TERRETT and others *v.* TAYLOR and others. (*a*)

Church lands in Virginia.

The religious establishment of England was adopted by the colony of Virginia, together with the common law upon that subject, so far as it was applicable to the circumstances of the colony.

The freehold of the church lands is in the parson.[1]

A legislative grant is not revocable.[2]

The act of Virginia of 1776, confirming to the church its rights to lands, was not inconsistent with the constitution or bill of rights of Virginia; nor did the acts of 1784 and 1785 infringe any of the rights, intended to be secured under the constitution, either civil, political or religious.

The acts of 1798 and 1801, so far as they go to divest the Episcopal church of the property acquired, previous to the revolution, by purchase or donation, are unconstitutional and inoperative.

The act of 1798 merely repeals the statutes passed respecting the church, since the revolution; and left in full operation all the statutes previously enacted, so far as they are not inconsistent with the present constitution.

Church-wardens are not a corporation for holding lands. Church lands cannot be sold, without the joint consent of the parson (if there be one) and the vestry.[3]

ERROR to the Circuit Court for the district of Columbia, sitting in the county of Alexandria.

Taylor and others, "members of the vestry of the Protestant Episcopal church, commonly called the Episcopal church of Alexandria, in the parish of Fairfax, in the county of Alexandria, and district of Columbia, on behalf of themselves and others, members of the said church, and of the congregation belonging to the said church," filed their bill in chancery, against Terrett and others, who were overseers of the poor for the county of Fairfax, in the state of Virginia, and against George Deneale and John Muncaster, wardens of the said church, and against James Wren.

The bill charged that on the 27th of May 1770, the vestry of the said parish and church, to whom the complainants, together with the defendants, George Deneale and John Muncaster, were the legal and regular successors in the said vestry, purchased of a certain Daniel Jennings, a tract of land, then situate in the county of Fairfax and state of Virginia, but now in the county of Alexandria, in the district of Columbia, containing 516 acres, which the said Jennings and his wife, by deed of bargain and sale, on the 18th of September 1770, by the direction of the then vestry, conveyed to a certain Townsend Dade, since deceased, and the said James Wren, both then of the county of Fairfax, and *the church-wardens of the said parish and church for the time being, and to their successors in office, [*44 for the use and benefit of the said church in the said parish. That in the year 1784, the legislature of Virginia passed an act, entitled "an act for incorporating the Protestant Episcopal church;" by the third section of which, power was given to the ministers and vestry of the Protestant Episcopal church to demise, alien, improve and lease any lands belonging to the church. That the act of 1786, entitled "an act to repeal the act for incorporating the Protestant Episcopal church, and for other purposes," declares,

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(*a*) February 17th, 1815. Absent, JOHNSON and TODD, Justices.

[1] See Bronson *v.* St. Peter's Church, 7 N. Y. Leg. Obs. 361.

[2] S. P. Town of Pawlet *v.* Clark, *post*, p. 292.

[3] See Mason *v.* Muncaster, 9 Wheat. 445, for a further decision upon the title in question in this case.

that the act of 1784 shall be repealed, but saves to all religious societies the property to them respectively belonging, and authorizes them to appoint, from time to time, according to the rules of their sect, trustees who shall be capable of managing and applying such property to the religious use of such societies. That under this last law, the complainants conceived they had the power of requiring the church-wardens of their church, who are the trustees appointed by the vestry, under the direction of the vestry contemplated by the last-mentioned act, to sell or otherwise dispose of the said land, and to apply the proceeds of the same to the religious use of the society or congregation belonging to the said church, in such manner as the vestry for the time being should direct. That the complainants had been, according to the rules and regulations of the said society, appointed by the congregation, vestrymen and trustees of the said church, and had appointed the defendants, Deneale and Muncaster, church-wardens of the said church. That some of the present congregation of the church were originally members of the church, when the church was built, and when the land was purchased, and contributed to the purchase thereof. That some of them resided in the county of Fairfax and state of Virginia, but had pews in the church, and contributed to the support of the minister. That the lands were wasting by trespasses, &c. That the complainants, as well as the congregation, wished to sell the lands and apply the proceeds to the use of the church; but were opposed in their wishes by the defendants, Terrett and others, who are overseers of the poor for the county of Fairfax, and who claimed the land under the act of Virginia of the 12th of January 1802, authorizing
*45] the *sale of certain glebe lands in Virginia, which act was not passed until after the district of Columbia was separated from the state of Virginia: in consequence of which claim, they were unable to sell the lands, &c.; wherefore, they prayed that the defendants, Terrett and others, the overseers of the poor, might be perpetually enjoined from claiming the land, that their title might be quieted, and that the defendants, Deneale, Muncaster and Wren might be decreed to sell and convey the land, &c.

