1850, was unique. To no man in America did the country look with such confidence. The story of his great arguments, which has just been rehearsed, was fresh in every breast. The Senate Chamber was thronged to hear him. But his audience was in every one of the thirty States then composing the Union. The difficulties of the situation seemed insurmountable, and it was generally felt that he was the Lewis and Clark who could find a practicable pass through these Rocky Mountains. Clay, the compromiser, was engaged in the preparation of compromise measures. But men looked to Webster to convince the judgment and the conscience of the country.

In the nature of the case, it was impossible that he should satisfy every one. Gabriel himself could not have done that.

Any one who reads carefully the contemporary literature, as, for example, Emerson's lecture on the Fugitive Slave Law,[1] will perceive that the real

[1] Delivered March 7, 1854.

difference between Webster and his critics was this. They believed that slavery, everywhere and under all circumstances, was wrong, and that therefore any stipulation in its favor in the Constitution was void. He thought it an evil, he opposed its extension, he hoped for its termination, but he did not think that at all times and under all circumstances it was morally wrong. Therefore he judged that it was right to recognize the existence of slavery, and to submit to the agreement which bound the federal government to tolerate that existence in the Southern States. His position was analogous to that of James Russell Lowell in the winter of 1876–77. There can be little doubt that Lowell's conscience revolted against the proceedings of the Returning Boards in Louisiana and Florida, which suppressed and altered returns from various districts, and thereby converted a popular majority for Tilden into an electoral majority for Hayes. The Electoral Commission held that it had no power to inquire into the Democratic allegations of fraud in the proceedings of these Returning Boards. Under these circumstances, some of Mr. Lowell's friends urged upon him that, in his position as Elector from the State of Massachusetts, it was his duty to redress the fraud thus committed, and to deprive those who had committed it of the fruit of their conduct, by voting in the Electoral College for Tilden. This would have given Tilden a majority in that College. But Lowell, in opposition to this solicitation, declared that he was commissioned by the State of Massachusetts to vote for Hayes. It

could not be denied that he had constitutionally the right to vote differently. But he did not feel at liberty to disregard the mandate which unbroken custom had given to the members of the Electoral College. In short, while he saw the wrong, he did not feel called upon to redress it, although he had the clear constitutional right so to do.

Mr. Webster, with equal clearness, saw the wrong of slavery. But his case was stronger than Lowell's, for as Senator from the State of Massachusetts, he had no constitutional right to interfere with slavery in the Southern States, and he felt it his duty to convince his countrymen, if possible, that the observance of the obligations which they had assumed when they adopted the Federal Constitution was consistent with good conscience. But it was natural that those who did not agree with him in this should condemn his course. It was a distinct disappointment to them. And it is not surprising that those who were disappointed should have expressed that disappointment in bitter words. Some of them, like Whittier and Lowell, were men of extraordinary literary gifts, and embalmed their indignant thoughts in the clear amber of their style. Then came the war, and the epoch of reconstruction, warped and embittered by the tragical death of our great Captain, just as his ship was entering port after the stormy four years of his first Administration. It was then too soon to judge fairly of Webster's position in 1850. But the experience of the last thirty years has not been in vain. We have learned that the earnest men

were mistaken who thought the solution of the negro question easy—who declared, as the author heard Roswell D. Hitchcock say—"Do you ask what is to become of the negroes? I answer—What is to become of the red-headed men?"

Webster vividly described the situation in 1850 in this very speech[1]:

"It is not to be denied that we live in the midst of strong agitations, and are surrounded by very considerable dangers to our institutions and government. The imprisoned winds are let loose. The East, the North, and the stormy South combine to throw the whole sea into commotion, to toss its billows to the skies, and to disclose its profoundest depths."

The nature of this commotion can best be appreciated by a brief reference to the character of the conflicting elements.

The Northern abolitionists imagined that the Southern negroes had reached the full standard of manhood, and were capable of self-government. To them the Southern whites were cruel oppressors. No one did more to impress these ideas upon the last generation than James Russell Lowell. The indignation which others vehemently but coarsely uttered, he expressed with the skill and fire of genius. *Uncle Tom's Cabin*, too, was read throughout the world, and was regarded by many as a true picture of the South, as a whole.

