

"Free Trader"
Natchez

HOLLY SPRINGS GAZETTE.

"VERITAS NIHIL VERETUR, NISI ABSCONDI"

BY THOS. A. FALCONER.

THURSDAY, SEPT. 23, 1841.

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From the Southern-
Mississippi Union Bank,
Jackson, July 16, 1841.

Charles Scott, Esq.,
Attorney Mississippi Union Bank.
SIR—I hand you herewith, "the Mississippian" of this date, containing a correspondence between Hope & Co., of Amsterdam, and his Excellency A. G. McNutt, on the subject of interest due and unpaid, on the State bonds, sold by this institution.
Believing such a correspondence well calculated to alarm the holders of these bonds, and to lead to great pecuniary loss, should they dispose of them under circumstances so very unfavorable, as such a communication might induce in the bond market, I refer this correspondence to you, and ask your legal opinion, 1st, as to the constitutionality of the issuance of these bonds, and 2dly, the legality of the terms of the sale, as referred to in the Governor's letter; with such other views as your own mind may suggest on this important subject.
With respect, your servt.
J. ELLIOT, PRES'T.

JACKSON, MISS., July 27, 1841.

James Elliot, Esq., President of the Mississippi Union Bank.
SIR—Your communication of the 16th inst., in which my opinion is requested, as to the liability of the State of Mississippi upon her bonds, executed to, and sold by the Union Bank, has been duly considered.

Deeply impressed with the importance which the question has assumed in the eye of the civilized world, I have bestowed upon it all the thought and reflection which my mind is capable of affording. Constituting an engrossing theme of State politics, it has necessarily given rise to that diversity of views, which is ever exhibited in times of party excitement. Unbiased by motives of either a personal or political character, the investigation which I have given to the subject results in the clear and deliberate conviction that the State is liable, upon the soundest principles of moral and legal obligation.

True it is, that there is no process known to the law, by which a State may be peaceably enforced to discharge or liquidate her debts—however honestly or legally contracted. Those who trust a State, alone depend upon her faith and honor. The State of Mississippi, except as to such powers as are surrendered to the Federal Government, is a free and independent sovereignty; and although she has established a constitutional forum where all controversies arising between the State and individuals are to be heard and determined, still, in no event, can she be reached by means of an execution. But the question involving the *legality or illegality* of the bonds, is one which the people or citizens of the State are legally incompetent to determine; for, in obedience to the requisitions of the 10th section of the 7th article of our Constitution, the Legislature have conferred upon the court of Chancery original jurisdiction of all questions which may arise between the State and individuals, whether citizens or aliens. That law provides "any person or persons, deeming him, her, or themselves, to have a just claim against the State, may file a bill in Equity in the superior court of Chancery, against the State of Mississippi," &c. Then, it is perfectly clear, that where any controversy exists as to the legality of any claim against the State, the only lawful and constitutional forum where the question can be tried and settled, is that appointed and constituted by the law. The decree of the Chancellor, or of the High Court, in case of appeal, on such a case, would be binding and obligatory upon the parties, and there can be no truth in the argument, that such decree, if rendered against the State, would not be binding, "in relation to the rights of the parties to the constitutional compact." Who, let us enquire, are the authors and framers of the Constitution? Who delegated the judicial power? The people themselves—They authorized and empowered the Legislature "to direct in what manner and in what courts suits might be brought against the State." They then immediately delegated to the Legislature the right to establish the court of Chancery, with this judicial power, and consequently, the decree of that court, upon hearing of this question, would not only be obligatory and conclusive, upon every department of the State Government, but would be binding upon the whole people. The Executive has no authority whatever to pronounce upon the legality of the State Bonds, and when he undertakes to do so, it is a high assumption of power, on his part, and in derogation of the fundamental law of the land. It is the exercise of a judicial power, and therefore, in utter violation of the 1st section of the 2d article of the Constitution, which declares that, "the powers of the Government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate body of magistracy, to wit: those which are Legislative, to one; those which are Judicial, to another; and those which are Executive, to another." No one can hesitate to believe, that the question involving the State's liability is entirely a legal one, and therefore, its decision calls for the exercise of judicial power and discretion. The power to construe a law or contract is vested by the Constitution in the judiciary to construe laws. "If, then, a case under the Constitution and laws does arise," says a great jurist, "if it is capable of judicial investigation and decision, we see that this very tribunal is appointed to make the decision; and the only question open for controversy is, whether such decision, when made, is conclusive or binding upon the people."—The reason why they should be bound, has been already submitted. But my design is to prove that this is a question capable of judicial examination and decision, and as such, his Excellency, A. G. McNutt, in undertaking to declare and publish to the world that, "the State will never pay the five millions of bonds issued in June '38, or any portion of the interest due, or to become due thereon," has violated his executive duty, and transcended the limits of his rightful prerogative. The people themselves, as has been shown, cannot determine the question in hand, because they have delegated that power to the judicial department of the State. They may, it is true, disregard the law, and declare through their Representatives in the Legislature, that they will not provide the ways and means of paying either the bonds, or the interest accruing thereon, but they cannot refuse payment upon the ground that the bonds are illegal, unless such be the decree of the Chancellor. But where are the people—where is the Legislature or Govern-