The bill was regularly taken for confessed, against all the defendants. The court below decreed a sale, &c., according to the prayer of the bill. The defendants, Terrett and others, the overseers of the poor, sued out their writ of error.

The cause was argued, at last term, by *Jones*, for the plaintiffs in error, and by *E. J. Lee* and *Swann*, for the defendants in rror. The opinion of the court is so full, that it is deemed unnecessary to report the arguments of counsel.

February 17th, 1815. (Absent, Johnson, J., and Todd, J.) Story, J., delivered the opinion of the court, as follows:—The defendants not having answered to the bill in the court below, it has been taken *pro confesso*, and the cause is, therefore, to be decided upon the title and equity apparent on the face of the bill.

If the plaintiffs have shown a sufficient title to the trust property, in the present bill, we have no difficulty in holding, that they are entitled to the equitable relief prayed for. It will be but the case of the *cestuis que trust* enforcing against their trustees the rights of ownership, under circumstances in which the objects of the trust would be otherwise defeated. And in

our judgment, it would make no difference whether the Episcopal church were a voluntary society, or clothed with corporate powers; for in equity, as to objects which the *laws cannot but recognise as useful and [*46
meritorious, the same reason would exist for relief, in the one case as in the other. Other considerations arising in this case, material to the title on which relief must be founded, render an inquiry into the character and powers of the Episcopal church, indispensable.

At a very early period, the religious establishment of England seems to have been adopted in the colony of Virginia; and of course, the common law upon that subject, so far as it is applicable to the circumstances of that colony. The local division into parishes for ecclesiastical purposes can be early traced; and the subsequent laws, enacted for religious purposes, evidently pre-suppose the existence of the Episcopal church, with its general rights and authorities growing out of the common law. What those rights and authorities are, need not be minutely stated. It is sufficient, that, among other things, the church was capable of receiving endowments of land, and that the minister of the parish was, during his incumbency, seised of the freehold of its inheritable property, as emphatically *persona ecclesiæ*, and capable, as a sole corporation, of transmitting that inheritance to his successors. The church-wardens, also, were a corporate body, clothed with authority and guardianship over the repairs of the church and its personal property; and the other temporal concerns of the parish were submitted to a vestry, composed of persons selected for that purpose. In order more effectually to cherish and support religious institutions, and to define the authorities and rights of the Episcopal officers, the legislature, from time to time, enacted laws on this subject. By the statutes of 1661, ch. 1, 2, 3, 10, and 1667, ch. 3, provision was made for the erection and repairs of churches and chapels of ease; for the laying out of glebes and church lands, and the building of a dwelling-house for the minister; for the making of assessments and taxes for these and other parochial purposes; for the appointment of church-wardens to keep the church in repair, and to provide books, ornaments, &c.; and, lastly, for the election of a vestry of twelve persons, by the parishioners, whose duty it was, by these and subsequent statutes, among other things, to make and proportion levies and assessments, and to purchase glebes and erect dwelling-houses for *the ministers in each [*47
respective parish. See statute 1696, ch. 11; 1727, ch. 6; and 1748, ch. 28; 2 Tucker's Black. App'x, note M.

