The New Orleans Bee.

OFFICE 73 CHARTRES STREET. NEW ORLEANS, WEDNESDAY MORNING, JANUARY 27, 1869. Vol. XLI.—Whole—14,659.

THE NEW ORLEANS DAILY BEE,
DUFOUR & LIMIT, Proprietors.
No. 73 Chartres Street.

TERMS OF THE BEE:
Terms of Subscription—Daily, per annum, in advance, $16; six-month, $8; quarterly, $4.
Price of the paper—Single copies, 10 cents.
The Semi-Weekly; published every Tuesday and Saturday. Subscription, $6 per annum, invariably in advance.
Rates of Advertising—Standard advertisements, by the square of ten lines, first insertion $1 50 per square; each subsequent insertion, 75 cents per square.
First or Editorial Page Prominent Advertisements, each insertion, $1 50 per square.
All reasonable reserved at intervals, to be charged as new* each insertion.
First or Editorial Page, Monthly Advertisements, each square, $30 net per month.
Local advertisers, who otherwise largely, shall be allowed such discount from the above named monthly rates as may be agreed upon. In no case shall such discount exceed 33 per cent.
All Business Notices of a miscellaneous character to be charged 25 cents per line, each insertion.
Prominent Advertisements must be paid for in advance.
All advertisements not marked for any number of insertions, will be published six times.
All bills with regular advertisers shall be rendered monthly.

NEW ORLEANS:
WEDNESDAY MORNING, JAN. 27, 1869

THE ONE PER CENT. SPECIAL STATE TAX.

ABSTRACT OF THE ARGUMENT AGAINST THE TAX BY JUDGE H. M. SPOFFORD, OF COUNSEL FOR PLAINTIFFS IN INJUNCTION.

We should be pleased to publish the whole of this finished, elaborate and powerful argument addressed to the Judge of the Seventh District Court, for the parish of Orleans, by Judge H. M. Spofford, in behalf of Freiberg and others, who sued out a writ of injunction in that court to prevent the tax collectors from collecting this tax. Its great length precludes our giving more than a mere skeleton of the argument, which is a thorough and learned examination and discussion of the law and of the constitutional principles applicable to the subject. We presume Judge Colfax' decision yesterday, which was against the constitutionality of the tax, was based upon this argument and the authorities cited therein.

The introduction to the argument forms a very clear and instructive exposition of the paramount authority of constitutional law over mere legislative action. As some of our readers will dispute that doctrine, we proceed to give an abstract of the the leading propositions contained in the argument and the authorities on which they rest:

I. That the tax act of Sept. 29, 1868—No. 114—was not passed with the formalities required by the Constitution.

II. That it is retroactive, and therefore expressly forbidden by the Constitution.

III. That the tax is not equal and uniform, and does not tax all property in proportion to its value, to be ascertained by law, as prescribed by the Constitution.

I. Under the first proposition—that is as to the informality of the act No. 114, it was argued that it violates art 42 of the Constitution which declares that "no bill shall have the force of a law until on three several days it be read in each House of the General Assembly, and free discussion allowed thereon, unless four fifths of the House where the bill is pending may deem it expedient to dispense with this rule."

This provision is imperative and vital, no directory simply. People vs. Lawrence 36 Barbour 177. Supervisors vs. Stanley 2 Minnesota 330. Fowler vs. Pierce 2, Caliornia 165. People vs. Fin don 2, Hill 31. 4 Hilli 340. In these decisions it was laid down that the validity of legislation depends upon a pursuance of the constitutional provisions in the enactment, so that the law shall be read on three successive days, and that the Court could go behind the Statute book and the certificate of the Sec of State and enquire whether the act had been passed by the constitutional majority."

The question of fact is then most searchingly examined by Judge Spofford as to whether the act No. 114, when it was in the form of "bill" was read in each House on three several days, and if not, whether this constitutional requirement was dispensed with by four fifths of the House where the bill was pending. It is shown most conclusively by quotations from the highest record evidence—the House Journal—that the position required by law were not observed by that body, that the bill was not read on "three several days" and that four fifths of the House did not dispense with the rule established by art. 42 of the Constitution for such readings. Judge Spofford discusses the proceedings of the House in a most sarcastic and scathing analysis.

The inferences which he draws must make its members feel accordingly small. But grave and worse logic, ignorance of the Constitution and their own rules are intimated in the plainest kind of language.