ment on earth who would repudiate a debt which had been solemnly decided to be just and legal, by a properly constituted power? The bond holders will not for a moment entertain the opinion or judgment of his Excellency; for they have a clear and constitutional right to be heard in the superior court of Chancery: and if the bonds should be decided to be legal instruments, there need be no apprehension but that the State will discharge them to the uttermost farthing.
The next proposition which I shall attempt to establish, is, that the State bonds were created in accordance with the requisitions of the Constitution, and as such, were legally sold and negotiated.—The bond, upon their face, evince no evidence of their illegality.—They are in due form, signed by the Executive, countersigned by the Treasurer, and are attested by the Great Seal of the State. Clothed with all the solemnities of law and sovereignty itself, they, *prima facie*, are legal obligations. But it is urged that they were executed for the purpose of raising a loan of money upon the faith and credit of the State, and the law or act incorporating the Mississippi Union Bank, by virtue of which they were executed, was not passed and approved in accordance with the requisitions of the Constitution, the bonds are unconstitutional and void because their validity depends upon the validity of the law or charter authorizing their issuance. Then the question resolves itself into this—is the act incorporating the Mississippi Union Bank a constitutional act? All remember the general suspension of the banks in '37, and the serious train of embarrassments which followed upon the heels of that event. The monetary affairs of the whole Union felt the shock. Despair brooded over the whole land. The very wheels of Government were clogged—individual enterprise drooped, and the face of business wore a melancholy aspect. It is needless to remark that our own state and people experienced the fatal consequences of suspension. What was to be done? Credit seemed destroyed, and the people were threatened with ruin and bankruptcy. In the midst of the alarm and panic, the Governor convened the Legislature. That body met, and the proposed measure of relief was the establishment of the Union Bank. None doubted the right of the Legislature to charter a bank. The act of any Legislature, when approved by the Executive, is sufficient to incorporate an ordinary bank; but the 5th section of the Union Bank Charter contains the following provision. "Be it enacted, that in order to facilitate the said Union Bank for the said loan of fifteen millions five hundred thousand dollars, the faith of the State be, and is hereby pledged, both for the security of the capital and interest, and that seven thousand five hundred bonds, of two thousand dollars each, to wit, eighteen hundred and seventy-five, payable in twelve years; eighteen hundred and seventy-five, in fifteen years; eighteen hundred and seventy-five in eighteen years, and eighteen hundred and seventy-five in twenty years, and bearing interest at the rate of five per cent. per annum, shall be signed by the Governor," &c. Now, it is contended by those who are opposed to paying the bonds that, this section proposed to raise a loan of money upon the credit of the State, and pledge the State faith for the payment or redemption of that loan—and therefore, is unconstitutional, unless it was passed and approved in accordance with the forms and requisitions of the 9th section of the 7th article of the Constitution, which is as follows—"No law shall ever be passed to raise a loan of money upon the credit of the State, or to pledge the faith of the State for the payment or redemption of any loan or debt, unless such law be proposed in the Senate or House of Representatives, and be agreed to by a majority of the members of each House, and entered on their journals, with the yeas and nays taken thereon, and be referred to the next succeeding Legislature and published for three months previous to the next regular election in three newspapers of this State; and unless a majority of each branch of the Legislature so elected after such publication, shall agree to and pass such law," &c.—The Constitution then requires, 1st, that the act proposing to raise a loan of money upon the credit of the State, or to pledge the faith of the State for the payment or redemption of any debt, shall be proposed in the Senate or House of Representatives; 2d, that it shall be agreed to by a majority of each House; 3d, entered on their journals with the yeas and nays taken thereon; 4th, be referred to the next succeeding Legislature; 5th, be published in three newspapers of the State for the space of three months previous to the next general election; 6th, passed by a majority of the Legislature elected next after such publication; and 7th, approved by the Governor. Were not all these requisitions fully complied with, at least, in contemplation of law, and in the purview and meaning of the Constitution? That the act originated in one of the two branches of the Legislature cannot form a matter of doubt: that it was passed by a majority of each House, the journals, or the Legislature prove: that it was entered on the journals, with the yeas and nays taken thereon, the journals also establish: that it was referred to the People and the next Legislature, the 4th section of the Charter itself shows, which enacts that, "the 5th section, where by the faith of this State is pledged, be referred to the next Legislature, in pursuance of the 9th section of the 7th article of the Constitution;" that it was passed by a majority of the next Legislature, the journals of that body testify: and, that it was approved by the Executive on the 5th of February 1838, none will controvert.
But it is contended that the act was not published in three newspapers of this State for three months previous to the next general election, and therefore, it is no law, and the bonds were issued under a void authority. The journals of the legislature, of course, do not show whether the necessary publication was made or not. That such publication was made, is asserted by some and denied by others. How the fact really is, I have no means of ascertaining—nor does it matter. In the latter clause of the 47th section of the charter of the Bank, provision is made for its publication, under the direction of the Governor. A more proper person could not have been selected to superintend its publication. The Constitution merely declared that the act should be published, and did not designate who should attend to its publication. It certainly did not contemplate that the Legislature, as a body, should do any thing more than order the act to be published; for, if published at any time, or by any person, in obedience to such order, for three months before the next election of members to the legislature, it would assuredly have been considered a legal publication. Then, it seems to me that, all the lo-