By the operation of these statutes and common law, the lands thus purchased became vested, either directly or beneficially, in the Episcopal church. The minister for the time being was seised of the freehold, in law or in equity, *jure ecclesiæ*, and, during a vacancy, the fee remained in abeyance, and the profits of the parsonage were to be taken by the parish for their own use. Co. Litt. 340 *b*, 341, 342 *b*; 2 Mass. 500.

Such were some of the rights and powers of the Episcopal church, at the time of the American revolution; and under the authority thereof, the purchase of the lands stated in the bill before the court, was undoubtedly made. And the property so acquired by the church remained unimpaired, notwithstanding the revolution; for the statute of 1776, ch. 2, completely confirmed and established the rights of the church to all its lands and other property.

The statute 1784, ch. 88, proceeded yet further. It expressly made the minister and vestry, and in case of a vacancy, the vestry of each parish, respectively, and their successors for ever, a corporation, by the name of the Protestant Episcopal church, in the parish where they respectively resided, to have, hold, use and enjoy all the glebes, churches and chapels, burying-grounds, books, plate and ornaments appropriated to the use of, and every other thing, the property of the late Episcopal church, to the sole use and benefit of the corporation. The same statute also provided for the choice of new vestries, and repealed all former laws relating to vestries and church-wardens, and to the support of the clergy, &c., and dissolved all former vestries; and gave the corporation extensive powers as to the purchasing, holding, aliening, repairing and regulating the church property. This statute was repealed by the statute of 1786, ch. 12, with a proviso saving to all religious societies the property to them respectively belonging, and authorizing them to appoint, from time to time, according to the rules of their sect, trustees, who should be capable of managing and applying such
*48] property to the *religious use of such societies; and the statute of 1788, ch. 47, declared, that the trustees appointed in the several parishes to take care of and manage the property of the Protestant Episcopal church, and their successors, should, to all intents and purposes, be considered as the successors to the former vestries, with the same powers of holding and managing all the property formerly vested in them. All these statutes, from that of 1776, ch. 2, to that of 1788, ch. 47, and several others, were repealed by the statute of 1798, ch. 9, as inconsistent with the principles of the constitution and of religious freedom; and by the statute of 1801, ch. 5 (which was passed after the district of Columbia was finally separated from the states of Maryland and Virginia), the legislature asserted their right to all the property of the Episcopal churches, in the respective parishes of the state; and, among other things, directed and authorized the overseers of the poor, and their successors in each parish wherein any glebe land was vacant, or should become so, to sell the same and appropriate the proceeds, to the use of the poor of the parish. It is under this last statute, that the bill charges the defendants (who are overseers of the poor of the parish of Fairfax), with claiming a title to dispose of the land in controversy.

This summary view of so much of the Virginia statutes as bears directly on the subject in controversy, presents not only a most extraordinary diversity of opinion in the legislature, as to the nature and propriety of aid in the temporal concerns of religion, but the more embarrassing considerations of the constitutional character and efficacy of those laws touching the rights and property of the Episcopal church.

It is conceded on all sides, that, at the revolution, the Episcopal church no longer retained its character as an exclusive religious establishment. And there can be no doubt, that it was competent to the people and to the legislature to deprive it of its superiority over other religious sects, and to withhold from it any support by public taxation. But, although it may be true, that "religion can be directed only by reason and conviction, not by
*49] force or violence," and that "all men are equally *entitled to the free exercise of religion, according the dictates of conscience," as the bill of rights of Virginia declares, yet it is difficult to perceive, how it follows as a consequence, that the legislature may not enact laws more effectually to

enable all sects to accomplish the great objects of religion, by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns. Consistent with the constitution of Virginia, the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. But the free exercise of religion cannot be justly deemed to be restrained, by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead. And that these purposes could be better secured and cherished by corporate powers, cannot be doubted by any person who has attended to the difficulties which surround all voluntary associations. While, therefore, the legislature might exempt the citizens from a compulsive attendance and payment of taxes in support of any particular sect, it is not perceived, that either public or constitutional principles required the abolition of all religious corporations.