II. Under the second proposition—that is, the retrospective character of the law—it was argued that the tax is directly contravenes article 110 of the Constitution of 1868, which declares that "no retroactive law shall be passed." A numerous array of authorities is brought forward to show that it has frequently been decided by the courts of the United States and other courts, although not without opposition, that the Legislatures of the States have the power, under the Constitution of the United States, to pass laws retrospective in their character and divest vested rights, unless they impair the obligation of contracts or partake of the character of ex post facto laws, the latter of which relate only to crimes and penalties, unless such laws are prohibited by the State Constitutions, see Sharpless vs. Mayor, 21 Penn. 157; Satterlee vs. Matthewson 2, Peters 393. Watson vs. Mercer 8 Peters 110. Charles river Bridge vs. Warren Bridge 11. Peters 539. Bennett vs. Boggs 1, Baldwin 71. Baltimore and Susquehannan Railroad Co vs. Nesbit 10, Howard 401. Carpenter vs. Penn 17, Howard 456. Allen vs. Sandy 2, Paine's c c, Reg. 70. But these decisions imply that where retrospective laws are forbidden by the State Constitutions the courts of the United States and all other courts would conform their action to the local laws, would hold retroactive laws to be valid in States where they are not constitutionally prohibited and void where they are so prohibited. Thus in the case of the Society, etc., vs. Wheeler 2, Gallican 139, Judge Story held a retrospective law of New Hampshire to be null and void, because as the bill of rights of that State denounced such laws. See also Clark vs. Clark, 10 N H. 388. Wasrt vs. Wasrt 3 N H 376. Baskin vs. Cumming 16, Geo. 13. Von Schmidt vs. Huntington 1, Calif 65.

In the Constitution of Pennsylvania, Judge Spofford goes on to say, there was no express prohibition against retroactive legislation. Yet one of the ablest judges that ever sat in that State seems to have vented that their courts had not taken a stand against it, as prohibited by implication. See Chief Justice Gibson in Greenough vs. Greenough, 11 Penn. State Rep 495, who said:

"All ex post facto laws are arbitrary, and it is to be regretted that the constitutional prohibition of them has been restricted to laws for penalties and punishments. In a moral or political aspect, an invasion of the right of property is as great an invasion of the right of personal security. But retrospective legislation bears, and has been continued, because the judiciary has thought itself too weak, because it has neither the patronage nor the prestige necessary to sustain it against the assumptions of the Legislature and the Bar. Yet, had it taken its stand on the rampart of the Constitution at the outset, there is some little reason to think it might have held its ground."

"Noble words," says Judge Spofford, "and full of warning as to the course proper to be pursued by the Judiciary here, in the case of the first case arising under a new constitutional provision in Louisiana. On account of such a sparsely settled, and of judicial lessons and decisions like these over the absence of an express constitutional restraint upon retroactive legislation, some States in the Union, previous to the change in Louisiana, had felt and acted upon the necessity of such a legal prohibition in their fundamental laws." See 24 Ohio N S 211, 154, 207. Ohio (N. S.) 225. Following the lead of the Supreme Court of the United States which, if ding no decision in the Federal Constitution prohibiting the States from passing retro-active laws as somewhat decided therefore that the Court could not supply such a prohibition; the Supreme Court of several State tribunals where their State Constitutions contained no such express prohibition declined to supply it. And it was precisely under this ground that the court of Municipality No. 1 vs Wheeler & Blake, 10. La. ann Rept. was decided. In that case Judge Spofford, J., who delivered the majority opinion: "However repugnant to logic and sound policy they may be, retrospective laws, in civil matters, do not violate the Constitution, unless they tend to divest vested rights or to impair the obligation of contracts, neither of which can be predicated of the act in question." By referring to the Louisiana Constitution of 1852, then in existence, it will be found that there was no prohibition against retroactive legislation, any more than there is in the Constitution of the United States. This decision was followed in Cordeville's case, 13 Ann. 1858. Perry 58. Ann 353; and Locke's case, 14 Ann 858.

But the oft repeated regrets of judges over their inability to prevent the adoption by States of rear retroactive legislation generally, combined with the mischievous consequent upon such legislation, at present, induced the framers of the Louisiana as they had already done in Ohio and some other States.