On the farther side of Mason and Dixon's line, the Southern people smarted under and resented these attacks, which they knew to be, in the main, unjust. They were well aware that, while there

[1] Webster's *Works*, vol. v., p. 325.

were many individual exceptions, the negroes as a race were backward in development, childish in taste and feeling, incapable of the proper exercise of the duties of citizenship.

In the light of our experience since the war, we ought to revise the traditional opinions as to its causes. The great discovery of Darwin—the law of evolution—was not understood before the war. The Northern abolitionists did not realize that the negroes who had been brought from Africa had existed in their native country in a state of the lowest barbarism, not far removed from the ape, and that what Wordsworth calls the "discipline of slavery" was a stage in the evolution of the race. "Hateful though it is to us," says Herbert Spencer,[1] "and injurious as it would be now, slavery was once beneficial, was one of the necessary phases of human progress."

On the other hand, the Southern people did not know, or failed to realize, that slavery was only a transitory stage, and that it was the part of wise statesmanship to train these blacks for something better than slavery. So they did their utmost to keep their slaves just as they were, and discouraged or prohibited education of every sort, except that actually necessary for the daily work of the town or of the plantation. And with unspeakable folly, under the leadership of Calhoun, they claimed, as has been shown,[2] that the Constitution itself carried

[1] Herbert Spencer, *Illustrations of Universal Progress*, p. 444 (Ed. D. Appleton & Co., 1890). See also Shaler, *The Individual*, p. 135.

[2] *Ante*, pp. 74, 75.

slavery into the Territories, and they were constantly aiming to extend its area, not merely by this process of colonization, but by the acquisition of new territory, adapted for the cultivation of cotton by slave labor. To this end Texas had been annexed. This led to the war with Mexico. That resulted in the annexation of California and New Mexico. And now California stood at the doors of Congress, asking for admission as a State with a constitution that prohibited slavery. New Mexico needed a territorial government. Should Congress prohibit slavery there? And the District of Columbia, over which Congress had exclusive jurisdiction—Should slavery be prohibited there? Should the sale of slaves be longer tolerated at the national Capital? And what was to be done with fugitives who escaped from slavery to the North? The Constitution contained an agreement that they should be returned. For this reason Garrison called it a "covenant with hell." And when United States soldiers in Boston were ordered out to protect the United States marshal in executing the process of the federal court for the return of a fugitive, the flag under which they marched was greeted with the following verse, which seems shocking to us to-day, after that flag has been consecrated by untold blood and suffering, but which then expressed the sentiments of thousands of sincere lovers of liberty.

"Tear down the flaunting lie,
Half-mast the starry flag,
Defile not sea and sky
With hate's polluted rag."

So it came to pass that both abolitionists and pro-slavery men were for disunion.

Mr. Webster saw clearly to what this conflict would lead, unless wiser counsels could prevail. An incident which the author is enabled to relate on the word of an eye-witness tells the story faithfully. One day at Marshfield, in 1849, he was oppressed by sadness. Usually cheerful and full of varied anecdote, he was silent. After dinner he stood in front of the fire and said in his deep tones: "If this slavery agitation goes on, we shall have war between the North and South. And who is ready for that?"

To prevent that, he delivered this great address, which is not the least of his titles to the gratitude of his countrymen. If the War of Secession had come in 1850, the South would probably have succeeded. The increase of the Northern States in population during the succeeding decade was far greater than that of the Southern States. But more important than this was the rapid development of railroads and telegraphs, and of innumerable manufacturing industries. The mines of California enriched us as well as those of Pennsylvania and Michigan. Together they upheld the war by "its two main nerves, iron and gold."

If secession therefore was to come, anything that should postpone its advent was of vital importance to the Union. This speech of Webster's was the most important factor in producing that result. And had Douglas and his supporters in the North, and Davis and his associates in the South,

acquiesced in the compromise which followed, we might have been spared the blood and suffering of the Civil War, and emancipated our slaves peaceably and gradually, as the British did in 1833, with compensation to the Southern States. Let no man, therefore, now attribute to our great statesman ignoble motives for this, his final great effort "for the Constitution and the Union."