Be, however, the general authority of the legislature as to the subject of religion, as it may, it will require other arguments to establish the position, that at the revolution, all the public property acquired by the Episcopal churches, under the sanction of the laws, became the property of the state. Had the property thus acquired been originally granted by the state or the king, there might have been some color (and it would have been but a color) for such an extraordinary pretension. But the property was, in fact and in law, generally purchased by the parishioners, or acquired by the benefactions of pious donors. The title thereto was indefeasibly vested in the churches, or rather in their legal agents. It was not in the power of the crown, to seize or assume it; nor of the parliament itself, to destroy the grants, unless by the exercise of a power the most *arbitrary, oppressive and unjust, and endured only because it could not be resisted. [*50
It was not forfeited; for the churches had committed no offence. The dissolution of the regal government no more destroyed the right to possess or enjoy this property, than it did the right of any other corporation or individual to his or its own property. The dissolution of the form of government did not involve in it a dissolution of civil rights, or an abolition of the common law under which the inheritances of every man in the state were held. The state itself succeeded only to the rights of the crown; and we may add, with many a flower of prerogative stricken from its hands. It has been asserted as a principle of the common law, that the division of an empire creates no forfeiture of previously vested rights of property. *Kelly* v. *Harrison*, 2 Johns. Ch. 29; *Jackson* v. *Lunn*, 3 Ibid. 109; *Calvin's Case*, 7 Co. 27. And this principle is equally consonant with the common sense of mankind and the maxims of eternal justice. Nor are we able to perceive any sound reason why the church lands escheated or devolved upon the state by the revolution, any more than the property of any other corporation created by the royal bounty or established by the legislature. The revolution might justly take away the public patronage, the exclusive cure of souls, and the compulsive taxation for the support of the church. Beyond these,

we are not prepared to admit the justice or the authority of the exercise of legislation.

It is not, however, necessary to rest this cause upon the general doctrines already asserted; for, admitting that, by the revolution, the church lands devolved on the state, the statute of 1776, ch. 2, operated as a new grant and confirmation thereof to the use of the church. If the legislature possessed the authority to make such a grant and confirmation, it is very clear to our minds, that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which could support the doctrine, that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such a doctrine would uproot the very foundations of almost all the land-titles in Virginia, and is utterly inconsistent with a
*51] great and fundamental principle of a *republican government, the right of the citizens to the free enjoyment of their property legally acquired.

It is asserted by the legislature of Virginia, in 1798 and 1801, that this statute was inconsistent with the bill of rights and constitution of that state, and therefore, void. Whatever weight such a declaration might properly have, as the opinion of wise and learned men, as a declaration of what the law has been or is, it can have no decisive authority. It is, however, encountered by the opinion successively given by former legislatures, from the earliest existence of the constitution itself, which were composed of men of the very first rank for talents and learning. And this opinion, too, is not only a contemporaneous exposition of the constitution, but has the additional weight, that it was promulgated or acquiesced in by a great majority, if not the whole, of the very framers of the constitution. Without adverting, however, to the opinions on the one side or the other, for the reasons which have been already stated, and others which we forbear to press, as they would lead to too prolix and elementary an examination, we are of opinion, that the statute of 1776, ch. 2, is not inconsistent with the constitution or bill of rights of Virginia. We are prepared to go yet further, and hold, that the statutes of 1784, ch. 88, and 1785, ch. 37, were no infringement of any rights secured or intended to be secured under the constitution, either civil, political or religious.

How far the statute of 1786, ch. 12, repealing the statute of 1784, ch. 88, incorporating the Episcopal churches, and the subsequent statutes, in furtherance thereof, of 1788, ch. 47, and ch. 53, were consistent with the principles of civil right or the constitution of Virginia, is a subject of much delicacy, and perhaps, not without difficulty. It is observable, however, that they reserve to the churches all their corporate property, and authorize the appointment of trustees to manage the same. A private corporation created by the legislature may lose its franchises by a *misuser* or a *non-user* of them; and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. Upon a change of government, too, it may be
*52] admitted *that such exclusive privileges attached to a private corporation as are inconsistent with the new government may be abolished. In respect, also, to public corporations which exist only for public purposes, such as counties, towns, cities, &c., the legislature may, under proper limi-