Indeed, it is probable that this very decision of Wheeler & Blake's case and those decisions which followed in its wake, impelled the framers of the Louisiana Constitution of 1864 to revise Article 105 of the Constitution of 1852 by simply inserting the two words (or retroactive) after the words ex post facto, making the article 109 of the Constitution of 1864 to read thus "No ex post facto or retroactive law, nor any law impairing the obligation of contract, shall be passed, nor vested rights be divested, unless for purposes of public utility, and for adequate compensation previously made." This article is preserved in the fourth section in Article 110 of the present Constitution of 1868, and this is the first case in which the reporters and constructing interpretation upon the old Constitutions of 1812, 1845, and 1852 has been brought forward as the basis of judicial action. The change was obviously made to prevent the possibility of any more such decisions as the courts were compelled to make in Wheeler & Blake's case. If the previous had existed in the Constitution of 1852, that case would certainly have been decided the other way by that bench unanimously. As it was, prompted by their constitutional prohibition, next to the odium of this species of legislature, that the court hesitated long over the case, and one of the judges (Mr. Justice Buchanan) dissented at last in very earnest emphasis.

That case was a most peculiar one in its features, and it was not intended with the reproach of injustice that this is, as the court will perceive by reading the whole of the majority opinion.

All but that portion which held that retroactive legislation was not forbidden by the Constitution, was obiter simply, not even binding on the court that pronounced it. These remarks vindicating the law "from the odium of injustice" were considered by the majority of the court, were not material to the judgment, and are not to be taken as essential elements of the case. The law was passed by the Legislature, certainly retrospective," because it was remedial merely, the tax then in question having been prospectively laid and collected all of it subsequent and expended, so that the effect of exempting it would be great inequality and injustice.

The short opinion of Mr. Justice Field, in Locke vs. New Orleans, 4 Wallace, 173, was evidently based up on the majority opinion in Wheeler & Blake's case, 10 Annual, although the latter case is not alluded to. An abstract of it is quoted from it almost verbatim, but no reference from the explanatory remarks which followed as to survey or enforcement of the sales of lot owning. The question whether the law was retrospective or not was not before the Supreme Court of the United States at all, as the only point that could be raised by any writ of error to a State court was, whether the Constitution of the United States was infringed, and it was earnestly held that it was not, because that instrument did not forbid retroactive laws at all.

If the Legislature can tax upon an assessment made the year previous and with a view to the basis of that year, it can impose an assessment of two years previous; upon one of three years; upon one of four years. Who shall draw the line? The Constitution draws it plainly and unmistakably. You shall not retroact at all. Your legislation levying taxes and providing assessments according to which taxes shall be collected, like all other legislation, shall be prospective only. You shall so act in imposing future taxes, which alone you have power to impose, as to provide a just measure of the value of every man's property for the year to which that tax is to be laid. If you depart from this plain rule all must be left to the wild caprice, mad greed, and passion and savagery of party domination, and the boasted Constitution is indeed "a parchment lie."

By virtue of the change in our State Constitution originally inhibiting, for the future, all retroactive laws, the doctrine announced as the true one, on principle, in Wheeler's case, 8 Ann 510, has become a constitutional and imperative doctrine, which cannot now be violated by the Legislature without affecting their seat with the judicial veto. The power to levy and collect taxes has ever been understood to operate prospectively, and never retrospectively, in consequence. It could not be said legally tax for a year hast, we see no reason to prevent them from doing so for any number of years. Such has never been the interpretation of a power to lay and collect taxes conferred by the Legislature or political corporations acting under its authority."

The law in question comes precisely within the definition of Worcester: RETROACTIVE Acting backward, or upon something past or preceding."

III. We now come to the third proposition or division of Judge Spofford's argument—the inequality and want of uniformity in the tax, in violation of art. 118 of the Constitution. Property, says he, is essentially incorrect in value. It fluctuates from year to year. Some descriptions of property rise in value, while others are falling. Notably has this been the case during the past few years, manifold values have been lost by the mere sudden and extraordinary convulsions, civil and political. Sugar plantations this year are often appraised at more than twice the value of 1867, while cotton lands in many parts of the State have scarcely risen at all. No man's estate is in precisely the same condition as to its elements and valuation in 1868 that it was in 1867. Many parties owning property in 1867 parted with it entirely before the assessment of 1868 was begun or this tax thought of Many who owned property in 1868 have parted with it in 1867 or made, have required large estates since then, and before the new tax was levied Large numbers of speculators have been buying up property in this city between the assessments of 1867. These last will escape any taxation at all under the retroactive law in question, while those who have been long in the city and possessed assessments in 1867 will have to pay now a tax of 1868 upon property they ceased to own before the date of the law which imposes the tax was imposed. Numerous individuals who were assessed in 1867 on lands and houses then stood in the city, have since removed to other localities and other liabilities, were obliged to suffer those lands and houses to be sold before the tax of Sept. 29, '68, was even assessed or and yet, if the law is valid, there must be held to and to pay this new tax, while those who occupied the same estates, perhaps at second sales, since the N. O. & O. W. Railroad Co to the Legislature, and sent by the President of the State to the Mayor.