gislature could do, was done, in ordering the publication of the act, and making it obligatory upon the Executive to see that it was done. Who were the persons to be satisfied of the fact of publication? The members of the Legislature, who were sworn to support the Constitution. Were they satisfied? The presumption is that they were—for they passed the act and we must not charge them with a violation of their oaths. Who else was to be satisfied? The Executive—for he approved the act, which, if unconstitutional, it was his power and duty to veto. But he did not veto it, but in fact gave it his sanction and approval; therefore we must infer, for charity's sake, at least, that he too was satisfied that all the forms and requisitions of the Constitution had been fully complied with, or he never would have signed and approved the act. But the fact of publication must be presumed, and, in law, cannot be inquired into. The charter or act of incorporation, is a public act, in the nature of a law, and, as such, must be construed. Its constitutionality must be judged according to what it purports to be upon its face, which the courts of the country cannot look beyond. It is a well settled rule in the construction of a law that, every thing is to be presumed in favor of its constitutionality. A multitude of authorities might be referred to in support of this position.
The people, through their Representatives, as I have shown, have declared that, the State may be sued in the court of Chancery. Then, when sued, she comes into court, to answer as a mere individual. Her case is to be decided upon the same rules and principles of law applicable to the case of an individual or private person. Suppose, then, that a suit is commenced against a mere private person, and the plaintiff relies upon an act of the Legislature to maintain his case, which act the defendant alleges to be unconstitutional. How will the court determine the question? It will alone look to the context, terms and subject matter of the law—the face of the act, in deciding upon its constitutionality. It will not permit the defendant to go beyond the face of the act. Then, if the State in subjecting herself to be sued in the ordinary courts of the country, has placed herself, when sued, in the attitude of a private person, so far as the suit is concerned, of course, she is bound by the same rules of law and evidence which would relate to the suit of a private individual. Now, the Charter of the Bank or act of incorporation, having been passed by a second Legislature, and having received approval and constitutional sanction of the Executive, must in law be presumed, in all respects constitutional. The argument is susceptible of many familiar illustrations. The Constitution requires that, every bill shall be read and passed three several times, in each branch of the Legislature, to be signed by the Speaker, &c., and receive the approval of the Governor, before it shall become a law. Now, the mere fact that the bill was read and passed three several times in each House is no necessary part of the act, and never appears upon its face; and the judiciary must presume and take it for granted, that all the requisitions of the Constitution have been complied with, otherwise the Speaker of the House, the President of the Senate, would never have signed, and the Governor approved it. Every law or act read from the statute book, if my position be correct, would have to be proved. Another section of the Constitution declares that "all bills for raising revenue shall originate in the House of Representatives." Now, the fact that such bill originated in the House, constitutes no part of the bill, and yet that fact must be presumed to give effect.—And why? Simply because those who passed, signed and approved it were the sworn officers of the people, and we must not presume that they violate their duty. Other striking illustrations, drawn from the Constitution, might be adduced, in support of this position. But I content farther that, the State is estopped from denying the fact of publication. I have shown that, the members of the Legislature and the Executive were the only persons who were to be satisfied that the act was duly published. They are the only properly constituted judges, appointed and chosen by the people themselves, of the fact of publication. They by passing the act, and the Governor by approving it, have declared to the world that, there was no constitutional barrier or impediment to the passage and approval of the act,—that the requisitions of the fundamental law had, in all things, been complied with, and therefore, the act is constitutional. I repeat that, the Constitution makes them the sole judges of the fact of publication, and this is not mere assertion. In 1 Peters Reports, in the case of *Ross vs Barland, et als.*, page 666, the court decides this principle.—Commissioners were appointed under the act, relative to claims of lands of the United States, south of the State of Tennessee, and were authorized to hear evidence as to the actual evacuation of the territory by the Spanish troops, and to decide upon the facts. The law gave them the power to hear and decide all matters respecting such claims, and to decide thereon, according to justice and equity. The court decided that they were bound to presume that every fact necessary to warrant the certificate, in the terms of it, was proved before the commissioners, and that consequently, it was shown to them, that the final evacuation of the Spanish troops took place on the 30th of March 1798. Now, apply this principle to the case in hand. The Constitution authorized the Legislature to pass the act in question, under forms and requisitions. All those forms and requisitions actually appear to have been complied with, but the fact of publication.—The members of the Legislature, who alone had the right to pass the act, and the Executive, to approve it upon the knowledge or evidence of the publication, are necessarily the only judges of the fact, or of the kind and character of the evidence requisite to establish it. Then, if they were the constitutional judges of the fact, or the measure and degree of evidence requisite to prove that fact; then we are bound to presume every fact necessary to warrant the passage and approval of the act. Then, is not the State estopped and forever barred from enquiring into the fact of publication? What is the true statement of the State's defence? Let us suppose that suit has been instituted upon her bonds. These bonds bear upon their face the highest assurance of their legality. The Governor has signed them—they are countersigned by the Treasurer—and attested by the Great Seal of the State. The State pleads that there is no law authorizing their execution. The law is produced, and appears to have been passed by two Legislatures and approved by the Executive. But it is urged that the act was never published, and the State's counsel propose to show that fact. What will the