Webster is now justly entitled to full belief when he himself declared in this memorable speech his purposes and motives. He said:

"I wish to speak to-day, not as a Massachusetts man, nor as a Northern man, but as an American, and a member of the Senate of the United States.[1] . . . I have a part to act, not for my own security or safety, for I am looking out for no fragment upon which to float away from the wreck, if wreck there must be, but for the good of the whole, and the preservation of all; and there is that which will keep me to my duty during this struggle, whether the sun and stars shall appear, or shall not appear for many days. I speak to-day for the preservation of the Union. 'Hear me for my cause.' I speak to-day, out of a solicitous and anxious heart, for the restoration to the country of that quiet and that harmony which make the blessings of this Union so rich and so dear to us all. These are the topics that I propose to myself to discuss; these are the motives, and the sole motives, that influence me in the wish to communicate my opinions to the Senate and the country; and if I can do anything, however little, for the promotion of these ends, I shall have accomplished all that I expect."[2]

It must be noted here that only three days before Webster spoke, Calhoun's last important speech

[1] It must be remembered that there were then in the Senate the first lawyers and statesmen in the United States.

[2] Blaine frankly concedes Webster's sincerity and patriotism in this speech. *Twenty Years in Congress*, vol. i., p. 94.

was heard in the Senate. He was too feeble to deliver it, and it was read by Mr. Mason of Virginia.[1] A brief extract from this will illustrate the position of Calhoun and his associates at this time :

"That the Government claims, and practically maintains, the right to decide in the last resort, as to the extent of its powers will hardly be denied by any one conversant with the political history of the country. That it also claims the right to resort to force, to maintain whatever power she claims, against all opposition, is equally certain. Indeed it is apparent, from what we daily hear, that this has become the prevailing and fixed opinion of a great majority of the community."[2]

Calhoun then went on to show how the great religious bodies had been broken asunder by the slavery discussion.

He attacked the doctrine of the right of a Territory to legislate on the subject as worse than the Wilmot proviso. It seems that Senator Houston of Texas had favored this local legislation.

He puts the case thus to the Senate :

"It is time, Senators, that there should be an open and manly avowal on all sides as to what is intended to be done. If the question is not now settled, it is uncertain whether it ever can hereafter be; and we, as the representatives of the States of this Union, regarded as Governments, should come to a distinct understanding as to our respective views, in order to ascertain whether the great questions at issue can be settled or not. If you, who represent the stronger portion, cannot agree to settle them on the broad principle of justice and duty, say so, and

[1] Calhoun died in Washington on the 31st of March, 1850.

[2] Page 6 of a pamphlet copy of this speech, among the Webster papers in the Library of the N. H. Historical Society.

let the States we both represent, agree to separate and part in peace. If you are unwilling we should part in peace, tell us so, and we shall know what to do, when you reduce the question to submission or resistance." [1]

The principal propositions which Webster maintained in his reply to this speech of Calhoun's were these :

1. That at the time the Constitution was adopted, slavery existed in the United States, but was generally looked upon as an evil which would gradually pass away.

2. That public sentiment in the South on this subject had changed, and that the change "was owing to the rapid growth and sudden extension of the COTTON plantations of the South. So far as any motive consistent with honor, justice and general judgment could act, it was the COTTON interest that gave a new desire to promote slavery, to spread it, and to use its labor." [2]

3. That the Constitution found slavery "in the Union; it recognized it, and gave it solemn guaranties. To the full extent of these guaranties we are all bound in honor, in justice, and by the Constitution." [3]

4. "That there is not at this moment within the United States, or any territory of the United States, a single foot of land, the character of which, in re-

[1] Page 16 of a pamphlet copy of this speech, among the Webster papers in the Library of the N. H. Historical Society.

[2] Webster's *Works*, vol. v., p. 338. The emphasis on COTTON is given as it is in the published speech.