The report was read and laid on the table.

The report of the Drainage Commissioners was referred to the Committee on Streets and Landings.

A report from the Controller relative to adjudications made by him, was referred.

The following bills, which Mayor Hunt has not signed, by resolution adopted on second reading.

A resolution was also adopted on second reading, to appoint a committee of five, three from this and two from the Upper Board, to petition the Legislature for an extension of the time for paying the city taxes and licenses till March 1st. Adopted.

A communication from the treasurer was received, asking instructions in regard to the notes falling due February 1st for leases of markets, payable, according to resolution of the Council, in gas checks, but, according to contracts made by the Mayor, payable in city currency. Laid over, subject to call.

Resolution permitting the Magnolia street Railroad Company of Jefferson City the right to connect with the City Railroad of New Orleans, provided the city of New Orleans is put to no expense. Adopted finally.

Several not very important amendments were made in the license ordinance.

Resolution allowing Charles Morgan to erect certain sheds and enclosures on his steamship wharf, subject to the approval of the Council. Concurred in, with amendment declining out enclosures.

A communication from the Lower Board asked a committee of conference in regard to the budget, the Lower Board refusing to concur in the amendments increasing the salary appropriation to $550 000, and in the amendment appropriating $192,000 for a police. A committee of conference was appointed.

Resolution approving adjudication of the lease of the Ninth Street Market for $12,200 U. S. currency, from Feb. 1st to Dec. 31st, 1869. Concurred in.

Resolution of Lower Board for a joint committee to investigate the matter of signing the market contracts for city money. Concurred in.

Resolution for the opening of Levee street, below Barthomew. Concurred in.

The Board adjourned till Thursday evening.

Board of Assistant Aldermen.—Meeting last evening. Mr. Brock in the chair.

Mayor Conway submitted the report of the Drainage Commissioners; also, the opinion of Miles Taylor, Esq., on the claim of Mrs Myra Clark Gaines vs. the city of New Orleans, also, a communication from the N. O. & O. W. Railroad Co to the Legislature, and sent by the President of the Senate to the Mayor.

The report was read and laid on the table.

The report of the Drainage Commissioners was referred to the Committee on Streets and Landings.

A report from the Controller relative to adjudications made by him, was referred.

The following bills, which Mayor Hunt has not signed, by resolution adopted on second reading.

A resolution was also adopted on second reading, to appoint a committee of five, three from this and two from the Upper Board, to petition the Legislature for an extension of the time for paying the city taxes and licenses till March 1st. Adopted.

A communication from the treasurer was received, asking instructions in regard to the notes falling due February 1st for leases of markets, payable, according to resolution of the Council, in gas checks, but, according to contracts made by the Mayor, payable in city currency. Laid over, subject to call.

Resolution permitting the Magnolia street Railroad Company of Jefferson City the right to connect with the City Railroad of New Orleans, provided the city of New Orleans is put to no expense. Adopted finally.

Several not very important amendments were made in the license ordinance.

Resolution allowing Charles Morgan to erect certain sheds and enclosures on his steamship wharf, subject to the approval of the Council. Concurred in, with amendment declining out enclosures.

A communication from the Lower Board asked a committee of conference in regard to the budget, the Lower Board refusing to concur in the amendments increasing the salary appropriation to $550 000, and in the amendment appropriating $192,000 for a police. A committee of conference was appointed.

Resolution approving adjudication of the lease of the Ninth Street Market for $12,200 U. S. currency, from Feb. 1st to Dec. 31st, 1869. Concurred in.

Resolution of Lower Board for a joint committee to investigate the matter of signing the market contracts for city money. Concurred in.

Resolution for the opening of Levee street, below Barthol