court say? That the act upon its face is constitutional—and that the State cannot be permitted to establish a fact *alibande*, to show the unconstitutionality of the act, and more especially, as the Constitution itself, the solemn compact of the people, has, by way of necessary implication, made the members of the Legislature, and the Executive, the only judges of the existence of that fact.
But again: the members of the Legislature, in a government like ours, are the representatives or agents of the people, and their acts are binding and obligatory upon the people. Now, it is a truth that can be easily established, that the Legislature of the State, which met or convened subsequent to the execution and sale of the bonds; by resolutions did recognize and approve the sale of the bonds. These resolutions are of binding efficacy upon the State, so that she cannot now examine either into the validity of the execution or sale of the bonds.—She is a party to the contract, or bonds; and is she not estopped, after having recognized the validity of the bonds to deny that she had a right to execute them? Is she not estopped effectually? In the case of the commonwealth vs the Pejepseat proprietors, reported in the 10th Mass. Rep. p. 155, it is decided that, the commonwealth is estopped by the resolve of the Legislature, declaring the boundary between its lands and those of a private company. In an Indian deed to a tract of land to the company, in 1684, one important boundary was declared to be the uttermost falls in Androskoggon river. There were, in fact, five sets of falls. In 1787, the Legislature declared the twenty mile falls, (in fact the middle ones), to be the boundary intended in that deed, and ordered matters accordingly. The court decided that the commonwealth was estopped; and held to those falls as the true boundary. So it is clear that the doctrine of estoppel is applicable as well to States as individuals, and the case cited bears a striking analogy to the one now under consideration. Again: can the State be permitted to deny the validity of her bonds, solemnly attested and proved by her Great Seal? That seal, the seal of sovereignty itself, furnishes the highest evidence that the bonds were properly and legally executed. The keeper of the seal may abuse his trust, but the only remedy which is administered in the exercise of the elective franchise.—But there is an equitable estoppel which applies to this question. If A proposes to sell a certain tract of land to B, which belongs to C, and C stands by in silence and permits A to offer and sell the land to B, as his, C is estopped in equity from denying A's title. Here, recollect, the fee and real title was in C to the land, and to pass the fee and real title, the law regularly requires a deed or conveyance from C. But here is no deed or conveyance—but still his right and title has departed. Why? He stood by when the contract of sale was made and consummated, he did not deny the right of A to sell, he permitted B to purchase it, and the law therefore says, he is forever estopped from setting up his title.—Because, it would be encouraging a species of fraud. Now, apply this principle to the bond question, and you perceive how it will operate. After the sale of the bonds, and before the last four millions were paid over to the Union Bank, the Legislature of this State met. They were timely informed of the sale and negotiation of the bonds. Did that Legislature repudiate them? Did they deny their legal execution and sale? Did they say to the purchasers, pay no more money for the purchase of these bonds, for we intend to resist their payment, upon the ground that the act authorizing their issuance was not regularly published? No. Then it is contended that the State will be estopped from relying upon any such defence as the want of publication; for if permitted to set up such defence, it would be legalizing the worst of frauds—a fraud committed by a sovereign State.