tations, have a right to change, modify, enlarge or restrain them, securing however, the property for the uses of those for whom, and at whose expense, it was originally purchased. But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal, can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine. The statutes of 1798, ch. 9, and of 1801, ch. 5, are not, therefore, in our judgment, operative, so far as to divest the Episcopal church of the property acquired, previous to the revolution, by purchase or by donation. In respect to the latter statute, there is this further objection, that it passed after the district of Columbia was taken under the exclusive jurisdiction of congress, and as to the corporations and property within that district, the right of Virginia to legislate no longer existed. And as to the statute of 1798, ch. 9, admitting it to have the fullest operation, it merely repeals the statutes passed respecting the church, since the revolution; and, of course, it left in full force all the statutes previously enacted, so far as they were not inconsistent with the present constitution. It left, therefore, the important provisions of the statutes of 1661, 1696, 1727 and 1748, so far as respected the title to the church lands, in perfect vigor, with so much of the common law as attached upon these rights.

Let us now advert to the title set up by the plaintiffs in the present bill. Upon inspecting the deed which is made a part of the bill, and bears date in 1770, the land appears to have been conveyed to the grantees, as church-wardens of the parish of Fairfax, and to their successors *in that office, for ever. It is also averred in the bill, that the plaintiffs, [*53 together with two of the defendants (who are church-wardens) are the vestry of the Protestant Episcopal church, commonly called the Episcopal church of Alexandria, in the parish of Fairfax, and that the purchase was made by the vestry of said parish and church, to whom the present vestry are the legal and regular successors in the said vestry; and that the purchase was made for the use and benefit of the said church in the said parish. No statute of Virginia has been cited, which creates church-wardens a corporation, for the purpose of holding lands; and at common law, their capacity was limited to personal estate. 1 Bl. Com. 394; Bro. Corp. 77, 84; 1 Roll. Abr. 393-4, 10; Com. Dig. tit. Esglise, F. 3; 12 Hen. VII. 27 *b*; 13 Ibid. 9 *b*; 37 Hen. VI. 30; 1 Burn's Ecc. Law 290; Gibs. 215.

It would seem, therefore, that the present deed did not operate by way of grant, to convey a fee to the church-wardens and their successors; for their successors, as such, could not take; nor to the church-wardens in their natural capacity; for "heirs" is not in the deed. But the covenant of general warranty in the deed, binding the grantors and their heirs for ever, and warranting the land to the church-wardens and their successors for ever, may well operate by way of estoppel, to confirm to the church and its privies, the perpetual and beneficial estate in the land.

One difficulty presented on the face of the bill was, that the Protestant

Episcopal church of Alexandria was not directly averred to be the same corporate or unincorporate body as the church and parish of Fairfax, or the legal successors thereto, so as to entitle them to the lands in controversy. But upon an accurate examination of the bill, it appears, that the purchase was made by the vestry "of the said parish and church," "for the use and benefit of the said church in the said parish." It must, therefore, be taken as true, that there was no other Episcopal church in the parish; and that the property belonged to the church of Alexandria, which in this respect, represented the whole parish. And there can be no doubt, that the Episcopal members of the parish of Fairfax have still, notwithstanding a separation from the state of Virginia, the same rights and privileges as *they
*54] originally possessed in relation to that church, while it was the parish church of Fairfax.

The next consideration is, whether the plaintiffs, who are vestrymen, have, as such, a right to require the lands of the church to be sold in the manner prayed for in the bill? Upon the supposition, that no statutes passed since the revolution, are in force, they may be deemed to act under the previous statutes and the common law. By those statutes, the vestry were to be appointed by the parishioners "for the making and proportioning levies and assessments, for building and repairing the churches and chapels, provision for the poor, maintenance of the minister, and such other necessary purposes, and for the more orderly managing all parochial affairs;" out of which vestry, the minister and vestry were yearly to choose two church-wardens.