[3] *Ibid.*, vol. v., p. 347. See also his argument in Passenger-Tax cases, *Writings and Speeches*, vol. xv., p. 404.

gard to its being free territory or slave territory, is not fixed by some law, beyond the power of the action of the Government."[1] As to Texas he showed that, by the compact for its admission, it was entitled to be divided into four States, every part of which lying south of "thirty-six degrees thirty minutes north latitude, commonly known as the Missouri Compromise line, shall be admitted into the Union with or without slavery, as the people of each State asking admission may desire." North of that line, in any State formed out of Texas, slavery was to be prohibited, as it had been by the compromise of 1820, in every State to be admitted north of that line. As to New Mexico (of which the State now called Utah was then a part), the mountainous character of the country was such that slavery was impossible. "Such a prohibition would be idle, as it respects any effect it would have upon the territory, and I would not take pains uselessly to reaffirm an ordinance of nature, nor to re-enact the will of God."[2]

5. That he himself had always opposed the annexation of Texas, because inevitably it would lead to the extension of the area of slavery, but that it had been carried by the votes of Northern representatives.

6. That he himself had always, and still opposed the extension of the area of slavery.

7. That the Supreme Court had decided[3] "that the power to cause fugitives from service to be

[1] Webster's *Works*, vol. v., p. 340. [2] *Ibid.*, vol. v., p. 352.
[3] Prigg *vs.* Pennsylvania, 16 Peters, 610.

delivered up, was a power to be exercised under the authority of this [the national] government," and that the oath to support the Constitution bound all who took it, at least not "to endeavor to get round this Constitution, or to embarrass the free exercise of the rights secured by the Constitution to the persons whose slaves escape from them."

8. And then, to conclude in his own words[1]:

"Secession! Peaceable secession! Sir, your eyes and mine are never destined to see that miracle. The dismemberment of this vast country without convulsion! The breaking up of the fountains of the great deep without ruffling the surface! Who is so foolish, I beg everybody's pardon, as to expect to see any such thing? Sir, he who sees these States, now revolving in harmony around a common centre, and expects to see them quit their places and fly off without convulsion, may look the next hour to see the heavenly bodies rush from their spheres, and jostle against each other in the realms of space, without causing the wreck of the universe. There can be no such thing as a peaceable secession. Peaceable secession is an utter impossibility. Is the great Constitution under which we live, covering this whole country, is it to be thawed and melted away by secession, as the snows on the mountain melt under the influence of a vernal sun, disappear almost unobserved, and run off? No sir! No sir! I will not state what might produce the disruption of the Union, but Sir, I see as plainly as I see the sun in heaven, what that disruption itself must produce. I see that it must produce war, and such a war as I will not describe, *in its twofold character*."[2]

There were many arguments in the speech adapted to produce a more friendly understand-

[1] Webster's *Works*, vol. v., p. 361.

[2] A remarkable statement of the duty and right of the national government to put down secession by force is in a circular submitted by him to the Cabinet when he was Secretary of State, October, 1850 (*Writings and Speeches*, vol. xv., p. 232).

ing between the North and the South. But the eight propositions I have thus stated were the principal topics. It is difficult now to realize the offence that their statement gave to many good people at the North. Apparently some had expected that Mr. Webster would head a crusade against the South. For a time the doors of Faneuil Hall were closed against him by the Boston Common Council, though they afterwards swung wide open by the unanimous invitation of the Mayor and Council to welcome the first citizen of Massachusetts.[1] On the whole, the great majority of the Northern and Southern people approved his course.[2] The speech was circulated by the hundred thousand. It was entitled, a speech "for the Constitution and the Union." "With the highest respect and the deepest sense of obligation, I dedicate this speech," he said, "to the People of Massachusetts."

The motto he prefixed to the pamphlet edition expresses tersely the spirit of the whole. Its aptness illustrates his familiarity with the Latin historians, whom he discussed sympathetically in his address before the New York Historical Society on the 23d of February, 1852.[3]

"I know that there are things more pleasing to be spoken, but I speak that which is true rather than that which is pleasing; and even if my judgment did not warn me to do this, necessity compels me to do it. I purpose, indeed, to please

[1] Webster's *Writings and Speeches*, vol. xiii., p. 510.

[2] On the 30th of April, 1850, a resolution condemning his course was rejected in the Massachusetts Legislature by a vote of 77 yeas to 139 nays; see Burgess, *The Middle Period*, p. 359.