It will not be expected that I should notice all the objections which are urged against the payment of the bonds. It would be idle and useless to do so. It is sufficient to review the most prominent arguments which militate against the opinion I have expressed. It is said that the faith of the State was to be pledged, and the bonds executed only upon the performance of certain conditions stipulated in the charter or contract to be performed on the part of the stockholder of the bank, for whose use and benefit the State was to pledge her faith and credit. Let us for a moment direct our attention to the true intent and meaning of the charter of the bank, for this branch of the question depends upon its construction. The 5th section of the charter pledges the faith and credit of the State, and also provides for the execution of the bonds, as to form and amount. The 6th section makes them negotiable instruments, and authorizes the President and Cashier of the bank to transfer them to the purchaser by endorsement.—The 7th section provides that "both the capital and interest of said bonds shall be paid by said bank, at the times they shall severally fall due." The 8th section declares that "to secure the payment of the capital and interest of said bonds, the subscribers shall be bound to give mortgage." Now observe the language of the 5th section, which provides that, "in order to facilitate the said Union Bank for the said loan of fifteen millions five hundred thousand dollars, (which is the capital of the bank,) the faith of this State be, and is hereby pledged, for the security of the capital and interest." Now do the 7th and 8th sections contain any conditions precedent to the pledging of the State's faith or the execution of the bonds?—None whatever, it is conceived. The faith of the State is pledged absolutely and unconditionally—for the 5th section embodies this clear language: "The faith of this State be, and is hereby pledged," but again, it is believed that, to make the State responsible upon her bonds, it was not a necessary prerequisite that the State should pledge her faith. She may not have pledged her faith, and still be liable. The nature of the State's contract is to be gathered alone from the bonds themselves, which are of the following form: "Know all men by these presents, that the State of Mississippi acknowledged to be indebted to the Mississippi Union Bank, in the sum of two thousand dollars, which sum the said State of Mississippi promises to pay in current money of the United States, to the order of the President Directors and Company, in the year—, with interest at the rate of five per cent. per annum, payable half yearly at the place named in the endorsement hereto, viz: on the—of every year until the payment of said principal sum. In testimony whereof, the Governor of the State of Mississippi has signed, and the Treasurer of the State has countersigned, these presents, and caused the seal of