As incident to their office, as general guardians of the church, we think, they must be deemed entitled to assert the rights and interests of the church, But the minister also, having the freehold, either in law or in equity, during his incumbency, in the lands of the church, is entitled to assert his own rights as *persona ecclesiæ*. No alienation, therefore, of the church lands can be made, either by himself, or by the parishioners, or their authorized agents, without the mutual consent of both. And therefore, we should be of opinion, that, upon principle, no sale ought to be absolutely decreed, unless with the consent of the parson, if the church be full.

If the statute of 1784, ch. 88, be in force for any purpose whatsoever, it seems to us, that it would lead to a like conclusion. If the repealing statute of 1786, ch. 12, or the statute of 1788, ch. 47, by which the church property was authorized to be vested in trustees chosen by the church, and their successors, be in force for any purpose whatsoever, then the allegation of the bill, that the plaintiffs "have, according to the rules and regulations of their said society, been appointed by the congregation, vestrymen and trustees of the said church," would directly apply, and authorize the plaintiffs to institute the present bill. Still, however, it appears to us, that in case of a plenarty of the church, no alienation or sale of the church lands ought to take place, without the *assent of the minister, unless such assent be
*55] expressly dispensed with by some statute.

On the whole, the majority of the court are of opinion, that the land in controversy belongs to the Episcopal church of Alexandria, and has not been divested by the revolution, nor any act of the legislature passed since that period; that the plaintiffs are of ability to maintain the present bill; that the overseers of the poor of the parish of Fairfax have no just, legal or

equitable title to the said land, and ought to be perpetually enjoined from claiming the same; and that a sale of the said land ought, for the reasons stated in the bill, to be decreed, upon the assent of the minister of said church (if any there be) being given thereto; and that the present churchwardens and the said James Wren ought to be decreed to convey the same to the purchaser; and the proceeds to be applied in the manner prayed for in the bill. The decree of the circuit court is to be reformed, so as to conform to this opinion.

Decreed accordingly.

The Short Staple. (*a*)

The Brig Short Staple and Cargo, Holloway and others, Claimants, *v.* United States.

Embargo.—Rescue.

Quære? Whether, under the 1st and 2d embargo laws of 1807 and 1808, a registered vessel, which had a clearance from one port to another of the United States, was liable to condemnation for going to a foreign port?

If a vessel be captured by a superior force, and a prize-master and a small force be put on board, it is not the duty of the master and crew of the captured vessel to attempt to rescue her; for they may thereby expose the vessel to condemnation, although otherwise innocent.

The Short Staple, 1 Gallis. 104, reversed.

This was an appeal from the sentence of the Circuit Court for the district of Massachusetts, which affirmed that of the district court, condemning the brig Short Staple and cargo. The facts of the case are thus stated by the Chief Justice in delivering the opinion of the court:

This vessel was libelled in the district court of Massachusetts, in March 1809, for having violated the embargo *laws of the United States, [*56
by sailing to a foreign port. The fact is admitted by the claimants, who allege, in justification of it, that the vessel was captured, while on her voyage to Boston, by a British armed vessel, and carried into St. Nichola Mole, where the government of the place seized the cargo.

It appeared in evidence, that the Short Staple sailed from Boston, about the 10th of October 1808, with instructions to procure a cargo of flour, and return therewith to Boston, unless the embargo should be removed before the commencement of her return-voyage, in which case she was directed to proceed to the island of Guadaloupe. At Baltimore, she took on board a cargo of flour, and sailed thence to Boston, about the 28th of October. She was detained, several days, in Hampton Roads, by contrary winds. During this detention, the British armed vessel Ino put into Hampton Roads, for the purpose of repairing some damage sustained in a storm on the coast. The Ino had been in the port of Boston, while the Short Staple lay there, and had cleared out for the Cape of Good Hope, though her real destination was Jamaica. The reason her captain has since assigned for this imposition, was, that by clearing out for the Cape of Good Hope, he was allowed to take on board a larger supply of provisions than would have been allowed, had he cleared out for any port in the West Indies.

(*a*) February 13th, 1815. Absent, Johnson and Todd, Justices.