[3] Webster's *Writings and Speeches*, vol. xiii., p. 463.

you, but I purpose much more that you should be saved, however you may in the future regard me." [1]

Great public meetings were held in various parts of the Union to express approbation of the positions taken in this speech. Some of the letters of gratitude which Webster received are in print. But there are many more in the collections of Webster manuscripts. Perhaps none pleased him better than the following letter from Francis Lieber, who was then Professor in the University at Columbia, South Carolina, and who came North before 1861 and rendered signal service in that war which may justly be named—as was the seventh of March speech,—"for the Constitution and the Union."

COLUMBIA S. C. 6 June 1850

"MY DEAR SIR

"I received last night the three pamphlets which you have had the kindness of sending to me, and for which I beg you to accept my thanks. I had read and read with deep interest, your Letter before, but I am glad I now possess that masculine and substantial paper in pamphlet form, and feel proud to have a copy of it with your name inscribed. Sir, I trust in God, that all these papers may not receive an additional and most melancholy interest by being looked upon, a few years hence, as belonging to the closed period of the once existing Union. I confess, I do not believe in an immediate dissolu-

[1] This quotation, which Webster prefixed to the widely circulated pamphlet edition of this speech, is from the third book of Livy, Cap. 68. It is part of a speech of the Consul Titus Quinctius Capitolinus, to the Roman people, rebuking them for their dissensions while the Æqui and Volsci were ravaging the Campagna, up to the very gates of Rome:

"His ego gratiora dictu alia esse scio; sed me VERA PRO GRATIS loqui, etsi meum ingenium non moneret, necessitas cogit. Vellem, equidem, vobis placere, sed multo malo vos salvos esse, qualicumque erga me animo futuri estis."

tion of the Union—though everything is possible with reckless fanatics, and the power of mischief is incalculable in every being, even in the mouse which perforates a dyke—but this shaking and rude handling—this, *tabefacere*, may make our Union so rickety a thing that we may suffer nearly all the misery and disgrace under which Germany has staggered for centuries in consequence of her wretched federal constitution and of her 'particularism,' as the body of those tendencies is there called, which tears that unhappy country—destined for great things but cheated out of her history. I find that I feel far deeper upon this subject of the Union than very many of the native citizens, perhaps because I am not a native American, and therefore naturally and necessarily a Pan-American, and because I am a native German, who knows by heart the commentary which his country has furnished and is furnishing for the text of querulous, angry, selfseeking, unpatriotic confederacies, and who finds in the history of his native country the key clearly and plainly to decipher every line of Grecian decay. While I am writing these sad lines to you, they may be engaged at Nashville in a 'torch-dance' which—God avert it—may end as that which concluded with the end of Persepolis and the glory of Alexander—with a conflagration.

"But all this is very sad; for as the weeping Persian said, 'the saddest of all things is to see the ruin of your country and to see how it ought to be averted, but to have no power.'

"I am with the highest regard

"my dear Sir

"Your very obdt

"Francis Lieber,

"*Pan-American*"[1]

Just after the receipt of this letter, on the seventeenth of June (which we may remember is Bunker Hill Day), in the debate on the admission of California, Mr. Webster declared that he had, in deference to the critics who had assailed him, re-

[1] The original of this letter is in the Congressional Library.

examined his opinions, and rejudged his own judgments, but that he could not part from his own settled opinions, and must "leave consequences to themselves." He concluded his five minutes' speech with the following patriotic words:

"Sir, My object is peace. My object is reconciliation. My purpose is not to make up a case for the North or to make up a case for the South. My object is not to continue useless and irritating controversies, I am against agitators North and South, and against all narrow and local contests. I am an American and I know no locality in America; that is my country. My heart, my sentiments, my judgment, demand of me that I shall pursue such a course as shall promote the good and the harmony and the Union of the whole Country—This I shall do, God willing, to the end of the chapter."[1]

The legislation which was adopted in 1850 was on the lines of the Seventh of March speech: California was admitted as a free State. And here we must pause to note that this for the first time gave the free States a majority in the Senate. It was this circumstance that had alarmed Calhoun. For thirty years the number of Senators from the slave States had equalled that from the free States. Massachusetts was divided in 1820, and Maine admitted as a separate State, in order to counterbalance the admission of Missouri as a slave State.

To New Mexico and Utah was given a territorial government. Its organic law contained no prohibition of slavery.

A fugitive slave law was passed. Webster introduced and endeavored in vain to secure the

[1] Webster's *Works*, vol. v., p. 385.

passage of an act giving to the alleged fugitive the right of trial by jury.[1] This, however, did not pass.

The traffic in slaves in the District of Columbia was prohibited.

In addition to the measures thus briefly stated, the compromise included the settlement of the dispute between the United States and Texas as to the boundaries of that State. Texas was paid ten million dollars, and she ceded to the United States the disputed territory—now a part of Wyoming, Colorado, Kansas, Oklahoma and New Mexico. The country generally acquiesced in this Compromise of 1850. When, in 1852, General Scott was nominated for the Presidency by the dissatisfied section of the Whig party, he carried but four States, Vermont, Massachusetts, Kentucky, and Tennessee. Every other of the thirty-one States voted for Franklin Pierce. He had been brought forward as "a dark horse," to use a modern phrase, because he was known to be a colorless man against whom there was no prejudice. He stood on a platform pledged to the approval and maintenance of the Compromise of 1850. The desire for peace was almost universal, and the peace candidate was triumphantly elected.

In an evil hour, Douglas revived the agitation in 1854. A fundamental element in the Compromise of 1850 was that there should be no further extension of the area of slavery. When Douglas proposed that the voters of Kansas and Nebraska

[1] Webster's *Works*, vol. v., p. 373.

should decide this question for themselves, and introduced a bill which repealed the prohibition of slavery contained in the Missouri Compromise of 1820, it became plain that this essential consideration for the Northern concessions was to be repudiated. The fountains of the great deep were broken up. War came, and that war gave us absolute emancipation.

In that war our great leader was Abraham Lincoln. He in his time received as much abuse from extreme men on both sides as did Mr. Webster. But his assassination made him a martyr. History has told the truth of him. And when a curious poll was made of one hundred prominent Americans to determine the names that should be inscribed on the Hall of Fame of the New York University, the three names that obtained their unanimous verdict were Washington, Webster and Lincoln. Let us therefore compare the positions taken in the seventh of March speech, with Mr. Lincoln's first inaugural.[1] In this the President distinctly declares in favor of the maintenance inviolate of "the right of each State to order and control its own domestic institutions according to its own judgment exclusively." He declares that the Constitution requires "the reclaiming of what we call fugitive slaves" and that an oath to support the Constitution is an oath to give support "to this provision as much as any other."

When Mr. Lincoln on the 6th of March, 1862, sent to Congress his message recommending Con-

[1] Lincoln's *Works*, vol. ii., pp. 1–7.

gress to provide for pecuniary aid to any State which should abolish slavery,[1] he advocated the true policy, which it would have been wise for both North and South to have adopted. In his message of December 1st, he renews this recommendation,[2] describing it as "compensated emancipation."

And as late as the 5th of February, 1865, Lincoln presented to his Cabinet a message to Congress offering four hundred million dollars to the fifteen slave States (as they were in 1860), to be distributed *pro rata* on their respective slave populations, as shown by the Census of 1860, on condition that "all resistance to the National authority shall be abandoned and cease on or before the 1st of April next." [3]

He recommended this plan, as he had his prior plan,[4] by calling attention to the fact that its cost would be much less than the cost of the war. It seems strange that this proposition of Mr. Lincoln's, so fair, and so frequently renewed, should not have been accepted by a single slave State. It seems strange that such a solution does not appear to have occurred to any of the great men, who in 1850 were endeavoring to adjust amicably the differences between the North and the South. Colonization in Africa was proposed. Liberia was founded as a nucleus for this movement. In the speech we are now considering, Webster declared that if the South should propose "a scheme to be carried on by this Government, upon a large scale, for the transporta-

[1] Lincoln's *Works*, vol. ii., p. 129.
[2] *Ibid.*, p. 268.
[3] *Ibid.*, p. 635.
[4] *Ibid.*, p. 210.

tion of free colored people to any colony, or any place in the world," he would favor the use for this purpose of a sum equal to the amount already received by the United States from the proceeds of lands ceded by Virginia, amounting then to eighty million dollars, and likely to reach the sum of two hundred millions.[1] But the South needed and still needs the colored people. Their development as a race has progressed and will progress better here than in Africa. They were fated to be free here in America. And, as the South refused voluntary emancipation, it came with fire and sword. Nevertheless, it did come. The difficulties that the more intelligent Southerners foresaw, and which we must now admit palliated their refusal, are now upon us. They can only be overcome by the exercise of the same spirit of moderation, of sympathy, of mutual consideration, which characterizes the seventh of March speech, and which always has been the most odious spirit to zealots on both sides.[2]

[1] Webster's *Works*, vol. v., p. 364.

[2] It is a notable fact that in the winter of 1860–61, "with a Republican majority in both branches, Acts organizing the Territories of Colorado, Dakota and Nevada were passed without containing a word of prohibition on the subject of slavery . . . the Republican party took precisely the same ground held by Mr. Webster in 1850, and acted from precisely the same motives that inspired the 7th of March speech."—Blaine, *Twenty Years in Congress*, vol. i., pp. 269–271.

CHAPTER XX

CONCLUSION

The principles which in the leading cases, summarized in the foregoing chapters, Webster successfully maintained against the adverse decisions of the courts below, underlie our whole American system. Mr. Everett tells us that what gave to Lafayette his spotless fame was "the living love of liberty protected by law." What has given to this country its greatness is its well-ordered freedom, protected and secured by the Union; liberty secure, union equal. No individual or citizen of one State may have privileges secured to him by law superior to the privileges of others. On the other hand, every citizen is protected by law in the acquisition of property and in the enjoyment of his personal rights. So long as American courts respect the principles thus established, and America combines public freedom with individual security, so long shall a grateful people cherish the memory of the Expounder of the Constitution, the farmer boy of Salisbury, the eloquent, farseeing lawgiver and lawyer, *Daniel Webster*.

He was the one man in American history to whom during his lifetime the epithet of godlike was applied. It did not, in his case, arouse any

feeling of surprise. His character, his features and his form alike justified its application.

Whittier aptly describes his personal appearance:

> "New England's stateliest type of man,
> In port and speech Olympian:
> Whom the rich heavens did so endow
> With eyes of power and Jove's own brow,
> Whom no one met, at first, but took
> A second awed and wondering look!"

Ball's statue in the New York Central Park gives us Webster's shape and figure. But, unfortunately, the artist had not the genius of St. Gaudens, whose Lincoln and Farragut seem on the point of speaking. It needs imagination to breathe into this statue the breath of life.

Webster's voice both in volume and quality was unsurpassed by that of any American orator. Even at the age of seventy, when he delivered his oration before the Historical Society, his peroration rose and swelled and reverberated in perfect harmony through the great hall. The sonorous Greek of his quotation from the book of Revelation resounded as if the angel himself were there, who "came down from heaven, having great power, and the earth was lightened with his glory."

All the living force of this personality, the constructive genius of the lawgiver, the learning of the lawyer, he put at the service of his country.

There are some who think that it elevates the race to underrate the influence of individuals. It has been said that the greatest man is but little in advance of his time, and is to the advancing flood

what the crest of the wave is to the billow below. The proposition is pleasing to small minds. Since they cannot rise themselves, it flatters their vanity to diminish the interval which separates them from the leaders of mankind. But the plainest teachings of history and the most ordinary facts of everyday life must be disregarded in order to maintain this ingenious hypothesis.

The traveller who stands in the Union Station at Chicago beholds numerous tracks side by side, all apparently leading in the same direction. A man at one end of the station moves an iron rod, and one train, obedient to the steel ribbons on which it rolls, passes away to the East. He moves another, and the next train departs for the West; and so they go, parallel at first, but diverging as far as the waters of the Atlantic are from the Golden Gate of the Pacific. Such is the influence of individuals upon nations. The bigotry and cruelty of Philip brought the proud Castilian monarchy of Ferdinand and Isabella to the dust. The weakness and selfishness of Charles humiliated and degraded the great nation which with Cromwell at its head received the respect and deference of all Europe. The same army which was discomfited and driven back at Chancellorsville carried the banners of the Republic in triumph upon the bloody field of Gettysburg.

Great men elevate and ennoble their countrymen. In the glory of our Webster, we find the glory of our whole country. His name and his fame are the birthright of every American citizen.

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